Neutral Citation Number: [2022] EWHC 800 (Fam)

Case No: FA-2021-000195

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

ON APPEAL FROM THE FAMILY COURT AT EAST LONDON

Order of Her Honour Judge Sapnara dated 16th July 2021

Case No. ZE19P00751

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 4th April 2022

Before :

MRS JUSTICE ARBUTHNOT

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Between :

	C	**Appellant**
	- and -	
	S	**Respondent**

Represented by Mr Latham for the Appellant and Mr Herbert for the Respondent

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JUDGMENT

Mrs Justice Arbuthnot:

Application

1. The Appellant seeks to appeal the Order of HH Judge Sapnara refusing his application for costs against the Respondent and her husband. The application is limited to the decision made by the Judge in relation to the first Respondent in which she dismissed the Appellant's application for costs on 16th July 2021. An oral application for permission to appeal was refused by HH Judge Sapnara upon the handing down of her judgment on 16th July 2021, but that application was renewed in the Appellant's Notice which was filed on 5th August 2021.

2. The appeal came before me remotely on 2nd February 2022 when both parties appeared and were represented. After hearing argument, I adjourned for judgment.

Grounds of Appeal

3. The grounds of appeal and my decision on permission to appeal are set out below:

Ground One

The Judge erred and/or was wrong to conclude that the Respondent's conduct in the relevant proceedings had been "anything other than unreasonable and/or reprehensible".

Ground Two

The Judge was wrong to conclude that the Respondent's conduct was neither reprehensible or unreasonable on the basis that many litigants in family proceedings of this kind engage in conduct of a similar nature (ie lying in evidence, making false allegations etc).

Ground Three

The Judge erred in principle in her approach or was wrong to have considered it necessary that the Respondent's conduct be categorised as "exceptional" before any costs order should be made against her.

Ground Four

In all the circumstances, the Judge failed to give adequate weight to matters of importance and/or gave too much weight to matters which she ought not to have taken into account or ought to have attached significantly less weight to, such that she arrived at a decision which was outside the generous ambit of her discretion and/or was wrong.

Permission to Appeal

4. My decision giving permission to appeal was expressed in the terms set out below:

"I am conscious that HH Judge Sapnara had conduct of this case for a number of years and had produced a number of impressively detailed judgments. She had heard the parties give evidence at length and had knowledge of the issues raised. She had decided not to make a costs order against the Respondent having

considered all the evidence. It would be unusual for a court would interfere with the exercise of discretion in a costs matter in those circumstances.

Having said that, and after consideration of the four grounds of appeal and the evidence, and after in particular reading the judgments of the late HH Judge Glen Brasse and those of HH Judge Sapnara, I find it is arguable that the Respondent's conduct before and during the proceedings was outside the bounds of what could be said to be reasonable etc. It is arguable that this conduct and all the circumstances led to a considerable increase in the cost to the Appellant, whether financially or indeed emotionally.

Whether a court hearing from both parties would make an order for costs is a different matter. There is a risk that no order for costs might still be made or that any order would be for a very small contribution to the Appellant's costs. The risk of that of course is that the Appellant would spend more on the appeal than he would gain on the costs. The Appellant should bear that in mind before he decides whether to proceed with this appeal. If he decides not to proceed, I will send out a longer judgment considering in detail the Respondent's conduct, that judgment would be sent to the Respondent.

I grant permission to appeal on grounds one to four and would ask the Appellant to let my clerk know whether in view of my observations above he still wishes to pursue the appeal. If he does this matter is to be listed before me *inter partes* for two hours early in 2022.

Before I give directions, I would ask the Appellant to let my clerk know whether he wishes to proceed with the appeal."

5. The Appellant let my clerk know that despite the warning set out above he wished to pursue the appeal.

6. I received a number of documents which I had read before the substantive appeal. I was much assisted by the detailed, well-researched and persuasive written and oral submissions from Mr Latham for the Appellant and Mr Herbert for the Respondent.

Background and proceedings

7. The Appellant father and the Respondent mother are the parents of two children, A born in 2009 and B born in 2010. Their relationship broke down, with the father moving out whilst the children remained living with their mother. The Respondent has now remarried and has another child who lives with her and her husband.

8. A brief summary of the extensive family court proceedings conducted by the Appellant and Respondent is the following: an early dispute about the arrangements concerning the children led to an order by HH Judge Altman on 31st January 2013 for the children to live with the Respondent mother with the Appellant father to have regular, including overnight, contact.

9. Contact started but was then stopped by the Respondent. After hearing evidence, an Enforcement Order had to be made by the late HH Judge Glen Brasse on 7th January 2014. The Judge directed the Respondent to comply with the order.

10. On 20th October 2014, the Respondent made an application to relocate the family to the USA. An order made by HH Judge Sapnara on 8th April 2015 dismissed the Respondent's application.

11. The most recent application was the Appellant's made on 12th April 2019. He applied for a child arrangements order for the children to live with him and spend time with the Respondent. This was contested by the Respondent and having been initially listed for a four day fact finding hearing starting on 28th October 2019, became a ten-day hearing in front of HH Judge Sapnara that ran between 28th October 2019 and 8th January 2020.

12. A judgment was delivered on 28th February 2020 and a welfare hearing then took place on 9th November 2020 when the Judge granted the Appellant's application and made an immediate order for the transfer of the children's residence from the Respondent to him.

