Case No: FD19P00058

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2021] EWHC 2602 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

MR JUSTICE KEEHAN

Re A and B (Parental Alienation: No.3)

- -

Between :

The Father	**Applicant**
- and -	
The Mother	**Respondent**

- -
- -

Ms J Bazley QC (instructed by **Keystone Law**) for the **Applicant**
Mr E Devereux QC (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing dates: on the papers

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE KEEHAN

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.

The Hon Mr Justice Keehan :

Introduction

1. This judgment should be read with the judgments I have previously given in these proceedings on 25th November 2020 and 24th February 2021.

2. In these proceedings I am concerned with two children Child A, who is 14 years of age, and Child B, who is 11 years of age. On 25th November 2020 at the conclusion of a contested final welfare hearing I transferred residence of the children from their mother, The Mother, to their father, The Father.

3. In the judgment of 25th November I set out a route map for the reintroduction and progression of contact between the mother and the children after a prescribed period during which the mother would not have any contact with the children.

4. Unfortunately, as I set out in a postscript to the judgment of 25th November, the children left their father's home on two occasions, 26th November and 2nd December, and were only returned to their father's care with the assistance of officers of the Metropolitan Police. In consequence of these events, the case was listed of the court's own motion for a directions hearing on 8th December 2020. At this hearing I suspended the operation of the contact route map and listed the matter for a further hearing on 11th January 2021 to consider the way forward which met the welfare best interests of the children.

5. For reasons which I will set out later in this judgment I was required to list the matter for a further directions hearing on 24th February 2021.

6. At the conclusion of my judgment on 25th November Ms Bazley QC, counsel for the father, made an application for the whole of the father's costs of these proceedings. I directed written submissions should be filed and served in respect of the father's application for costs. Therefore, I have the benefit of written submissions from Ms Bazley QC, and from Ms Wood QC, then leading counsel for the mother and a response by the father to the mother's written submissions.

7. At the conclusion of the hearing on 24th February 2021, Ms Bazley QC made an application for the mother to pay the father's costs of that hearing and the hearing of 11th January 2021. Costs schedules had been filed and served.

8. Mr Devereux QC, now leading counsel for the mother, opposed the application and was granted permission to file and serve written submissions on this issue. I granted the father permission to file and serve written submissions in reply to the mother's submissions.

The Law

9. By virtue of Rule 28.2(1) of the *FPR* 2010, as supplemented by Practice Direction 28A – Costs, certain provisions of the *Civil Procedure Rules* 1998, ("the *CPR* 1998"), apply to costs in "family proceedings" that is to say, (with modifications), Parts 44, (except, *critically*, 44.2(2) and (3), 44.10(2) and (3), 46 and 47 and rule 45.8 of the *CPR* 1998, which all expressly do not apply).

10. Thus, as a general rule, in family proceedings (which are not financial remedy proceedings) before the family court costs do not *automatically* follow the event.

11. In order to understand the impact of rule 28.2 of the FPR 2010, one has to consider, so far as is relevant, Part 44.2 of the *CPR* 1998 which provides as follows:

> "(1) The court has a discretion as to –
>
> > (a) whether costs are payable by one party to another;
> >
> > (b) the amount of those costs; and
> >
> > (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> > (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> >
> > (b) the court may make a different order.
>
> (3) The general rule does not apply to the following proceedings –
>
> > (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
> >
> > (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
>
> > (a) the conduct of all the parties;
> >
> > (b) whether a party has succeeded on part of his case, even if he 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 under Part 36 apply.
>
> (4) 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 his case or a particular allegation or issue;
>
> (d) whether a claimant who has succeeded in his claim, in whole or in part exaggerated his claim.
>
> (5) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment."

12. In *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317 at 1317 Mr Justice Wilson (as he then was) said:

> "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…"

13. This theme was taken up by the Supreme Court in In *re S (A Child) (Access to Justice Foundation intervening)* [2015] 1 WLR 1631 where Baroness Hale said at paragraph [23]:

> "Another consideration is that, 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. Children's lives do not stand still. Their needs change and develop as they grow up. The arrangements made to cater for those needs may also have to change. Parents need to be able to

> co-operate with another after the case is over…Stigmatising one party as the loser and adding to that burden of having to pay the parents' costs is likely to jeopardise the chances of their co-operating in the future."

14. In *Re T (Costs: Care Proceedings: Serious Allegation Not Proved)* [2013] 1 FLR 133, Lord Phillips of Worth Matravers said at paragraph [11]:

> "In family proceedings, however, there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particular true 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."

15. He went on to say at paragraph [44]:

> "we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance is one that accords with the ends of justice…" (emphasis added)"

16. In *Re N (A Child) v A and others* [2010] 1 FLR 454 Mr Justice Munby (as he then was) said (at paragraph [47]):

> "…the fact that a parent has litigated in an unreasonable fashion may open the door to the making of an adverse costs order; but it does not of itself necessitate the making of such an order. There is, at the end of the day, a broad discretion to be exercised having regard to all the circumstances of the case. And a judge must be careful not to fall into the trap of simply assuming that because there has been unreasonable behaviour in the conduct of the litigation an order is therefore to be made without more ado. Careful attention must be paid to all the circumstances of the case and to the factors which, on the authorities I have referred to, indicate that normally it is inappropriate to make such an order – factors which do not simply disappear or cease to have weight merely because the litigation has been conducted unreasonably."

