Neutral Citation Number: [2023] EWHC 2078 (Fam)

Case No: FA-2022-000227

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th August 2023

Before :

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

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Between :

	The Mother	**Mother**
	- and -	
	The Father	**Father**
	- and -	
	Melanie Gill	**Expert**
	- and -	
	Association of Clinical Psychologists (ACP-UK)	**ACP UK**

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Mr Chris Barnes (instructed by **Beck Fitzgerald**) for the **Mother**
Mr Charles Hale KC (instructed by **Thomson Snell and Passmore**) for the **Father**
Ms Jessica Lee and Mr Luke Eaton (instructed by **TV Edwards LLP)** for the **Expert**
Ms Barbara Mills KC (instructed by **Dawson Cornwell)** for the **ACP UK**

Hearing dates: 10th May 2023
Judgment Handed Down on 14th August 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14TH August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ANDREW MCFARLANE PFD

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.

Sir Andrew McFarlane P:

1. On 13th September 2022, Peel J granted permission to appeal to a mother who had failed in an application to HH Judge Lyndsey Davies to reopen a fact finding determination made in private law children proceedings in June 2021 in which the judge had made findings of parental alienation against the mother. An earlier application for permission to appeal the original fact finding judgment had been dismissed by Peel J on the basis that it was totally without merit.

2. As his judgment makes clear, Peel J was persuaded to grant permission to appeal on the sole basis that the need for the court to look at the practice of instructing unregulated experts in such cases provided a compelling reason, under FPR 2010, r 30.3(7), for an appeal to be heard.

3. The appeal was heard before me on two separate days in late 2022, with judgment being handed down on 21 February 2023 ([2023] EWHC 345 (Fam)). The appeal was dismissed but, in the course of the judgment, it was unfortunately necessary to express criticism of the approach taken by the Association of Clinical Psychologists ['ACP' or 'the association'] which had been given permission to intervene in the appeal proceedings (see particularly paragraphs 51 to 56 of the appeal judgment).

4. The father, who succeeded in opposing the appeal and who was the recipient of a costs order in his favour before HHJ Davies, has now applied for an order for his costs of the appeal to be paid by the appellant mother and, if not, then, either in whole or in part, by the ACP.

5. Ms Gill, the expert whose instruction was at the centre of the appeal, appeared as an intervenor in the appeal by leading and junior counsel. She also applies for an order for costs against the appellant mother and/or the ACP in such proportions as the court may determine.

6. The costs application was heard remotely on 10 May 2023.

Costs on appeal in children cases: The legal framework

7. There is essentially no dispute between the parties with respect to the legal framework that applies to a cost application following an appeal in a children's case.

8. By Family Procedure Rules 2010, r 28.2, Parts 44, 46, 47 and rule 45.8 of the Civil Procedure Rules apply to costs in children cases, subject to certain important exceptions. The principal exception is that CPR, r 44.2(2) is excluded so that, in contrast to civil proceedings, the general rule that the unsuccessful party should pay the costs of the successful party does not apply in children cases.

9. CPR, r 44.2(4)+(5), which do apply to children cases, provide that:

> '(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including:
>
> (a) the conduct of all 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.

(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 . . . 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 particular allegation or issue; and

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

Rule 44.2(4)(b) does not apply when, as is the case in a children case, the rule that costs follow the outcome does not apply.

10. Two Supreme Court decisions have considered the issue of costs in children cases:

- *Re T (Children) (Care Proceedings: Costs) (CAFCASS intervening)* [2012] UKSC 36; and
- *Re S (A Child) (Access to Justice Foundation intervening)* [2015] UKSC 20.

In *Re T*, at the conclusion of the judgment of the court, at paragraph 44 Lord Philips PSC described the approach to be taken:

> '… 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 …'

11. In *Re S*, Baroness Hale DPSC, giving the lead judgment, held, at paragraph 29, that the same approach should apply to appeals:

> '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 *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, the judge's reasons are known. Both parties have an opportunity to "take stock" (para 24), 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.'

12. The submissions in the present case, therefore, proceeded on the basis that the costs of this appeal would not be awarded against the appellant mother in the absence of reprehensible behaviour or an unreasonable stance.

The Father's application for costs against the mother

13. In presenting the father's application for costs, Mr Charles Hale KC, who has represented him throughout this litigation, both at first instance and on appeal, made the following submissions:

i) Whilst it was the mother's choice to apply for permission to appeal and then to proceed once that was granted, she did so following clear warnings from the father's lawyers that an application for costs would be made against her should she fail;

ii) In the light of his previous refusal of permission to appeal on the basis that the application was 'totally without merit', Peel J's decision to grant permission on the second occasion was expressly upon a very narrow basis concerned with the lawful competence of the expert;

iii) The father had no choice but to oppose the appeal as the mother's case was very broadly drawn and he was obliged to meet the arguments that she presented;

iv) If, as the court has found, it was right for HHJ Davies at first instance to order costs against the mother, it must also be justified for the father's costs of the appeal to be awarded;

v) By pressing on with an appeal, the mother ignored the welfare reality for the children, as described in HHJ Davies' judgment. She has been 'oblivious' to the children's welfare to an extent that her stance can be regarded as conduct for the purposes of determining costs.