13. On 22nd January 2021, the Appellant applied for an order that the Respondent and/or her husband pay some or all of his costs incurred in respect of the Respondent's unsuccessful relocation application to the USA in April 2015 and of the Appellant's successful application for a transfer of residence in 2019 to 2020. On 29th June 2021 HH Judge Sapnara heard the application and delivered an oral judgment on 16th July 2021 dismissing it.

In more detail

14. More detail is required to understand the nature of the Respondent's behaviour during these extensive proceedings.

15. After the parents' relationship broke down, in January 2013 HH Judge Altman decided the children should live with the Respondent but have regular contact with the Appellant including overnight. These arrangements soon went awry.

7th January 2014, HH Judge Glen Brasse - contact

16. On 7th January 2014 and after hearing evidence, HH Judge Glen Brasse noted that the "Respondent has not obeyed the order of HH Judge Altman by allowing staying contact to continue. It began and then she stopped it" (paras 2 and 3 B56).

17. The Judge made a number of critical comments about the mother's evidence: "I am driven to the conclusion that this reference [by the mother] to the Local Authority's involvement in the case was simply designed to raise the court's anxiety and concern about the care that the children were receiving with their father" (para 16 B61). The Local Authority was not involved with the children.

18. In relation to the mother's evidence about what A's school said about his behaviour, HH Judge Brasse said: "There were a number of reasons, when I listened to the mother's evidence, why I felt the court needed to proceed cautiously in relying on what she said" (para 8 B58).

19. The mother had told the court that contrary to the head teacher's report that A's behaviour was unexceptional, A's teacher, Ms D, had told her that she had considerable concern about his presentation. The Judge said "I am bound to say that I found it inherently improbable that Mr. H, who was an independent professional, would prevent a schoolteacher from reporting what, on the face of it, would be highly relevant material... On the other hand, a parent like this

mother, locked in a prolonged dispute with the father, has an obvious motive for gilding the lily where a piece of evidence left in its pristine state does not support her case. I was left with the impression, therefore, that that is what may have happened here." (para 10 B59).

20. The mother had said Ms D, was deeply concerned about his behaviour and emotional stability and him overreacting to things yet when the teacher was asked about this the Judge said she was reported as saying "that [A] had a lovely personality, he was helpful, kind and gentle, he had formed good relations with both his peers and other adults who work with him. There is no mention at all of him over-reacting if there was an altercation with another child or being tearful." (para 21 B63).

21. HH Judge Brasse said about the mother's evidence: "she was feeding to the school her own concerns about [A's] presentation in order, plainly, to raise their level of anxiety about this child's emotional state when she reported to them that he was suffering from emotional outbursts. This is not an isolated incident of such behaviour on her part. To Dr. Davies, who made a report dated 12th November 2013, she said this: *"The main symptoms the children have been seen for are diarrhoea, night terrors and behaviour change"*, and she added, *"which has also been noted by the school"*. I asked Ms. Gerald about this. She told me that she had not received any such report from the school that there was any sign that this child was suffering in this way. Such a report is entirely absent from the written report of Mr. H, the head teacher. When Ms. Gerald spoke to him this morning he confirmed that he had not noted such behaviours. The

mother therefore misrepresented what the school was saying, to the doctor." (para 11 B59).

22. HH Judge Brasse gave other examples of the mother manipulating evidence: "[The CAFCASS Officer] recorded that the mother told her that she had allowed contact under pressure from the father: "It appears to me that she made that remark to the CAFCASS officer in order to discredit the evidence which otherwise existed that there had been a level of cooperation between the parents and that both - I underline "both" - parents had regarded contact as being in the children's best interests. I felt that it was another example of what can only be described as an attempt to manipulate the views of the CAFCASS officer on the part of the mother." (para 17 B62).

23. The mother misrepresented the evidence given by Mr Desai, an associate specialist urologist. The Judge explained that the mother had said that "she was informed by this doctor that [A's medical condition] was stress related. She relies on this evidence in support of her principal contention that the stress is caused by the father. In fact, Mr. Desai says nothing about stress being the cause of this problem at all. Is this another example of the mother attributing to a professional - as she did with Ms. D - statements which are unconfirmed by the professional concerned? I suspect that this is exactly what is happening here." (para 20 B63).

24. There was limited criticism of the Appellant by HH Judge Brasse in the judgment which was that he had introduced the children to their maternal grandmother who was estranged from the Respondent.

25. HH Judge Brasse said "As regards parental capacity, I have criticised the father, but the main criticism, sadly, is reserved for the mother. She lacks insight into the effect of her own anxiety on these children and at times, in order to bolster her case, she has, frankly, embellished the evidence, as I mentioned earlier in my judgment. Whether she does this consciously or whether it is a spontaneous product of her emotional state, it is hard to discern. But what I am clear about is this. Once she has embellished the evidence, as she did in relation to Ms. D, she is aware of what she has done and needs, in my judgment, to be honest enough to admit it." (para 34 B68).

26. HH Judge Brasse ordered the Respondent to comply with the earlier Order.

8th April 2015, HH Judge Sapnara – mother's application to relocate

27. About nine months after the hearing in front of HH Judge Brasse, on 20th October 2014, the Respondent applied for a specific issue order to allow the permanent relocation of the children to the USA. This was opposed by the Appellant. HH Judge Sapnara heard evidence from the Appellant and Respondent.

