COSTS IN FAMILY PROCEEDINGS:
DO YOU HAVE GREATER LATITUDE TO ARGUE FOR COSTS WHERE THE APPLICATION WAS FOUND TO BE UNNECESSARY?

Costs – FPR 2010/CPR 1998

1. In family cases, the relevant rule governing the award of costs is Rule 28.1 of the Family Procedure Rules 2010 ('FPR 2010') which provides that:

   "The court may at any time make such order as to costs as it thinks just".

2. CPR 1998 44.2 deals with a court's discretion as to costs.

3. FPR 2010 r28.2 disapplies CPR 1998 44.2(2). The general rule that the unsuccessful party will pay the costs of the successful party is not applicable within Children Act proceedings.

   44.2 Court's discretion as to costs

   (1) The court has 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) ….

   (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) …

   (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.

(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.

Case law

4. The general practice in proceedings involving a child is for no order for costs to be made. The fact that the interests of a child are at stake justifies a departure from the principles that apply in adversarial litigation. Such an approach has been justified for a range of reasons including:

   (a) 0rders for costs between the parties may reduce the funds available to the family see *Gojkovic v Gojkovic* [1992] 40, 57 per Butler Sloss J and *R v R (Costs; Child case*) [1997] 2 FLR 95 at 97 per Hale J (further considered below).

   (b) An award of costs could exacerbate feelings between two parents to the ultimate detriment of the child see *Sutton London Borough Council v Davis (No.2*) [1994] 1 WLR.

(c) The approach to costs in family proceedings is well established by two decisions of the Supreme Court: firstly in the case of *Re T* [2012] UKSC 36 and the later case of *Re S* [2015] 2 FLR 208 In short, the principle established by those decisions is: ($44 of Re T):

> *"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 and which should not be subject to an exception in the case of split hearings.*"[1]

5. In Re E-R (Child Arrangements Order) [2016] EWHC 805 (Fam) Cobb J considered and distilled a number of earlier principal authorities on costs as follows:

> [75] *"Rule 28.2 of the FPR 2010 imports aspects of the CPR 1998 to costs in family proceedings, including of Rule 44 (though disapplying Rule 44.3(2), which provides that the unsuccessful party will be ordered to pay the costs of the successful party) and Rule 48.2, which deals with the court's approach to making costs orders against non-parties under Section 51 of the Senior Courts Act 1981. Of the rules which are relevant to this issue I have noted specifically rule 44.3 (sic 44.2) (4)/(5) of the FPR 2010 (sic – CPR 1998) which read as follows:*
>
> *"(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) …*
>
> *(c) …*
>
> *(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 his case or a particular allegation or issue; and*

[1] Quoted with approval by McFarlane LJ (as he then was) in *Re A (A Child)* [2018] EWCA Civ 904

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

[76] The over-arching principle under which the litigation is conducted is contained in Rule 1.2 FPR 2010, which requires the court to give effect to the overriding objective, which is defined in Rule 1.1, including "dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues", and "saving expense".

[77] The principles under which the court exercises discretion on costs in cases of this kind are to be found in a number of authorities including notably London Borough of Sutton v Davis (Costs)(No.2) [1994] 2 FLR 569 and Re T (Children: Care Proceedings: Serious Allegations Not Proved) [2012] UKSC 36) [2013] 1 FLR 133. From these rules and authorities, the following core principles can be extracted:

i) I have a wide discretion in relation to the award of costs;

ii) Costs do not ordinarily follow the event in family proceedings, as they do in other forms of civil proceedings;

iii) ***"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 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****." (Wilson J – as he then was – in LB Sutton v Davis (No.2) at 1319); see also Re S [2015] UKSC 20 at §23* ***("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… stigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future."*** *(ibid.))* [Emphasis added]

iv) It can generally be assumed that all parties to the case are motivated by concern for the child's welfare (Re S [2015] UKSC 20 at §22)

