



Neutral Citation Number: [2023] EWHC 3171 (Fam)

Case No: FD23P00282

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2023

Before :

MRS JUSTICE THEIS DBE

Between :

	D	<u>Applicant</u>
	- and -	
	E	<u>Respondent</u>

Mr Teertha Gupta KC and Ms Victoria Green (instructed by **Dawson Cornwell**)
for the **Applicant**

Ms Anna McKenna KC and Ms Jennifer Perrins (instructed by **Stewarts**)
for the **Respondent**

Judgment: 11 December 2023

Approved Judgment

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MRS JUSTICE THEIS DBE

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.

Mrs Justice Theis DBE :

Introduction

1. This judgment is to determine an application made by the Applicant mother, D, for the Respondent father, E, to pay her legal costs.
2. The application is made in the context of concluded proceedings under the Hague Convention where the mother successfully sought orders for the return of the parties child, X, to Country B. The judgment setting out the reasons for that decision is reported at *E v D* [2023] EWHC 1941 (Fam).
3. The mother's application is made pursuant to directions made in that order directing the filing of skeleton arguments if a costs application is made, and for the court to determine the application on the papers.

Relevant background

4. The detailed background to this matter is set out in the previous judgment and will not be repeated here other than in summary.
5. The mother was born in Country B, came here in 2015 where she met the father. The father was born here. The parents married in 2018 and X was born two years later.
6. The family went to Country B in December 2020 with tickets booked to return here in February 2021. The father returned here in June 2021 and for various reasons the mother and X did not return here until December 2022.
7. There were difficulties in the parents' relationship and the father issued divorce proceedings in Country B in October 2022. Prior to December 2022 the parties exchanged messages looking at options for reconciliation and to repair their marriage. Prior to the mother and X coming to this jurisdiction various documents were signed which, according to the mother, made clear the trip back here was time limited with X to return to Country B by June 2023, if not before. The mother was served with the father's divorce proceedings in Country B prior to leaving. Those proceedings made clear the mother and child lived in Country B.
8. The mother and X came here in December 2022 and the family lived together. The parents separated here in April 2023 after the mother alleged she had been assaulted by the father. X remained living with the mother and spent time with the father, who had rented his own flat. The father removed X's passport without the mother's consent. Both parties instructed solicitors and in May 2023 the mother issued this application seeking the return on X to Country B under the Hague Convention.
9. The father defended those proceedings on two basis (i) that X's habitual residence was here at the relevant time; (ii) the mother consented and/or acquiesced to X moving to live here.
10. Those defences were rejected by the court and an order made for X to return to Country B.

Legal framework

11. The usual order in children cases is no order as to costs (see *Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317 at 1319*).
12. In relation to costs the court has a wide discretion under Rule 28.1 Family Procedure Rules 2010 and the provisions in Part 44 of the Civil Procedure Rules 1998. Whilst the general rule under CPR, r.44.2(2) is disapplied by virtue of r.28.2 of the FPR 2010, the court's discretion is retained.
13. Part 44.2 (4) to (8) of the CPR 1998 provides as follows:
 - (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 under 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 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 the 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.
 - (6) 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.
 - (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.
 - (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.
14. The wide discretion, taking into account the matters set out in Part 44 (4) and (5), can include any reprehensible conduct and an unreasonable stance in the litigation (see *Re T (Care Proceedings: Costs) [2012] UKSC 36*).

Submissions

15. On behalf of the mother, Mr Gupta KC and Ms Green describe the basis upon which the father defended these proceedings as '*plainly nonsense*'. During the hearing it became clear the father had instructed his solicitors here in September 2021 and had instructed his solicitors in Country B since September 2022.
16. They submit the father '*manipulated the mother into bringing [X] to this jurisdiction, with the aim of entrapping her here, knowing that any lawful attempt to secure X's return to England was bound to fail. The father's action in clandestinely removing the child's passport from the mother's possession was symptomatic of the underhand approach that he took*'. The father had already recognised and acknowledged X's habitual residence in Country B in October 2022 and served the mother with those proceedings just before she and X came here in December 2022.
17. They further submit the father's litigation conduct in defending these proceedings was both '*unrealistic and unreasonable*'. His position that the time limited travel document signed by the parties in December 2022 was no more than a travel consent form was '*doomed to failure; the wording of the document made it abundantly clear that it was a consent form for [X] to be absent from [Country B] until 10 June 2023 at the latest. The ongoing divorce proceedings in [Country B] (including as to children matters) further entirely undermined the case that the father sought to advance before this court as to habitual residence*'. His case about consent/acquiescence was wholly undermined by his deceptive conduct, for example the unilateral removal of the passport and his message to the mother in December 2022, before the mother travelled here from Country B '*I have never said you, or we, should permanently live in England*'.
18. The mother seeks payment of her costs, summarised as follows:
 - (1) The costs of £40,800 incurred with her first solicitors prior to instruction of her current solicitors and prior to these proceedings being issued;
 - (2) £31,265 (£3,701 private fees; £27,564 legal aid fees) to the mother's current solicitors who instigated the mother's application under the Hague Convention.
19. In summary, Mr Gupta submits it was due to the father's unreasonable and reprehensible conduct that the mother was compelled to issue these proceedings to seek orders for X to return to Country B. The father's position was unjustified in circumstances where the court in Country B was seised of welfare matters concerning X, with those proceedings having been instigated by the father. Mr Gupta submits the father should be liable for the costs incurred by the mother's first solicitor, as even though their costs were incurred prior to the issue of these proceedings as the mother had no choice but to instruct them in the light of the father's conduct.
20. Ms McKenna KC, on behalf of the father, submits any alleged unreasonable litigation or reprehensible conduct does not automatically trigger a costs order. The court retains a broad discretion and must bear in mind the factors which will usually make such an order inappropriate in children orders (see *SB v MB (Costs)* EWHC 3721 (Fam)). Such factors can include whether the costs were proportionately and reasonably incurred.