28. The Judge considered the Respondent's evidence in her 8th April 2015 judgment. The following are examples given by the Judge of the Respondent's behaviour and criticisms of her evidence.

29. The Respondent mother was described by HH Judge Sapnara in the following ways: "a most unsatisfactory witness. She lacked consistency in respect of material issues. She presented as very rigid in her thinking…she advanced responses which were frankly lacking in credibility and logic. I found her to be

evasive at times and at other times that she embellished the account that she gave… to fit her case at various points" (para 145 B103). These criticisms echoed the findings of HH Judge Brasse.

30. HH Judge Sapnara noted that although in front of HH Judge Brasse the Respondent had agreed to attend mediation, shortly after the hearing she had said it "would be unhelpful and she was not prepared to engage in it" (para 150 B104). The Respondent then "very swiftly" suggested mediation when she wanted to move to the United States because it was a requirement of the MIAMs programme that she should do so before she could issue an application (para 151 B104). She then gave excuses about why mediation could not start.

31. In relation to contact, the Judge said the Respondent felt able to breach the terms of the order when it suited her and prevented or delayed remote contact for two months after HH Judge Brasse's order (para 84 B90).

32. The Respondent was not thinking of the children's best interests when she ensured that they missed out on contact with the Appellant (para 147 B103-104). The Respondent was being "deliberately difficult about Facetime contact and for no good reason" (para 164 B107). She offered inappropriately timed phone contact yet said to the Appellant: "I hope we can agree these timings. It is really important for the children to try our best to cooperate and accommodate each other's times". The Judge said the Respondent appeared perfectly reasonable but conducted herself in a manner which was not (para 163 B107).

33. The Judge said the mother "manufactured" her evidence in certain respects to fit her case (para 171 B108). When there was an agreement that neither parent would take the children out of the jurisdiction, the mother contacted the father

when she and the children were already at the Eurostar terminal on their way to Euro Disney and then recruited the children in getting the father to agree to the visit. The Judge said that the mother "in the end conceded that she had got [A] to call his father after initially denying it, but then said that [A] had only called the father after he had agreed that they could go" (para 168 B108). This was not true.

34. In relation to a holiday caravanning in the New Forest which the mother relied on to explain why the father could not see the children on inset days. The explanation came out for the first time on the second day of the hearing.

35. The Respondent claimed that she did not know that the father was in a relationship: "I found the mother's evidence utterly unconvincing and untruthful" (para 179 B110).

36. The Respondent said she did not know what her husband earned or the size of his bonus, the Judge said "In my judgment, the mother was being utterly disingenuous in these matters" (para 176 B109). The mother had worked in a bank, took a keen interest in the Appellant's finances during their relationship and managed the household budget: "I found it, frankly, lacking in credibility that she would have such little knowledge" (para 177 B110).

37. The Respondent struggled to name the school she had identified for the children and then said she had telephoned it. The Judge said: "I gained the distinct impression that she was making this up as she went along." (para 185 B111).

38. In contradistinction, HH Judge Sapnara said the Appellant gave evidence in a "forthright and straightforward manner". He "gave straight answers to straight

questions" (para 138 B102). He was consistent and tried to assist the court. He had not communicated his negative views of the Respondent to the children (para 143 B103).

39. HH Judge Sapnara made two criticisms of the Appellant. First, she repeated HH Judge Brasse's criticism about him introducing the children to the estranged maternal grandmother. Second, she said the Appellant struggled to accept that the Respondent should "in part be given credit for the good relations that he enjoys with the children" (para 141 B102). This did not reflect well on him notwithstanding the frustration he clearly feels "about the Respondent's attitude to contact and proceedings to date". (para 141 B102).

40. The Judge said she accepted the Appellant's evidence when it conflicted with the Respondent's and her husband's. He was telling the truth and he was motivated by the need to have contact with his children and not by malice nor was he trying to disrupt the Respondent's plans for the sake of it (para 144 B103).

41. The Judge's conclusion was that the children's welfare would not be met by them going to the United States. HH Judge Sapnara said the Respondent's application was "mainly motivated by seeking to place distance between the children and the father" (para 219 B117) whilst she found the Appellant's opposition to the move was based on genuine concerns about the children's welfare (para 228 B119).

42. The Respondent's application to relocate was refused. The order said there would be "no order as to costs".

28th February 2020, HH Judge Sapnara – the fact-finding

43. Four years later, on 12th April 2019, the Appellant made an application for a child arrangements order for the children to live with him and spend time with the Respondent.

44. The Appellant's case was that the Respondent was alienating the children from him. This was adversely affecting his relationship with them and had disrupted the contact arrangements. He was concerned that in living with the Respondent they were in a toxic environment and were the subject of emotional and psychological harm. He sought a reversal of the then arrangements.

45. The application followed allegations being made against the Appellant that he had abused the children. In May 2019, a further allegation was made against the Appellant and his unsupervised contact was stopped after an intervention by social services. For the following six to eight months his contact was supervised. He had to pay privately for supervision which cost him over £8,000.

46. The fact finding (initially listed for four days) became a ten-day hearing followed by a judgment handed down on 28th February 2020 (B121). HH Judge Sapnara's judgment is an impressive and very detailed written decision in which she sets out the Respondent's allegations against the father of sexual and physical abuse and makes criticisms of her evidence in support of them. The Judge makes findings that the mother has manipulated professionals and others.