17. In relation to the quantum of costs, in *K v K (Appeal: Excessive Costs)* [2016] EWHC 2002 (Fam), at paragraph [29], at sub paragraphs vii) and ix), Mr Justice MacDonald said (inter alia):

> "Where the court is to assess the amount of costs (whether by summary assessment or detailed assessment), pursuant to CPR r 44.3(1) the court will not allow costs which have been unreasonably incurred or are unreasonable in amount. Pursuant to CPR r 44.3(2), when assessing costs on the standard basis the court will only allow costs which are proportionate to the matters in issue and costs which are disproportionate in amount may be

> disallowed or reduced even if they were reasonably or necessarily incurred. CPR r 44.3(5) provides, in so far as is relevant to this case, that costs incurred will be proportionate if they bear a reasonable relationship to the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance (see also FPR 2010 PD28A para 4.4).
>
> …
>
> On the question of proportionality, the touchstone of reasonable and proportionate costs is not the amount of costs which it was in the party's best interests to incur but the lowest amount which he or she could reasonably have been expected to spend in order to have his or her case conducted and presented proficiently having regard to all the relevant circumstances. Expenditure above and beyond that level is for a party's own account and not recoverable from the other party." [emphasis added]"

18. At paragraph [44], Mr Justice MacDonald went on to say:

> "In summarily assessing costs the judge's task is to focus on the heads of costs he or she is being asked to assess and to form his or her judgment of the proportion it is reasonable to require the paying party to pay."

19. This court may exercise its discretion to award costs if it is satisfied that the conduct of a party (before as well as during the proceedings) and/or the manner in which he or she has pursued or defended the proceedings has been "reprehensible of unreasonable":- *Re T (Children) (Care Proceedings: Costs)* [2012] UKSC 36, [2012] 1 WLR 2281.

20. A useful consideration of the relevant principles following *Re T* appears from *Re E-R (Child Arrangements)* [2016 EWHC 805 (Fam); [2017] 2 FLR 501.

The Father's Application for Costs up to the Conclusion of the Final Hearing

21. In late 2018, the mother issued an application for a variation in the shared care arrangements ordered by Pauffley J on 25th November 2014. In this application the mother made allegations of domestic abuse against the father. Later the mother made other serious allegations set out in her witness statements.

22. In early 2019 the proceedings were re-allocated to a full judge of the Family Division. The case was first listed before me on 11th February 2019. The mother pursued all of her allegations against the father.

23. I acceded to the father's application and gave permission for Dr Butler, a child psychiatrist, to be instructed in this matter and to advise the court on why the children had behaved so negatively towards their father and how their relationship with him could be re-established. I later approved the instruction of Dr Braier, a psychologist

with particular expertise in the field of parental alienation. She undertook her enquiries and filed a preliminary report in conjunction with her colleague, Karen Woodall.

24. These expert reports had been ordered against the background of the mother continually seeking for the matter be set down for a fact finding hearing in respect of her various allegations of domestic abuse against the father.

25. On 12th June 2019 I listed the matter for a 3 day fact finding hearing commencing 10th July 2019.

26. Just prior to this hearing the report of Dr Braier and Ms Woodall had been received. In it Dr Braier recommended that she and Ms Woodall undertook a period of intensive therapeutic work with the parents and the children in an attempt to restore the children's relationship with the father. Both parties agreed to this proposed piece of intervention and by consent the fact finding hearing was adjourned.

27. On the advice of Dr Braier and Ms Woodall this work was successively extended until they filed their final report in October 2020.

28. In light of the complexities of the case, rather than making a clear recommendation in respect of the living arrangements for the children they set out a range of potential outcomes giving the advantages and disadvantages of each one for the children. These potential outcomes were the focus of the final hearing which I heard in November 2020. Ultimately I concluded that it was in the best interests of the children to transfer the residence of the children from the mother to the father.

29. From July 2019 the mother engaged with the therapeutic work undertaken by Dr Braier and Ms Woodall. Many criticisms could have been made and, indeed, were made on behalf of the father, of her actions and conduct on occasions which were not conducive to restoring the father's relationship with the children. In broad terms, however, she engaged with and participated in the work as far as she was capable, albeit this was seriously limited as a result of her own psychological and emotional functioning.

30. Applying the *Re T* test of whether there was any reprehensible behaviour or an unreasonable stance taken by the mother in the conduct of this litigation, I am not persuaded that the mother's behaviour after the hearing on 12th June 2019 could be characterised as reprehensible. Nor am I persuaded that, although one could be critical of some of her actions and behaviours in the period July 2019 to the final hearing in November 2020, taken as a whole, her stance in the litigation over this latter period could properly be characterised as unreasonable.