14. As to the level of costs, Mr Hale submitted that it should be on an indemnity basis as it is wholly exceptional for a party to apply to appeal, fail, then return to the lower court and apply to reopen the case, fail again, before then appealing that decision and failing in that endeavour.

15. Mr Hale submitted that the mother's assertion that her appeal was brought for the public benefit was unarguable in terms of costs, as this was not a reasonable justification for expecting the father to pay for his part in the failed process.

The Mother's response on costs

16. For the children's mother, Mr Chris Barnes invited the court to make no order as to costs on the appeal. He was clear that, insofar as the court may be critical of the role of the ACP, such criticism should not include the mother. The appellant mother's case

on appeal had been fully pleaded in the skeleton argument that was before Peel J at the permission stage. No further skeleton was filed and the mother's case was presented on that basis at the oral hearing. If the appeal process developed with the ACP taking a more prominent role, that was not as a result of action on the mother's part and she should not be held responsible for it.

17. Mr Barnes emphasised Baroness Hale's words at paragraph 23 of *Re S* that 'stigmatising one party as the loser and adding to that burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future'.

18. Mr Barnes submitted that costs will impact adversely upon the mother to a disproportionate extent when compared to the father, given their respective financial circumstances.

19. Although the law requires consideration of whether or not a party has been guilty of 'unreasonable conduct', a finding that there has been unreasonable behaviour was only a gateway finding and did not establish a requirement for the court to order costs.

20. A second limb of Mr Barnes' submissions was that the court should have regard to the basis on which Peel J granted permission to appeal. He challenged Mr Hale's submission to the effect that Peel J must have concluded that the mother's substantive appeal was totally without merit in that he only granted permission to appeal on the alternative basis of there being some other compelling reason. That challenge was obviously correct as, at the conclusion of his judgment, Peel J stated:

> '34. In an attempt to be absolutely clear and for the avoidance of doubt, I make no comment about the merits of the substantive appeal which will fall to be considered on another day and no doubt partly or wholly in the light of any conclusions on the wider issue. The submissions made on behalf of the father may well prevail but it seems to me proper for the court to consider, both generally and specifically in this case, the instruction of unregulated experts in these difficult and highly sensitive cases.'

21. It is not the case, submitted Mr Barnes, that the mother is hiding behind Peel J's decision or that she must have known that she was bound to fail. The appeal was pursued on the basis described by Peel J when granting permission and the mother should not be penalised in costs for having done so. In short, there is an absence of unreasonable conduct on the part of the mother and the application for costs should fail.

22. Thirdly, Mr Barnes submitted that the way in which the case developed during the appeal hearing was as a result of the intervention of the ACP and the court requiring the association to produce further detail of its case. These factors were not in the mother's control and she would have not been in a position to stop them.

23. Mr Barnes drew attention to the decision of the Court of Appeal in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 on indemnity costs [73 and 74].

> '83. The judge had a wide discretion as to costs but I consider that, in awarding costs on the indemnity basis rather than the standard basis, the judge made an

> error in principle. The weakness of a legal argument is not without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps take within them are not only based on a plainly hopeless case but are motivate by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit.
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> 84. The claimants' arguments on limitation have not been associated with culpable motive or improper purpose or otherwise such as to amount to an abuse...'

24. He submitted that the present case was very far short of those circumstances.

The Father's application for costs against the ACP

25. Mr Hale was clear that he only sought costs against the ACP as a fallback position if the court did not award costs 100% against the mother.

26. The application against the ACP is principally based upon the court's findings as to the organisation's approach to, and during, the second day of the hearing. Mr Barnes is correct in pointing to the fact that the appeal process deviated from the conventional course when the ACP intervened and themselves asserted that Ms Gill was not qualified to act as an expert in the case.

27. Mr Hale submitted that the court's power to make costs orders at its discretion under Senior Courts Act 1981, s 51 extends to orders against an intervenor. This point is accepted by the ACP. Mr Hale accepts that it will only be in an exceptional case that the court will exercise this power [*Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232; *HP v PB, OB and London Borough of Croydon* [2013] EWHC 1956 (Fam); and *Birmingham Children's Trust v K* [2020] EWHC 861 (Fam)].