47. In November or December 2018, A made allegations of sexual abuse against the Appellant. The Judge said that she was "satisfied that the mother had sought to recruit the active involvement of both children in her efforts to create a

narrative of sexual abuse" (para 80 B140). In relation to letters ostensibly written by A and B alleging sexually abusive behaviour, the Judge said "it is likely that [the mother] has some involvement in the contents of those letters and in sending them... The mother's evidence in relation to this aspect of the case was unsatisfactory" (para 66 B136). The Judge considered the tone, content and language used and said it was unlikely to be the sole work of the child.

48. The Judge makes it clear that the mother's suggestions of sexually abusive behaviour by the father had inflamed emotions and heightened the conflict between them as well as taking up a considerable amount of time at the hearing (para 62 B136).

49. The Judge said that in her judgment "the mother is entirely disingenuous when she asserts that she has never made allegations of sexual abuse against the father, and that the extent of her concerns are that the father's behaviour has been sexually inappropriate, or even – as she now says – a result of a difference in parenting style, and the father's differing approach to nudity. Looking at the totality of the evidence, I am quite satisfied that the mother has deliberately chosen to present facts in a particular light to third parties for the purpose, at the very least, of raising the possibility of the father sexually abusing both her and A. The mother is intelligent and articulate and would have understood perfectly well how the words used, and the circumstances in which they were used, may give rise to suspicion that the father may have sexually abused A. In my judgment it is only because she was faced with real difficulty of establishing

such allegations on the evidence available at this hearing that she has chosen to minimise her approach towards the issue" (para 76 B139).

50. Despite the Respondent saying that she was not accusing the Appellant of sexual abuse, the allegations were pursued in cross-examination and "the inference is that his behaviour was inappropriate and possibly suspicious" (para 87 B142).

51. The Respondent said the Appellant had physically abused A since his early childhood and she produced a video of A filmed when he was three and a half. The Judge said it is "abundantly clear that the mother is coaxing and leading [A] to say what she wants him to say, and he says conflicting things about daddy, and whether or not daddy had hit him… What it does point to is the mother's determination to manipulate evidence to suggest or allege that the father had been physically abusive towards [A]. The mother's evidence in relation to this matter was evasive and unsatisfactory" (para 126 B152).

52. The Judge said that it was "unlikely that there is any truth in the allegation" and if it had been true it would have been raised with the father. The Judge said that in her judgment "she knows there is no truth to this, yet persists in pursuing the allegation against the father, and I find she was dishonestly doing so" (para 128 B152).

53. After the Judge had raised concern about the making of the video, the mother raised for the first time an allegation that the father had also filmed A when he had bribed him with sweets to say he wanted to stay with the father. The Judge said, "the mother has fabricated this aspect of her evidence, and she has done so in an effort to counteract criticism of her video recording of [A]" (para 129 B153).

54. In December 2018 both children said the Appellant had physically assaulted B. In relation to the allegation of physical abuse, the Judge said, “the mother’s credibility as a witness of fact was severely undermined”.

55. When the Respondent realised there were no allegations of abuse prior to an incident in October 2017, the Judge said this “propelled the mother, in my judgment, to introduce new evidence of having witnessed rough handling of the children by the father such as taking the children out of the car by the scruff of their neck… Her evidence on these matters was highly conflicting, inconsistent and illogical. I gained the distinct impression she was making it up as she went along. She was challenged on the introduction of this new evidence and said that she had raised the allegations previously. As far as I am aware those allegations have never found their way into evidence…and I consider the mother to be untruthful in the evidence that she gave on these matters.” (para 110 B148).

56. The Judge found that the allegations of abuse made by the children about the Appellant were not substantiated (para 40 B129). The children had been alive to the Respondent’s antipathy towards the Appellant and any negative experiences they had had in the Appellant’s care had been exaggerated because of the Respondent’s attitude.

57. The Respondent relied on what the children had told her, but the Judge said “that the mother’s evidence is so unsatisfactory that I cannot rely upon her as having given an accurate and true picture of what the children have said to her” (para 46 B131).

58. In her oral evidence, the Respondent asserted that the father could be dangerous. The Judge said "that the father is dangerous to the children cannot be a genuinely held belief by the mother…where she supports direct face to face contact… including overnight" (para 140 B155).

59. The Judge set out what she called a graphic example of "the mother's propensity for fabricating evidence" in para 142 of her Judgment. The Judge said that these "serve to seriously undermine the credibility of the mother's allegations against the father". The mother made a complaint to the police that the father had assaulted her at the children's school. The police investigated and concluded that the allegations were unfounded and "possibly malicious". The mother tried to involve a domestic violence agency and it refused to assist her (para 142 B156).

60. HH Judge Sapnara said that the mother's oral evidence was not clear as to whether she was or was not alleging the father had raped her although she said she had been coerced into having sex against her will. The Judge had no doubt the mother had made this allegation to the school to cast the father in a bad light. The rape allegation was not explored with the father and no findings were sought (paras 78-79 B139).

61. The Judge set out the Respondent's manipulation of others. She said that a "feature of the mother's conduct is that she seeks to recruit professionals to her own view of the father, and to alienate them from him" (para 143 B156).

62. The Judge found that the Respondent had not given a balanced history to professionals involved with the family and "to that extent, I accept the

submission on behalf of the father that she has manipulated these individuals" (para 70 B137).