21. Ms McKenna refutes that the father has conducted these proceedings in a way which was reprehensible or unreasonable. The parties were living here together for a number of months prior to their separation. This was a summary process where the court made no factual findings and the court should, in those circumstances, be cautious in seeking to infer any conclusions from the father's early instruction of solicitors in this jurisdiction or any other motive for the father's behaviour as suggested on behalf of the mother. Further, she submits, it needs to be viewed in the context of the mother's evidence that she had decided not to return to this jurisdiction with X, despite the return tickets and the plan to return when they went to Country B in December 2020. In the correspondence between solicitors in 2023, prior to the issue of these proceedings, the mother did not assert X's habitual residence was in Country B and reference was made to issuing proceedings in this jurisdiction for leave to remove the child from the jurisdiction. In the judgment the court referred to the time the parties were here with X in early 2023 as being by consent albeit a *'fragile temporary arrangement'*.
22. Ms McKenna acknowledges the father took X's passport but submits that was in the context of his fear that the mother was about to remove X from the jurisdiction and immediately instructed his solicitors to inform the mother where it was.
23. Ms McKenna takes issue with whether the costs claimed were proportionate and reasonably incurred. The mother's first solicitors stance in their letters was to issue proceedings here and part of their costs include instruction of leading counsel to advise whose practice is described as being primarily in high value financial remedy claims. These proceedings were not issued until after the change in solicitors and the costs of the first solicitors were not included in the Form N260 filed before the final hearing. As a consequence, Ms McKenna submits, they should not form part of any order against the father.
24. In relation to the costs of these proceedings, Ms McKenna submits the correspondence between solicitors demonstrates the mother's refusal to constructively engage in matters relating to the father's contact with X, with the consequence he had no choice but to issue an interim contact application which was determined by Roberts J with directions being made for interim contact. The order made at that hearing was costs in the application so, Ms McKenna submits, part of the mother's claim for costs includes the father's interim application for contact which, she submits had to be made due to the mother's failure to properly engage in that issue.

Discussion and decision

25. In considering this application it is important that the court remains focussed on the relevant factors in considering this application, in particular those matters set out in Part 44, including the father's conduct in relation to the litigation and whether his stance in defending the mother's application could be described as unreasonable.
26. The mother was successful in securing the order she applied for. There is some force in the mother's position about the father's stance taken in relation to habitual residence and consent/acquiescence. This is particularly when he had instigated steps prior to December 2022 to issue divorce proceedings in Country B, which were based on the mother's habitual residence there and the petition actively sought arrangements regarding X to be considered within those proceedings, thereby accepting that court

had jurisdiction. In addition, the father had taken the active step to serve those proceedings just prior to the mother coming here with X. That was at the same time as both parties signed the document that confirmed X would be absent from Country B until 10 June 2023 *'at the latest'*. All that giving the mother the reassurance she sought.

27. Whilst it is right I rejected the father defence of the mother's application the background to this case was that the initial trip to Country B in December 2020 was intended to be short term, but a number of factors had delayed X's return back here, whereas the father was required to return here for work. The father accepted X's habitual residence was in Country B when he issued the divorce proceedings in October 2022. From the text messages exchanged between the parties in late 2022 he knew the mother's concerns if things did not work out between them if she and X came here, and that she wanted reassurance she would be able to return to Country B with X.
28. As I concluded in my judgment *'On the evidence this was not a wholly consensual relocation back to this jurisdiction as the father seeks to suggest in his statement. It was in the context of a very fragile relationship between X's parents, where they were tentatively exploring reconciliation'*. I stated the father's position in describing the mother and X coming here in December 2022 as a joint consensual decision to effectively re-establish their lives in London *'simply does not reflect the reality'*.
29. Whilst the mother succeeded in her application and the court rejected the father's defence, that in itself does not mean his stance in the litigation was unreasonable or that his conduct was reprehensible. The father's position in this litigation was unhelpful from X's welfare perspective. It caused inevitable uncertainty and insecurity for her due to the inability of longer term plans to be made until the mother's application was determined, there were issues of interim contact that required determination by the court. However, they could equally have been considered, if the father had not defended these proceedings, in Country B where the father had issued divorce proceedings where such issues could be determined.
30. Having stood back and looked at the wider canvas in this case and not without some hesitation, I have reached the conclusion that there should be no order as to costs in these proceedings. I agree that the costs incurred with the mother's first solicitor do not appear to wholly relate to the issues raised in this application and were in the context of different applications being considered. In relation to the costs incurred in these proceedings, whilst I rejected the father's defence as not reflecting the reality of the position, particularly in the circumstances of the documents he had signed and the divorce proceedings he had issued in Country B, when considering the wider context of the case, the background to the parties relationship and the decisions made since December 2020, there should be no order as to costs.