

This judgment was delivered in private. The Judge has given leave for this judgment to be published. 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.

**IN THE FAMILY COURT**

Case Number: WD20P01187

21<sup>st</sup> September 2020

Before

His Honour Judge Middleton-Roy

Between:

**MH**

Applicant

**- and -**

**KF**

Respondent

-----

*A Tatton-Bennett*, Counsel, instructed by Hughes Fowler Carruthers, Solicitors for the Applicant

*SL Cooper*, Counsel, instructed by All Family Matters, Solicitors for the Respondent

---

**JUDGMENT**

---

Crown Copyright ©

## His Honour Judge Middleton-Roy:

### Anonymity

1. In line with the Practice Guidance of the President of the Family Division issued in December 2018, the names of the children, family members and the adult parties in this judgment have been anonymised having regard to the implications for the children of placing personal details and information in the public domain. The anonymity of the children and members of their family must be strictly preserved. All persons must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court and may result in a sentence of imprisonment.

### Background

2. This Court is concerned with two children, both over 10 years old.
3. By application to the Family Court sitting at Watford dated Friday, 4<sup>th</sup> September 2020, the mother sought a Specific Issue Order for the Respondent father to return both children immediately to her care, together with an Order for the delivery up by the father of the passport of one of the children. The mother asserted that the father had retained both children at the conclusion of an agreed period of contact, failing to return them to her care on the agreed date of 2<sup>nd</sup> September 2020. The mother's request for a Court hearing, without notice of the application being given to the Respondent, was refused by the Court. The Court determined that the application must be listed on notice to both parties. A hearing date was fixed for 9<sup>th</sup> September 2020.
4. Following the decision of the Court on 4<sup>th</sup> September 2020 to refuse to hear the mother's application for a Specific Issue Order without notice, an urgent application for a Prohibited Steps Order was then made on behalf of the mother, outside Court hours on 4<sup>th</sup> September 2020, and was heard by the 'out of hours' Judge. That application was granted on a without notice basis. The out of hours Judge ordered that the Respondent be prohibited from removing the children from the jurisdiction of England and Wales. He then directed that the matter be listed on notice to the Respondent, at the Family Court at Watford on Monday 9<sup>th</sup> September 2020. The matter was listed before a District Judge. No substantive Order was made. The District Judge properly determined that both the mother's applications should be heard together on the date previously directed, namely 9<sup>th</sup> September 2020. In the event, that date was vacated and the matter was listed before me on 11<sup>th</sup> September 2020, on notice to both parties.
5. At the hearing on 11<sup>th</sup> September 2020, conducted remotely, the Court heard full submissions from Counsel for both parties and delivered an ex tempore oral judgment.
6. There are separate, ongoing Court proceedings in Spain due to conclude in January 2021. Court proceedings commenced in Spain in 2013. The mother holds a Spanish Residence Order. There are further Court proceedings in respect of the children in The Republic of Ireland. This Court determined it has jurisdiction solely in respect of this application for a Specific Issue Order, conferred by Article 20, Brussels II Revised, this being an urgent application for protective measures in respect of the children, notwithstanding the Courts of another Member State having jurisdiction as to the substance of the matter.
7. The Court heard that the father took the decision not to return the children to their mother's care as he was concerned for their welfare. The father had raised his concerns with the police and with Local Authority Children's Services regarding the children being exposed to inappropriate adult behaviour between the mother and her new partner, whilst the children were in their mother's care. The mother denies the allegations. The

Court granted the mother's applications and ordered the return of both children by the Respondent father forthwith to the care of their mother. The Court determined that the father's actions in preventing the children from returning to their mother's care, even if well intentioned, were wrong and were harmful to the children, in circumstances where both children missed the start of school term through his actions and where one of the children has additional learning needs, missing out on targeted support to assist him with his transition to school. The Court was not satisfied there were compelling welfare reasons to countenance a change of residence of the children on an interim basis, where the children had been in the primary care of their mother under a Court Order, there being no exceptional circumstances that merited the father's retention of the children and removal from their primary carer, on welfare grounds.