63. When the Respondent sensed the school professionals were not "fully aligned with her and had expressed concerns", the mother decided to move B from one therapist to another, when it was against B's best interests (para 106 B146).

64. The Judge gave a concrete but minor example of the Respondent's manipulation. The Respondent said she had learned from A that supervised contact had not gone well. The Respondent rang the supervisor to get her to produce a report whilst the events were fresh in her mind. "It transpired that the mother's account of what she believed had taken place was not what the supervisor had observed" (para 70 B137).

65. More generally the Judge said that the Respondent's evidence on material issues was not credible or reliable. At times she made trenchant allegations and then resiled from them before returning to them later (para 41 B130).

66. A feature of the 2015 case was the Respondent's attitude to contact, by 2019 to 2020 there had been no change. HH Judge Sapnara said the Respondent gave the impression that she fully supported the children's contact with the Appellant, but the Judge found the Respondent's actions and the evidence "overall do not support this" (para 42 B130).

67. The Judge found that the children's refusal or reluctance to go to contact was likely to have arisen because of the Respondent's continual criticism of the Appellant. She said the Respondent disproportionately interfered with the time he spent with the children.

68. On the surface the Respondent says the right things and can be said to have facilitated contact, "I am afraid to say that underneath it all, she has deliberately manipulated the facts, manipulated the children, manipulated professionals and individuals" (para 43 B130).

69. The Judge made the concerning observation that the conditions the Respondent had "created around contact is very much to the detriment of the children's individual welfare". Judge Sapnara goes on to say, "In my judgment, it is likely that these children have suffered significant emotional harm as a result" (para 44 B130).

70. The conflict has been created and exacerbated largely by the Respondent, and the children's anxieties have been heightened by "being distorted by the actions or influence of the Respondent" (para 44 B130). She showed a worrying lack of insight into the children's needs and welfare interests.

71. The Respondent's actions have "created a very unhealthy dynamic within this family" (para 43 B130). The Judge gave examples of this. The Respondent distorts the time the children spend with the Appellant and portrays it in a negative light.

72. In relation to a piece of evidence given by the Respondent for the first time in court which was confirmed by her husband, the Judge said "I have formed a clear view that the mother and her husband have colluded over the evidence that they gave, and both are unreliable witnesses…In my judgment, there was sufficient time for them to have had discussions about it and I am satisfied that it is likely that they did…so both the mother and her husband were being untruthful in the evidence they gave me" (para 72 B138).

73. The Respondent had said that the Appellant's conduct towards the children was abusive in various ways, but the Judge found these allegations either to be untrue, exaggerated or taken out of context. The Judge, however, set out in paragraphs 47 and 48 that the Appellant had behaved in unhelpful ways (B131). One way was by sending photographs of the children to the estranged maternal grandmother.

74. The Judge said, however, that the Appellant was "run ragged" and had become angry and frustrated by the Respondent's approach to contact. He has been obliged to develop a grip on the detail and chronology of the issues because he "had been operating against a backdrop of fear and concern that the mother will make false allegations and that the matter may have to be litigated and he will be required to defend himself" (para 49 B132).

9th November 2020, HH Judge Sapnara – welfare hearing

75. The evidence in the welfare hearing took eight days over September and October 2020 and judgment is dated 9th November 2020 (at B160). It consisted in a thorough and detailed analysis of the evidence given by the parties, the psychologist Dr Willemson and the guardian Ms Demery.

76. HH Judge Sapnara called the hearing a "complex and finely balanced case" (para 188 B199). Certainly, at the start of the hearing the guardian's well-articulated and reasonable position was that the parents should share the care of the two children. The guardian listened to nearly all the evidence given in the case and by the time she came to give evidence towards the end of the hearing, the guardian changed her recommendation to adopting Dr Willemson's position

that the children should move to live with the father. This was clearly justified by the guardian in her evidence as set out by HH Judge Sapnara in her judgment.

77. There were many echoes in this later judgment of the findings made in relation to the Respondent, not just by HH Judge Sapnara at an earlier stage, but also by HH Judge Brasse.

78. Judge Sapnara said the following:

a. The Respondent had exhibited "no meaningful change" since the fact-finding. The Respondent, no doubt seeing the way the wind blowed, contended that a shared residence order was an option for the court, but the Judge found the *status quo* "had not worked in the children's best interests and caused them harm and therefore this was not a realistic option now" (para 218 B207).

b. The Respondent ostensibly had accepted the findings made by her in the fact-finding judgment although the reality was different. What the Respondent was saying amounted to "doublespeak" (para 90 B179).

c. The Respondent continued to believe that she was acting reasonably and appropriately to safeguard her children (para 90 B179). She thought any harm they had suffered was not caused by her but by the conflict between the parents. The Judge said that the Respondent believed there was "parity in terms of the parents' conduct. That, of course, is far removed from the nature of my findings" (para 90 B179).

d. The Respondent had been unable to accept that the Appellant had had to fight for his relationship with his children. The Judge said that her attitude

did not provide confidence that the Respondent "has an appreciation of the difficulties she has created for him" and would be motivated to change in the future (paras 95 and 96 B180).

e. The Respondent had said in oral evidence that the Appellant had not engaged with her in mediation or in informal meetings, but the Judge said that she was "firmly of the view that there was no reasonable prospect of the Appellant being able to engage with the Respondent in reasonable, constructive discussion which would have led to mutually agreed conclusions" (para 99 B181).