28. The ACP argued that for the court to order costs against an intervening organisation of this nature would have a 'chilling effect' on other organisations coming forward to intervene in future cases. Mr Hale submitted that well intentioned intervenors had nothing to fear. This case had gone astray because the ACP had ignored the clear direction of the court as to the limited role it should have and, in particular, because, by filing a further full skeleton argument mounting a direct attack on the individual expert, the association had abused the leave that the court had given for it to adduce further limited information as to its case on lack of qualification.

29. Mr Hale submitted that the ACP had taken over the role of prosecutor. The first skeleton argument from the ACP had descended into the issues in the case itself, rather than a high level assessment of matters of principle.

30. The proper course for the ACP to have followed was that taken by the HCCP in its letter. That letter contained the answer to the court's question and the ACP should have done no more than repeat it. Instead, Mr Hale submitted, the ACP had acted in a manner which the court had expressly 'deprecated' in its judgment. The father had not anticipated that the intervenor would conduct itself in this manner and he should not have to pay his costs for responding to their conduct.

Response by the ACP on costs

31. On behalf of the ACP, Ms Barbara Mills KC, who had appeared on the appeal, made the following succinct submissions:

i) The father had originally been neutral as to the ACP intervening in the appeal;

ii) The ACP's application to intervene was put as follows, per its application form of 12th October 2022: *"*As a not-for-profit organisation, any intervention by the ACP-UK should be on the basis that "no order for costs" would be made by the Court, against the ACPUK, in the unlikely event any such order was sought"

i) There had been no suggestion, from any party, of an application for costs against the ACP prior to judgment being given on the appeal;

ii) The ACP had not intended to take over the case. The association had been drawn in to a more prominent role by the progress of the hearing. In any event, Ms Mills challenged the contention that the organisation had descended into the arena and the dispute in the substantive appeal;

iii) The ACP had not submitted that the expert had been acting 'unlawfully' in taking on instruction in this case;

iv) No warning about a possible costs application had been given to the ACP at any stage prior to the conclusion of the appeal;

v) Had the ACP been notified that costs were sought at an earlier stage it would have had to consider very carefully whether it wished to assist the Court by continuing in its intervention. It would have done so with regard to the financial implications for it as a not-for-profit community interest company. Part of those considerations would have included trying to establish whether any costs order might be met by its professional insurers.

Ms Gill's application for costs against the mother and/or the ACP

32. Ms Gill has incurred costs in the region of £50,000 including VAT. Those acting for her seek a costs order against the mother and the ACP on a joint and several basis so that if one cannot pay a half share, the other should be required to make up the deficit.

33. The submissions made on behalf of Ms Gill mirror those made by the father, and the responses of the mother and the ACP are, also, in like terms to their responses to the father's claims. It is not therefore necessary to expand upon.

Discussion and conclusions

(a) The father's application for costs against the mother

34. The test to be applied to the mother's conduct in the context of the appeal is whether it can properly be said to be 'reprehensible' or whether her stance in bringing and then prosecuting the appeal was unreasonable. In favour of that conclusion the father is able to rely upon the litigation history not only of this appeal but of the whole

sequence of earlier hearings before HHJ Davies and Peel J during which the mother's substantive case with respect to the judge's findings and the children's welfare wholly failed. In my view, Peel J was entirely correct in describing her first attempt to appeal as being 'totally without merit'.

35. Against that background, there being no significant development in the factual or welfare issues since the fact-finding hearing, the mother's appeal entirely turned upon her attack on the competence of Ms Gill to be instructed as an expert in the case. Yet, as the skeleton argument filed on her behalf and the oral presentation of her appeal demonstrated, she did not, herself, have any bright-line authority or any evidence to make good her case on this point, other than the letter from Professor Wang.

36. In those circumstances, I consider that it can properly be said that her stance in deciding to bring the appeal was unreasonable for, without the intervention of the ACP or some other outside source, the reality was that she had no means of making good her claim that Ms Gill was unqualified for the role of expert.

37. Peel J was correct in identifying a need for the court to look at the question of the professional competence of experts, and that, indeed, was the focus of the hearing. But, in terms of the mother having any prospect of success, her chances turned entirely upon the case being made by the intervenors. In terms of her own case, she had no prospect of success in the absence of any authority (in terms of statute, regulation or other provision) or evidence to establish the proposition that Ms Gill was not qualified.

38. It is accepted that, at all stages, the father had put the mother on notice of his intention to apply for costs if the appeal did not succeed, and HHJ Davies had already made an order for costs against her at first instance, yet she proceeded to prosecute her appeal despite the fact that she had no material to rely upon to demonstrate the sole basis upon which her case was based.

39. Mr Barnes is correct in pointing to the fact that the appeal process deviated from the conventional course when the ACP intervened and themselves asserted that Ms Gill was not qualified to act as an expert in the case. He is also correct that, had it not been for the court adjourning in order to receive further submissions from the ACP, the appeal hearing would have concluded on the first day.

