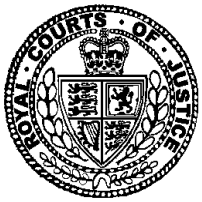

Neutral Citation Number: [2024] EWHC 1163 (Fam)

Case No: FA-2023-000304

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD
Mr Recorder Ian Peacock
GU21P00308

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2024

Before :

MS JUSTICE HENKE

- -

Re: O (Appeal: Costs)

- -

- -

Dr. Charlotte Proudman (instructed by **Signature Law Ltd.**) for the **Appellant**
Miss Sima Najma (instructed under the **Direct Access Scheme**) for the **Respondent**

AFTER CONSIDERATION ON THE PAPERS

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS JUSTICE HENKE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Ms Justice Henke :

Introduction

1. This short judgment deals with the ancillary issue of whether I should exercise my discretion to award costs in relation to the earlier appeal in this matter - [2024] EWHC 839 (Fam), which I allowed in large part.

2. The costs in issue relate to the initial stages of the appeal before the Appellant was legally aided. They amount to £1220. That sum covers: £500 which was the cost of instructing direct access Counsel to settle the Grounds of Appeal and the skeleton argument in support; £650 which is the cost of using Paramily to prepare the bundle for the appeal court; and £70 which is the cost of obtaining the transcript of the judgment given at first instance.

3. In order to determine the issue, I have received skeleton arguments on behalf of the Appellant and the Respondent. From those, I glean that quantum is not in issue. The issue is one of principle, namely whether the Respondent should pay the Appellant's costs.

The Law

Statute

4. Section 51(1)(b) of the Senior Courts Act 1981 provides that subject to rules of court, the costs of and incidental to proceedings in the High Court shall be in the discretion of the court. Furthermore, whenever a Court must determine a question relating to the upbringing of a child, the welfare of the child is the court's paramount consideration: Children Act 1989, section 1(1).

The Rules

5. The High Court has the power to make an order for costs when sitting as an Appeal Court under FPR r.30.11(2)(e). PD30A, para. 17.1 provides that costs are likely to be assessed by way of summary assessment at the following hearings:

    (a) contested directions hearings;

    (b) applications for permission to appeal at which the respondent is present;

    (c) appeals from case management decisions or decisions made at directions hearings; and

    (d) appeals listed for one day or less.

6. This appeal was listed for two days, of which one was reserved for judicial reading time. Technically, it falls outside PD30A para 17.1(d). Given the amount in dispute, I am therefore thankful that quantum is agreed.

7. The rules on costs in family proceedings are found in FPR Part 28 and PD28A. Rule 28.1 provides a power to make any such order as to costs as the Court thinks just.

8. Rule 28.2 applies CPR Parts 44 (except rules 44.2(2) and (3) and 44.10(2) and (3)), 46 and 47 and rule 45.8 to family proceedings.

9. Thus, under r.44.2(4) the Court must have regard to all the circumstances of the case, including:

    (a) the conduct of the parties;

    (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

    (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences of Part 36 apply.

10. Under CPR r.44.2(5), the conduct of the parties includes:

    (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

    (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

    (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

    (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

11. When applying these rules, the Court must, of course, have regard to the overriding objective in FPR Part 1 of dealing with cases justly, having regard to any welfare issues involved. Dealing with a case justly includes, so far as is practicable:

    (a) ensuring that it is dealt with expeditiously and fairly;

    (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

    (c) ensuring that the parties are on an equal footing;

    (d) saving expense; and

    (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Case Law

12. The general practice concerning costs orders in family proceedings involving children is that there is no order for costs in the absence of "reprehensible behaviour or an unreasonable stance" (*Re T (Children)* [2012] UKSC 36 at [44]; followed in *Re S (A*

Child) [2015] UKSC 20). The classic explanation for this was given by Wilson J in *Sutton London Borough Council v Davis (No. 2)* [1994] 1 WLR 1317 at p.1319:

> *"Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties."*

13. The approach taken to deciding whether to make a costs order in any individual case involves identifying the factors for and against the general rule and analysing them against the case at hand to decide whether it can, and should, be distinguished and an order made (*Re T (Children)* at [11] – [14] and *Re S (A Child)* at [19] – [27]). The underlying object of making a costs order in family proceedings involving children was described in the following way at [33] in *Re S (A Child)*:

> *"… The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk. (It may be that this is one of the reasons why parents are automatically entitled to public funding in care cases.)"*

14. In *Re T (Children)* the Court identified some potentially relevant factors at [12] – [14]:

    (a) Orders for costs between the parties will diminish the funds available to meet the needs of the family.

    (b) It is undesirable to award costs where this will exacerbate feelings between two parents, or more generally between relations, to the ultimate detriment of the child.

    (c) Where costs have been incurred because a party acted in an unreasonable way.

    (d) Where a party's conduct has been reprehensible or that party's stance has been beyond the band of what was reasonable.

15. In *Re S (A Child)*, the Court held at [17] that although CPR r.44.2(4)(c) does not readily fit the conduct of children's cases, it serves as an aspect of the general desirability of the parties co-operating and negotiating to reach an agreed solution which will best

serve the paramount consideration of the welfare of the child. As such, it is part of the general conduct of the proceedings.

16. The Court then identified the following considerations underlying the general rule at [20] – [24]:

    (a) Family proceedings are much more inquisitorial than other civil proceedings and the welfare of the child is the paramount consideration; the child should be the only winner.

    (b) Generally, each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child.

    (c) Generally, all parties to the case are motivated by concern for the child's welfare.

    (d) In most children's cases, it is important for the parties to be able to work together in the interests of the children both during and after the proceedings.

    (e) In certain circumstances, having to pay the other side's costs, or even having to bear one's own costs, will reduce the resources available to look after this child or other children.

17. It was not enough to displace the general rule that the Court was dealing with an appeal and not a first instance trial: (at [29])

> *"Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in EM v SW, In re M (A Child) [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, "nobody knows what the judge is going to find" (para 23), whereas on appeal the factual findings are known. Not only that, but the judge's reasons also are known. Both parties have an opportunity to "take stock" and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case."*

18. The Court was minded to point out at [31] that there may well be circumstances other than where there is reprehensible behaviour or unreasonable conduct of the proceedings which justify a costs order.

19. Nonetheless, reprehensible behaviour and/or unreasonable conduct are now accepted to be the ordinary test upon which an order for costs in family proceedings involving children can be made (see *Re A (A Child)* [2018] EWCA Civ 904 at [14] - [15] and *The Mother v The Father* [2023] EWHC 2078 (Fam) at [12]). In the latter case, Sir Andrew McFarlane P held at [40] – [42] that a finding of unreasonable conduct is merely a gateway finding, granting the Court the jurisdiction to make an order for costs, but not obliging it to do so.

20. When deciding whether there has been unreasonable conduct, each case must turn on its own facts (*Re W (A Child)* [2020] EWCA Civ 77 at [10]), remembering that the unreasonable conduct must relate to the litigation, not the child's welfare (*Re T (A Child)* [2005] EWCA Civ 311 at [36], citing *R v R (Costs: child case)* [1997] 2 FLR 95). The unreasonable conduct can be before as well as during the proceedings and unreasonableness can be found in the manner in which a case has been pursued or defended. Unreasonable conduct has been found to consist of:

    (a) bringing an appeal with no proper basis (*The Mother v The Father* (above) at [41]);

    (b) misleading the Court (*Re W (A Child)* (above) at [10]);

    (c) failing to engage with other parties or attend court hearings (*Re E-R (Child Arrangements* [2016] EWHC 805 (Fam) at [79]); and

    (d) making/maintaining allegations known to be wholly false (*The Mother v The Father* [2021] EWHC 2602 (Fam) at [34] (also found to be reprehensible behaviour)).