79. HH Judge Sapnara heard evidence from a clinical psychologist Dr Willemson who had considered the papers including the earlier judgments and had met the Appellant and the Respondent and their partners. His report was submitted on 6th August 2020. His evidence is significant when considering the Respondent's behaviour generally during the litigation.

80. Dr Willemson said the mother had no identifiable mental health diagnosis which would explain her behaviour. The expert said "I think that the mother at times, loses a sense of reality and creates beliefs based on her childhood experiences that have no, or little, basis in fact" (para 58 C293). The psychologist had received a history from the mother of her childhood, she had had a dysfunctional relationship with her own mother and an absent father and at the age of 14 had been sexually groomed and abused by a much older man. There was no other explanation for her approach to the Appellant and the proceedings.

81. In relation to the Appellant, HH Judge Sapnara raised some minor criticisms about him and his plans for the children. The Appellant had given little thought

to A needing a school place near where he was renting. The Appellant assumed professionals would continue to support the family without exploring the practicalities of this.

82. HH Judge Sapnara says "I did not find any wrongdoing of any real substance on the part of the Appellant and I did not find that the children's presentation was born out of anything that they have experienced in the care of the Appellant" (para 90 B179).

Costs hearing and judgment 29th June 2021 and 16th July 2021

83. The Appellant's costs application was dated 22nd January 2021 and heard on 29th June 2021. Judgment was given on 16th July 2021. I had a transcript of the hearing and of the judgment.

84. The findings the Judge made in the judgment are helpfully and accurately summarised in the skeleton argument of Mr Latham counsel for the Appellant. I have taken the findings from his argument and set them out below:

a. Costs awards are not the norm in proceedings of this kind, but they may be justified where it can be demonstrated that the conduct of a party before or during proceedings is reprehensible or unreasonable;

b. In considering a party's conduct the court must consider whether it was reasonable for a party to raise or contest an allegation or issue, and whether a party has exaggerated its claim;

c. The previous judgments in this matter set out a history of findings against the Respondent in relation to her dishonesty and manipulation, there being no comparable findings against the Appellant;

d. The Appellant's conduct was reasonable throughout the proceedings;

e. The Appellant had suffered obvious prejudice in having to respond to the Respondent's unsubstantiated allegations against him and had incurred substantial cost and significant debt as a result;

f. In so far as an order was sought against the Respondent's husband, he had not been a party to the proceedings, he was not controlling the litigation, and there was no causative link between his conduct and the course of the proceedings, which were dictated by the Respondent. Accordingly, it would be unjust to make a third-party costs order;

g. The Respondent's conduct in the fact-finding proceedings/hearing was not exceptional, reprehensible or unreasonable;

h. The Respondent's conduct in the welfare proceedings/hearing was not exceptional, reprehensible or unreasonable;

i. The Respondent's conduct was not unusual in the context of proceedings of this kind and was therefore insufficient to warrant an order for costs;

j. The Respondent's emotional and psychological position mitigated against a finding that her conduct had been reprehensible or unreasonable;

k. The fact that the Respondent had been acting as a litigant in person at all material times meant that she had not had the benefit of advice in preparing her case which might have modified her approach;

l. The court could not be satisfied that the Respondent would be able to satisfy any order against her;

m. If the Respondent was required to pay some of the Appellant's costs, it may impact on her ability to fund, or her desire to engage in, therapy;

n. A costs order against the Respondent may affect her household income and the wellbeing of the son she has with her husband;

o. A costs order against the Respondent may inflame tensions between the parents and have a negative effect on the children.

Argument

<u>The Appellant's case</u>

85. I have set out the grounds of appeal above. The Appellant relies on the findings that the Respondent repeatedly failed to comply with orders; gave false evidence and acted in a number of ways which greatly extended the length of the hearing. The Respondent's behaviour was unreasonable and reprehensible. He contends the Judge was wrong to conclude it was not.

86. The second ground was that the Judge was wrong to say that the Respondent's conduct was neither reprehensible nor unreasonable on the basis that many litigants engage in conduct of a similar nature.

87. Mr Latham pointed out that if such a conclusion was upheld, it would encourage litigants in the family court to engage in such conduct with impunity. He argued that parties who knowingly gave false evidence should be penalised for doing so. He said that the Judge's failure to make an order for costs did little more than endorse the Respondent's approach. It would allow her to continue litigating knowing that whatever she fabricates will put the Appellant to further cost without any consequences to her.

88. The third ground was that the Judge was wrong to consider that the Respondent's conduct had to be categorised as exceptional before a costs order could be made against her. Whilst the Judge was right to apply the exceptionality test to the costs application against the third party the Respondent's husband, she was wrong to use the same test for the Respondent.

89. The fourth ground was that the Judge failed to fairly balance the various factors and failed to give any or adequate weight to matters of importance and/or gave undue weight to factors and arrived at a decision that was outside the generous ambit of her discretion and/or was otherwise wrong.

90. Mr Latham relied on the inadequate weight he said had been given to the prejudice suffered by the father and the "very significant emotional and financial impact the Respondent's reprehensible and unreasonable conduct had on him". The judgments exonerated him and positively praised his approach to the children and the litigation.

91. The Judge had given too much weight to Dr Willemson's report on the Respondent and to her emotional and psychological position. HH Judge Sapnara had recognised in her judgment of 28th February 2020 that the mother's

psychological assessment "does not necessarily excuse or totally explain away the mother's determination and capacity for fabrication, manipulation and distortion" (para 96 B180) but this was not considered in the costs judgment.