31. Accordingly I am not satisfied that it would be a proper exercise of my discretion to award costs to the father against the mother for the period from the hearing on 10th July 2019 to the conclusion of the final hearing on 25th November 2020.

32. I then turn to consider the period from the commencement of the mother's application to vary the terms of the 2014 shared care order in late 2018 to the hearing on 12th June 2019. Throughout this time the mother made and then maintained very serious allegations of domestic abuse towards her and abuse of the children against the father. She repeatedly submitted that these allegations should be the subject of a fact finding hearing. In light of therapeutic work undertaken by Dr Braier and Ms Woodall, the

mother did not apply for a fact finding hearing to be listed after the fixture on 10th July 2019 was vacated.

33. At the final hearing in November 2020 the mother, in terms, accepted that the allegations she had previously made allegations against the father were untrue and false. She said in her evidence that words and events would come into her head and she would then set these matters out in her witness statements.

34. I am wholly satisfied and find that the mother had made and then maintained allegations she knew to be wholly false against the father throughout this period and sought to prove them to be true at a fact finding hearing, plainly amounted to reprehensible behaviour and was a wholly unreasonable stance for the mother to have adopted in this litigation.

35. It is submitted on behalf of the mother that she cannot afford to pay all or any part of the costs sought by the father. I have no hesitation in rejecting this submission for the following principal reasons:

i) the mother retained or received something in excess of £2million at the conclusion of the financial remedy proceedings;

ii) the mother has substantial investments and liquid assets in excess of £200,000;

iii) she owns a luxury flat in Moscow;

iv) albeit her earned income is relatively modest, her rental property in Marylebone costs her £4,800 per calendar month;

v) throughout these proceedings she has been represented by solicitors and leading counsel; and

vi) her wealthy family in Russia have regularly provided her with financial support.

36. In all of the circumstances I am wholly satisfied that I should exercise my discretion to order the mother to pay the father's costs of these proceedings from the date they were commenced up until and including the hearing on 12th June 2019.

37. I consider the quantum of the costs sought to be reasonable and proportionate to the issues raised in the case.

Costs of the Hearings on 11th January and 24th February

38. The father sought an order for the mother to pay the costs he incurred relating to the hearings which took place on 11th January and 24th February 2021. It was submitted on behalf of the father that the issues raised and determined at the hearing on 11th January could easily have been dealt with on the papers. Accordingly, this hearing was unnecessary and the costs of the same were entirely wasted.

39. I am not persuaded that this hearing was unnecessary. It was listed at my direction following the suspension of the contact route map on 8th December 2020 which I had previously set out in my judgement of 25th November 2020. Given the events of 26th November and 2nd December 2020, it was almost inevitable that a hearing would be

required to consider the way forward in respect of the mother's contact with the children. Even if I am wrong, I do not consider the mother's stance in seeking to maintain the listing can or should be characterised as so unreasonable as to merit the making of an order for costs against her.

40. At the hearing on 11th January Mr Devereux QC, appearing for the mother, raised the issue, as presaged in his position statement, of the children being joined as parties and represented by a children's guardian. No formal application, however, had been made to seek the joinder of the children or for the appointment of a children's guardian. Accordingly, I listed the matter for a hearing to consider this issue on 24th February 2021.

41. At the hearing on 24th February Mr Devereux QC wished to cross examine Ms Woodall. I permitted him to do so. All of the issues raised with Ms Woodall had either been raised in court approved written questions and/or in correspondence or could have been dealt with in writing. As set out in my judgement of 24th February the mother launched a full-scale attack on the expertise and objectivity of Ms Woodall and mounted a challenge to the quantum of her fees. It was attack on the professional integrity of Ms Woodall.

42. For the reasons given in my judgement of 24th February, the attack was baseless and was totally without any merit. It was mounted, in my judgement, to support or bolster the mother's applications for the children to be joined as parties and to be represented by a children's guardian and/or to subvert the outcome of the orders I had made on 25th November and 8th December 2020.

43. I found that the applications for the children to be joined as parties and for them to be represented by a children's guardian were wholly inimical to the welfare best interests of the children. Further I found the applications to be totally without merit on the particular facts of this case.

44. I am persuaded that:

    i) the pursuit of the opportunity to cross examine Ms Woodall;

    ii) the attempt to undermine her professional integrity and objectivity; and

    iii) the application to join the children as parties

    was wholly unreasonable and a totally ill-judged litigation tactic on the part of the mother. These actions were so egregious as to merit, indeed require me to exercise my discretion to make a costs order against the mother in respect of the costs incurred by the father in relation to this hearing.

45. For the reasons given in paragraph 35 above, I am wholly satisfied that the mother has the means to pay the father's costs. Further I am satisfied that, in broad terms, the costs claimed are reasonable and proportionate to the issues raised.

Summary Assessment

46. The mother opposed the court making a summary assessment of the quantum of the two costs orders I have made. As she is the paying party, I considered that I should, therefore, order that the father's costs be subject to a detailed assessment in the absence

of any agreement on the quantum of both costs orders. In light of my observations in this judgement the detailed assessment will be undertaken on an indemnity basis.