21. Finally, litigants in person are not immune from costs orders being made against them. As per the comments in *Barton v Wright Hassall LLP* [2018] UKSC 12, a litigant in person does not form a privileged class for whom the rules are modified or disapplied, and the litigant in person is expected to familiarise themselves with the relevant procedure and take legal advice if necessary.

My Decision and Reasons

22. I have asked myself whether there is good reason in this case to depart from the general practice of making no order for costs in cases involving children. I have concluded that there is not for the reasons which I set out in the paragraphs that follow.

23. It is the Respondent's litigation conduct I must take into account when determining whether to make an order for costs, not his conduct that may be relevant to the subject children's welfare, applying *Re T (A Child)* (above).

24. Before the Appellant issued the application for permission to appeal, she and the Respondent were acting as litigants in person. Prior to issue, there was no inter-party communication between them to ascertain if consensus could be reached in relation to a potential appeal. That lack of communication must be viewed in the established factual context of this case which includes the Respondent's admission that he had threatened to slit the Appellant's throat. In such circumstances, it is reasonable for the Appellant to submit that she feared communicating with him. Consequently, I consider that the lack of pre-appeal communication cannot be said to be unreasonable litigation conduct.

25. Permission to appeal was granted by me on 9 February 2024. The same day the dates of the appeal hearing were set. However, the Respondent did not instruct direct access Counsel in relation to the appeal until 21 March 2024. Thereafter, a full copy of the appeal bundle was requested from the court. That was not received until shortly before the Easter Bank holiday. The net effect was that it was not until receipt of the skeleton

argument on behalf of the Respondent dated 3 April 2024 that it became known that the Respondent conceded this appeal although not on all grounds. I am told that thereafter there were attempts to compromise the appeal but that those attempts were resisted on behalf of the Appellant.

26. I have stood back and considered whether the Respondent's litigation conduct which I have just described could properly be characterised as unreasonable or reprehensible. On balance, I have concluded that it cannot. There is no evidence of deliberate delay or prevarication. It seems to me that whilst such delay in formulating his response to the appeal is regrettable, it was not caused by the Respondent being unreasonable in conducting the litigation or reprehensible.

27. Having instructed Counsel, the Respondent took proactive steps to narrow the appeal and to compromise it.

28. The appeal came before me on 11 April 2024. At that hearing, both parties agreed that the appeal should be allowed and the order for contact made by Mr Recorder Peacock should be set aside. Further, they both agreed: (i) that I should remit the Respondent's application for a Child Arrangements Order for re- hearing before a Circuit Judge; and (ii) that it was for the trial judge to consider at a PTR/directions hearing whether a fact-finding hearing is necessary. Such was the consensus between the parties, that I queried with the advocates whether this appeal could proceed on an agreed basis. However, I was told on behalf of both parties that it could not. There remained a dispute upon the grounds upon which the appeal should be allowed. On behalf of the Respondent, it was agreed that Grounds 1-3 and Ground 5 in part were made out. Ground 4 and part of Ground 5 remained heavily disputed between the parties. Both parties asked me to hear that dispute because it was said my decision would determine the shape of the remitted hearing. Accordingly, I acceded to that argument and heard the appeal, limiting the hearing to the disputed grounds. Having heard the appeal, I concluded that Ground 4 was made out and that Ground 5 had been established in part in that the Recorder should have considered himself whether there should have been a fact-find. However, I did not go so far as the Appellant argued I should, namely, to say that he should have determined the allegations of abuse. Thus, I consider that there was no one clear "winner" on the issues that had remained in dispute and which had necessitated the hearing.

29. Both parties in this case have relatively modest financial resources. This appeal and the case remitted for re-hearing will have an impact on both parties' finances and thus ultimately on the financial resources available to promote and safeguard the welfare of the children at the heart of this private law dispute.

30. In the circumstances, I consider that no order for costs is the appropriate order for the costs of this appeal.

31. That is my judgment.