92. The father has spent more than £367,0000 in legal fees in total. He was in debt to his lawyers and his family. He could no longer afford his own home or a car. He is unlikely at his age ever to be able to buy a home. His ability to work is impeded by having the children in his care.

93. Mr Latham says the Judge failed to attach adequate weight to those factors and instead took into account the negative impact of a costs order on the Respondent.

94. Mr Latham said that inappropriate weight had been attached to the fact that the Respondent had been a litigant in person for some periods of the litigation. He said the mother was represented for much of the time and that it would be wrong to weigh in the balance a lack of legal representation as a factor mitigating the making of an order for costs.

95. In terms of the size of the costs order, the Appellant pointed out that the Respondent and her husband were both working, earning well and owned their own home. HH Judge Sapnara had asked for details of any savings the mother had but these were not provided. Mr Latham said that whether the Respondent could satisfy judgment was a matter for enforcement not whether an order should be made.

96. The Appellant asked this Court to conclude that the Judge erred in the exercise of her discretion and was wrong within the meaning of FPR rule 30.12(3). Mr

Latham urged the Court to allow the appeal and order either that the Respondent pay the Appellant's costs to be assessed or that she pay a contribution towards the Appellant's costs of a sum which was just and reasonable.

The Respondent's case

97. On behalf of the Respondent Mr Herbert argued that the appeal should be dismissed.

98. In relation to the first ground, he contended that the Judge was uniquely placed to determine the Respondent's application and whether her behaviour met the threshold of being unreasonable and/or reprehensible particularly as she had been involved in the case for a number of years.

99. He asserted that HH Judge Sapnara's decision that the mother's actions were not unreasonable or reprehensible could not be impugned. She directed herself appropriately and did not err. Her decision was within the generous ambit given to the exercise of a Judge's discretion. She had not exercised her discretion wrongly.

100. The Judge made it clear that even if she was wrong in her finding that the Respondent's conduct was not unreasonable or reprehensible, she would dismiss the application for costs. This ground therefore was not determinative of the appeal.

101. In terms of the second ground, the Judge was entitled to have regard to her vast experience in dealing with parents involved in private law children cases in determining that the Respondent's conduct was neither unreasonable nor

reprehensible when comparing this to the conduct of many litigants involved in family proceedings. He said this decision was fact-sensitive.

102. As to the third ground, Mr Herbert pointed out that HH Judge Sapnara had set out the correct principles at paragraphs 8 and 9 of her judgment dated 16th July 2021 (A138-139) which showed she had them in mind. He contended her use of the word 'exceptional' was descriptive in the sense of unreasonable or reprehensible conduct is rare in family proceedings.

103. Finally, as to the fourth ground, Mr Herbert said that the Judge had taken into account all the factors and given appropriate weight to the matters she should have done. Even if it could said to be a generous decision the Judge was best placed to weigh up the factors having dealt with the matters over many years.

104. In terms of the argument that the Respondent pay the costs of her failed application to relocate the children to the United States which took place on 8th April 2015. Mr Herbert relied on the case of *Timokhina v Timokhin* [2019] 1 WLR 5458 where after a refusal of the mother's application for a stay of an order, the order was silent as to the costs (paragraph 10).

105. He relied on King LJ's judgment at paragraph 45 of *Timokhina* where she says:

"In my judgment the starting point to the issue of jurisdiction is FPR r.28. The rule is the overarching provision and says in terms that the court may <u>at any time</u> may make such order as to costs as it thinks fit. I do not accept that the rule prohibits the making of a retrospective order where no order has been made. Whether a court will in fact make such an order will depend upon the circumstances of the case and where costs have not been mentioned in the

original order, an application will be necessarily considered by the court against the backdrop of CPR 44.10 (i)(a) that as a general rule, the party seeking the order for costs, is not entitled to an order".

106. Mr Herbert argued that contrary to the position in *Timokhina* because the order of 8th April 2015 says "no order as to costs", that was a positive decision on the Appellant's costs application. This is not a case where no order has been made. The court now had no jurisdiction to re-open the question of costs of that hearing.

107. Finally, in terms of the approach the court should take, Mr Herbert said there were three questions it should ask itself, first, whether the Judge erred in principle and applied the wrong test of "exceptionality" or had she the correct test in mind at paragraphs 8 and 9 of the judgment. Second, did she leave out of account or take into account factors she shouldn't have done. Third, was her decision wholly wrong.

108. He said the answer was no to the three questions. The decision not to award costs fell within the generous ambit given to judges when exercising their discretion.

109. As an alternative to his arguments, he invited the Court to make no order as to costs or to order a very small contribution if exercising the discretion afresh.

110. The parties relied on the authorities set out below.

Law

Costs in children cases

111. The law in relation to costs in children proceedings is settled. Section 51 of the Senior Courts Act 1981 gives the court an absolute discretion as to who should pay costs and in what sum. Rule 28.1 of the Family Procedure Rules provides that the court may make such order as it thinks just.

112. The Civil Procedure Rules apply and Rule 44.2(4) says, so far as it is relevant, that when it considers costs, the court will have regard to all the circumstances, including the conduct of the parties and whether a party has succeeded. CPR 44.2(5) considers the expression "conduct of the parties". I have set out CPR 44.2 below:

"44.2

(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".