40. I also accept Mr Barnes' submission that 'unreasonable conduct' is a gateway finding which entitles the court to consider making an order for costs, but it does not require the court to do so.

41. Drawing matters together, I do find that the mother's conduct in bringing and prosecuting this appeal was unreasonable as, in reality, she had no basis upon which to mount her argument that Ms Gill was not qualified to act as an expert. I also accept that the father was obliged to engage in the appeal as the key respondent. Against the litigation history of these proceedings, the warnings that she has been given, and HHJ Davies' earlier order for costs, the mother will have known that, should she fail, there was a real prospect of an application for costs, yet she persisted.

42. The court therefore has jurisdiction to make a costs order against her in favour of the father. I do not, however, consider that it is either fair or proportionate to order that

she should pay all of his costs. For reasons that have already been set out, the appeal process took off and moved on out of the mother's direct control. Taking a very high level approach, and without looking at any minute apportionment of responsibility, I consider that it is appropriate for there to be an order that the mother should pay one half of the father's costs of the appeal , that being half of the father's costs in the disclosed costs schedule for the appeal hearing. Approaching the issue in the manner described in *Arcadia Group Brands Ltd*, I do not consider that the mother's litigation conduct has gone beyond promoting a hopeless case; there is no evidence of some ulterior motive. The position seems to be that she simply does not, and will not, accept the sound findings that HHJ Davies has made. The costs order will therefore be on the standard basis and the father's application for costs on an indemnity basis is refused. (The mother has, since my draft judgment was provided to Counsel, now agreed with the father to pay the father's costs in the sum of £26,176,79 within 3 months of the date of this judgment rather than seek detailed assessment, and that will be reflected in my order).

(b) Ms Gill's application for costs

43. The finding of unreasonable conduct that I have made must apply on a similar basis in the context of Ms Gill's application for costs against the mother. The mother's attack on Ms Gill's qualification as an expert was front and centre of the mother's appeal yet, as I have held, the reality was that the mother had no means of establishing this central claim. It was entirely reasonable for Ms Gill, whose professional standing was on the line, to apply to intervene in the appeal and to be represented.

44. For the same reasons given with respect to the father's claim, it is not, in my view, reasonable for the mother to be responsible for all of Ms Gill's costs. The appropriate and proportionate order is for the mother to pay one half of Ms Gill's costs which may either be fixed at the figure of £20,000 including VAT which I summarily assess or taxed on a standard basis. Ms Gill accepts the court's summary assessment of £20,000 costs to be paid by the mother.

(c) Father's and Ms Gills' costs applications against the ACP

45. The ACP is an independent organisation representing practitioners. It has limited funds and it applied to intervene in order to assist the court. Whilst, for the reasons given in the main judgment, it can properly be said that its litigation conduct within the appeal was misguided, ill-conceived and possibly naïve, I do not consider that the association acted out of malice or for some other reprehensible motive.

46. In contrast to consideration of costs against a party, the test is not one of unreasonable conduct but one of exceptionality. I accept that there is a risk that making an order for costs against an intervenor may have a chilling effect on potential intervenors in other cases. I further accept, and this is an important consideration, that there had been no suggestion of the ACP being at risk of costs at any stage in the appeal hearing until judgment had been given.

47. It was, however, the ACP's case, both in the letter to HHJ Davies from Prof Wang and within the appeal, that Ms Gill was unqualified to hold herself out as a 'psychologist'. At the first day of the appeal, for reasons that were never explained, the ACP's counsel was unable to substantiate that claim by reference to any

regulation or other authoritative statement. The appeal was adjourned to a further date and the ACP were permitted to file a short document identifying the basis of its claim

48. It should have become clear to the ACP that it could not provide a clear, bright line, answer to the court's request for clarity on the issue of qualification. At that point the association might simply have acknowledged that that was the case and stepped back. Instead, in its second document and during the second day of hearing, the intervenor mounted a direct and detailed critique of the expert.

49. Where a non-party has been given permission to intervene and becomes an intervener by reason of its special interests and/or knowledge, it has a responsibility to assist the court in respect of the issues before it. Where an intervenor is found to have acted beyond the remit of the permitted intervention, or acted in contradiction to the court's direction and/or is found to have acted unreasonably and, in doing so, not to have assisted the court, it is likely to be at risk of an adverse costs order.

50. In the circumstances, I do consider that the ACP has conducted itself as an intervenor in a wholly exceptional manner and in way which is most unlikely to be replicated by other bodies who may consider intervening in Family Court proceedings. It is, therefore, fair and proportionate for the ACP to be responsible for a part of the costs of the father and of Ms Gill. However, both the fact that no costs warning was given and the limited financial resources of the association require any costs order to be kept at a modest level.

51. I will therefore direct that the ACP should pay the sum of £10,000 to each of the father and Ms Gill as a contribution to their costs, making a total costs liability for the association of £20,000.