*v) An award of costs in family proceedings may be justified if it is demonstrated that the conduct of the party (before as well as during the proceedings and/or in the manner in which a case has been pursued or defended) has been "**reprehensible or unreasonable"** (Re T); "unreasonableness" is a consideration in awarding costs which can be usefully traced back at the very least to R v R (Costs: Child Case) [1997] 2 FLR 95;*

6. In N (A child) [2009] EWHC 2096 Munby J (as he then was) gave clear guidance as to what might represent litigation misconduct and declined to make a costs order, including for the reasons outlined by Wilson J in Re Sutton (Costs) (No 2) above. The case of Re N had involved multiple cross-applications and extreme litigation behaviour; notwithstanding that, Munby J said when declining to make the costs order sought:

"46. As against that the father's approach, in my judgment, was unreasonable: unreasonable both in parts, though not, I emphasise, in every respect, and also, given the sheer number and reach of his applications - no fewer than 30 applications arising out of what was after all a consent order - unreasonable in its scale and overall effect.

47. That said, 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.

48. I have to say plainly that the father's litigation conduct has, in my assessment, come very close indeed to justifying the order the mother seeks. But I am persuaded, on balance, that it would not be fair, just or reasonable to make that order, not least - and this is an important factor in my thinking - because of the likely effect the making

of such an order will have on relations between the parents and thus, and crucially, on N.

49. There is, if I may say so, much wisdom in what Wilson J said in London Borough of Sutton v Davis (Costs) (No 2) [1994] 2 FLR 569 as above at pages 570-571.

50. Or, as Hale J put the point in R v R (Costs: Child Case) [1997] 2 FLR 95 at page 97, where she referred to:

> *"the possibility that in effect a costs order will add insult to the injury of having lost in the debate as to what is to happen to the child in the future; it is likely therefore to exacerbate rather than to calm down the existing tensions; and this will not be in the best interests of the child."*

51. I do not take so bleak a view as the mother's when she suggests that matters are already so bad that they can get no worse. Moreover, it needs to be remembered that the mother is not blameless in all this: see, in particular, what I said in Re N (A Child), A v G [2009] EWHC 1807 (Fam) at paras [46] and [202]. There is, I fear, a very real risk that were I to make the order the mother seeks she would treat it as a complete vindication of every negative view she has about the father - an outcome that would assist neither the parents nor their son.

52. For all these reasons I have concluded that notwithstanding the way in which the father has chosen to conduct this litigation, the proper order to make is that there should be 'no order' in relation to the costs of the section 8 issues. I make it clear, however, that if there is any further continuation of the litigation by the father making any further unsuccessful applications, a very different order may very well have to be made".

7. In Re A (A Child) [2018] EWCA Civ 904 the Court of Appeal found that a Judge had erred in ordering a litigant in person to pay a legally represented party's costs following the latter's successful appeal in family proceeding. The decision at first instance was found to be contrary to the default position that, in the absence of reprehensible behaviour, there should be no order as to costs in children cases, and was also unfair given the failure to serve a statement

of costs or to give notification of the costs application, particularly when that issue could have been dealt with at a subsequent hearing.

The principles of costs

Standard or detailed assessment?

8. The general rule is that costs should be summarily assessed at the conclusion of a hearing that has not lasted more than one day (CPR,PD 44.9.2(b)) unless there is a good reason not to do so. The observations in this talk are made on the basis that the Court has a wide discretion as to all matters in relation to costs. It may, if it sees fit, conduct a summary assessment even in a complex case (Lemmens v Brouwers [2018] EWCA 2963. In that case, the principle of summary assessment in a long case was approved even where no N260 (or similar) had been filed at all).

Standard or Indemnity Basis?

9. Re 44.2(1)(b):

> The court's discretion as to the amount of costs *'includes its discretion to decide whether some or all of the costs awarded should be on a standard or indemnity basis'*. In assessing the amount of costs, the court is entitled to take account of whether costs were proportionately and reasonably incurred.