#### The Application for Costs

8. The mother applies for an order that the Respondent father pay her costs of the application for a Specific Issue Order, in the amount of £21,414.80. The father opposes the costs application. There being insufficient time to hear the application on 11<sup>th</sup> September 2020, the Court reserved the issue of costs and directed written submissions from both parties. The Court received full and detailed written submissions from Counsel for both parties, for which the Court is grateful.
9. The core principles in respect of costs in proceedings involving children in the family Court in England and Wales are well established. The parties refer me to the leading authority of *Re S (Costs)* [2015] UKSC 20. I am also referred by Mr Tatton-Bennett to *Re E-R (Child Arrangements)* [2017] 2FLR and the authorities therein which summarise the principles under which the court exercises its discretion on costs, including notably, *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317, [1994] 2 FLR 569 and *Re T (Children) (Care Proceedings: Costs) (CAFCASS and Another Intervening)* [2012] UKSC 36.
10. There is no general rule in proceedings involving children in the Family Court that an unsuccessful party will be ordered to pay the costs of the successful party. There is no presumption that costs will follow the event. There are special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particularly important where the interests of a child are at stake. This explains why it is common in family proceedings, and usual in proceedings involving a child, for no Order to be made in relation to costs.
11. The Court, however, retains a wide general discretion as to the award of costs, as it thinks just. In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including the conduct of all the parties and whether a party has succeeded in part of their case, even if they have not been wholly successful. In respect of the conduct of the parties, this may include conduct before, as well as during, the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and the manner in which a party has pursued or defended a case or a particular allegation or issue.
12. "Whenever a Court determines a question relating to the upbringing of a child, the welfare of the child is the Court's paramount consideration (Children Act 1989, s1). Although the proceedings are adversarial in form, they have many inquisitorial features. An application cannot be withdrawn without the Court's consent (Family Procedure Rule 29.4). The Court is not bound by the proposals advanced by the parties but may adopt an alternative solution of its own. In such proceedings there are no adult winners and losers. The only winner should be the child. Furthermore, it can generally be taken for granted that 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. It would be difficult indeed for a Court to decide how to secure that the child has a meaningful relationship with each parent without hearing from them both. It would be difficult for a Court to decide the best way of protecting a child from the risk of harm without hearing from their parents and those whose task it is to protect them. No one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the Court achieve the right solution...It can also generally be assumed that all parties to the case are motivated by concern for the child's welfare. The parents who dispute with one another over their children's future do generally love their children dearly and want the best for them as they see it." (*per Baroness Hale, Re S (Costs)* [2015] UKSC 20)

13. In this case, the father's actions in retaining the children were in breach of the Spanish Court Orders. The father failed to raise his concern with the mother in advance of taking the unilateral decision to retain the children. He did not attend the handover venue at the conclusion of contact on 2<sup>nd</sup> September 2020. He gave the mother no notice of his intention not to return the children. He failed to respond to the mother's text messages for some two and half hours after the agreed handover time. He did not facilitate any indirect contact between the children and their mother until 5<sup>th</sup> September 2020. He did not respond to communications from the mother's solicitors on 4<sup>th</sup> September 2020 prior to the mother making her application to the Court. Further, he did not communicate to the mother or her solicitors his reasons for retaining the children and he made no application to the Court of his own accord.
14. The mother submits that, in addition to those factors, the Court should also have regard to the parties' respective finances, in circumstances where, the mother submits, the father is a television personality with several properties and other assets in the United Kingdom and abroad, whose finances far exceed her own. In contrast, the mother submits that she has sought help from family members to pay for her legal fees in these proceedings. In respect of the parties' finances, there is a paucity of evidence before the Court. I am not satisfied this is a factor that carries any weight in respect of my determination of the principle of whether to make an order for costs.
15. The factors identified in respect of the father's conduct must also be balanced with the fact that the father clearly acted on concerns raised by the children themselves. In my judgement, his actions were not malicious. In response to the concerns raised by the children, he took immediate action by contacting the police and Local Authority Children's Services. He was left with the impression that Children's Services and the police were treating his concerns seriously. The older child was interviewed by the police. The father has never previously reported to the police or Children's Services in any jurisdiction any allegations in relation to the mother. Further, the father had little time to seek legal advice prior to the mother making her application, having not used family lawyers in this jurisdiction prior to this point. In my judgement, the father was motivated in his actions by welfare concerns for the children. I am satisfied the father wanted the best for the children, as he saw it.
16. The mother's original application to this Court was not supported by a witness statement. Her application to this Court for a hearing, without notice first being given to the father, was bound to fail in the circumstances and was contrary to the well-established principle that, save in cases where it is essential that a Respondent must not be aware of the application, the Applicant should take steps to notify the Respondent at least informally of the application and for at least short notice to be given the other party in order that the Court could determine the issues relating to the children only after hearing from both parents. In rejecting the mother's request for a hearing without notice, the Designated Family Judge made plain that, on the material available, the need for an urgent hearing

was not made out. The Judge identified in particular that the mother's statement in support had not been delivered to the Court, there were jurisdictional issues and that the hearing must be on proper notice. The mother's actions then in applying on the same day to a different Judge in a different Court, seeking a different outcome when she received a response not to her liking, is concerning. I am invited on the mother's behalf to put that down to an unfortunate miscommunication. It appears that on making her second application on 4<sup>th</sup> September 2020, the matter was considered 'on the papers' by the out of hours Judge, but that the 'papers' filed by the mother omitted reference to an application having, immediately preceding that application, been filed, considered and refused by another Judge.

17. Taking into consideration all the circumstances of this case, I am not satisfied that the Respondent father should be liable to pay the Applicant mother's costs associated with her application. In my judgement, this is not a case where it is appropriate to depart from the general principle that each party should bear their own costs. The appropriate Order is that there be no Order as to costs. In the circumstances, it is not necessary for the Court to consider the quantum of costs by conducting a summary assessment of the painfully bloated schedule of costs filed on behalf of the Applicant mother.
18. At the hearing on 11<sup>th</sup> September 2020, the Court observed that the parents would benefit from discussion rather than litigation. I am informed that the parties have now agreed to attend therapeutic mediation with a view to improving the communication between them and to resolve issues in respect of the children, in relation to whom there has been continuous litigation for more than five years across three different jurisdictions.

Conclusion

19. The Court makes no Order as to costs.

HHJ Middleton-Roy  
21<sup>st</sup> September 2020