10. CPR 44.4 provides:

> 1) The court will have regard to all the circumstances in deciding whether costs were –
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> (a) if it is assessing costs on the standard basis –
>
> (i) proportionately and reasonably incurred; or
>
> (ii) proportionate and reasonable in amount, or
>
> (b) if it is assessing costs on the indemnity basis –
>
> (i) unreasonably incurred; or
>
> (ii) unreasonable in amount.
>
> 2) ….
>
> 3) The court will also have regard to –
>
> (a) the conduct of all the parties, including in particular –
>
> (i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget.

11. An award of costs on the indemnity basis is only justified where a paying party's has been unreasonable to a high degree: not "*merely wrong or misguided in hindsight"* (Kiam v MGN Ltd (No 2) [2002] 1 WLR 2810, CA); and whilst the discretion to award indemnity costs is very wide, the critical requirement before such an order can be made is that *"there must be some conduct or some circumstance which takes the case outside the norm"* (Three Rivers District Council v Bank of England [2006] 5 Costs LR 714 at [§25], cited with approval by Lady Justice King in Timokhina (see below).

Quantum: authorities

12. MacDonald J gave detailed consideration to the question of costs in K v K [2016] EWHC 2002 (Fam). The Court noted (at §44) that "*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 best judgment of the proportion it is reasonable to require the paying party to pay*" (see Machinery Developments Ltd v St Merryn Meat Ltd [2005] EWCA Civ 29).

13. The Court in K v K considered the well-established principles of law governing the position in respect of costs, and set out some principles at [§30]:

vi) The general practice of not awarding costs against a party in family proceedings in the absence of reprehensible behaviour or an unreasonable stance is one that accords with the ends of justice (Re T (Costs: Care Proceedings: Serious Allegation Not Proved) [2013] 1 FLR 133 at [44]).

vii) Where the court is to assess the amount of costs (whether by summary 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).

viii) In deciding the amount of costs, CPR r 44.4 also requires the court to take into account whether the costs were proportionately and reasonably incurred. The court will also have regard to, inter alia, the parties' conduct before, as well as during, the proceedings, the efforts made before and during the proceedings to try and resolve the dispute, the importance of the matter to all the parties, the particular complexity of the matter or the difficulty or novelty of the questions raised, the skill, effort, specialised knowledge and responsibility involved, the time spent on the case and the place where and the circumstances in which the work was done.

ix) **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** [emphasis added]. Expenditure above and beyond that level is deemed to be on a party's own account and not recoverable from the other party (Khazakstan Kagazy PLC v Zhunus [2015] EWHC 404 (Comm)).

x) When making an order for costs the judge should clearly state his or her reasons (English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605).

Timokhina v Timokhin [2019] EWCA Civ 1284.

14. The Court of Appeal considered a number of related costs questions in the case of Timokhina v Timokhin [2019] EWCA Civ 1284.

15. Whilst noting in that case that costs had been ordered on an indemnity basis, and that in those circumstances the costs therefore did not have to be proportionate, rather the test was whether they were 'unreasonable'. The Court nevertheless concluded that counsel's fees for the hearing were, on any basis, 'unreasonable in amount' pursuant to CPR 44.4(1)(b)(ii). The Court further stated that leading counsel's fee of £25,000, *"even absent a requirement for proportionality and notwithstanding the CPR 44.3(3) presumption in favour of the receiving party where indemnity costs are ordered"* was unreasonable in amount.

16. Some general principles can be identified. In summary, costs will likely be refused where the application is:
    - unjustified on the grounds of unreasonable conduct of the litigation, because future living arrangements for children are at stake;
    - is punitive, both in principle and as to the amount sought, for the following reasons:
    - Punitive in principle: where the losing party has no assets or capital of their own and in unemployed or earns only a modest salary.
    - The losing party owns no property &/or has no assets.
    - Punitive in amount: where the party seeking costs has incurred costs that are wholly disproportionate to the amount spent by the losing party.

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1 December 2021