113. In the family context Wilson J in *London Borough of Sutton v Davies* (Costs) (No. 2) [1994] 2 FLR 569, from 570-1, said that a costs order should not be used to discourage those "with a proper interest in the children from participating in the debate". The "proposition is not applied where, for example, the conduct of the party has been reprehensible or the party's stance has been beyond the band of what is reasonable".

114. The leading case on costs in child cases is *R v R (Costs: Child Case)* [1997] 2 FLR 95 the Court of Appeal explained why the practice of not awarding costs in child cases had grown up. At 96-97 Hale J, as she then was, said: "The reasons why this practice has developed perhaps fall into three categories. The first is general to all family proceedings and was pointed out by *Gojkovic v Gojkovic* at 57 and 237 respectively, that an order for costs between the parties will diminish the funds available to meet the needs of the family…The second reason which is given for there being no costs orders in general in children cases, is that the court's concern is to discover what will be best for the child. People who have a reasonable case to put forward as to what will be in the best interests of the child should not be deterred from doing so by the threat of a costs order against them if they are unsuccessful…The third reason is suggested by Wilson J in the case of *London Borough of Sutton v Davis Costs (No 2)* at 570-571, when he points 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 to exacerbate rather than to calm down the existing tensions; and this will not be in the best interests of the child".

115. At paragraph 97, Hale J (as she then was) goes on to say: "Nevertheless, there clearly are, as Neil LJ pointed out, cases in which it is appropriate to make costs orders in proceedings relating to children. He pointed to one of those sorts of situation: cases where one of the parties has been guilty of unreasonable conduct…"

116. In *R v R* at paragraph 99, Staughton LJ put the three categories of reasons why costs might not be ordered in a slightly different way: "First, it is said that it

would be wrong to discourage parents from putting their views before the court when they may well be helpful to the court. For my part I am not sure that it would be wrong to discourage unreasonable parents from putting unreasonable views before the court…Secondly, it is said that orders for costs will sour the attitude for future co-operation between the parents. Well, I can see the force of that, but I am not sure that it is of much significance in the present circumstances where there is little prospect of future co-operation. The third point is that if is an order for costs is made, it may diminish what was called in argument the cake, the total amount of money that is available for the welfare and the support of the child".

117. In *R v R* the lower court had taken the view that the father's conduct had been unreasonable in relation to the litigation, Hale J said at page 98 "Of course, the parties should not be deterred, by the prospect of having to pay costs, from putting before the court that which they genuinely think to be in the best interests of the child, but there have to be limits. Children should not be put through the strain of being subject to claims that have very little prospect of success, still less should they be put through a quite unreasonable involvement in their parents' disputes…" and later at page 98: "The judge in this case was very much the best person to determine whether this was an appropriate case, exceptional though it may be, to order that the father was to pay the costs. In my judgment he was perfectly entitled to do so and there is nothing in this case which could cause us to cast doubt on the exercise of his discretion".

118. In *Re N (A Child) v A & Ors* [2010] 1 FLR 454 Munby J (as he then was) held at paragraph 20 onwards in relation to the ordering of a party to pay costs in a

child case the general rule that costs follow the event does not apply, but "that principle had always been subject to exceptions, importantly for present purposes where a party has behaved unreasonably in relation to litigation" (para 21).

119. At paragraph 47, Munby J 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…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".

120. In *Re N* Munby J made it clear that the father's conduct had come very close to justifying the costs order, but he said he was persuaded "on balance, that it would not be fair, just or reasonable to make such an 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 crucially, on N" (para 48).

121. Another useful case is the Court of Appeal case of *In Re J (Costs of Fact-Finding Hearing)* [2020] 1 FLR 1893, where Wilson LJ held at paragraph 17 that the lower court had been wrong not to adopt a compartmentalised approach to the ordering of costs in relation to a fact-finding as opposed to a welfare hearing.

122. Wilson LJ said "the effect of the direction for a separate fact-finding hearing can confidently be seen to be wholly referable to her allegations against the father. There was in that sense a ring fence around that hearing and thus around the costs referable to it. These costs did not relate to the paradigm situation to which the general proposition in favour of no order as to costs applies". Wilson LJ made it clear that the mother's case in *In Re J* fell into a separate and unusual category and in those circumstances it was appropriate for the father to pay two thirds of the mother's costs of the hearing.

123. It was made clear in *Re T (Children Care Proceedings: Costs)* [2012] 1 WLR 2281 that the decision *In Re J* did not make the award of costs in fact-findings an exception to the general rule of not awarding costs against a party "in the absence of reprehensible behaviour or an unreasonable stance" (per Lord Philips of Worth Matravers PSC page 2294 para 44).

124. In the case of *Re G (Contact Proceedings: Costs)* [2014] 1 FLR 517 the lower court had made an order that the father should pay the mother's costs following a detailed assessment. This was challenged by the father before McFarlane LJ and Sir Stanley Burnton. They reviewed the authorities including the leading case of *R v R* (supra).

125. The court considered whether the father's conduct came within the category of unreasonable litigation conduct. The father had made groundless allegations and fabrications and his actions had driven the court to have to consider matters of detail at every turn which had lengthened the proceedings. He had behaved unreasonably throughout the proceedings.

126. In paragraph 16, the Court said "we are tied by the findings of fact that the judge made, and more particularly the findings of motivation that the judge made. She sat and heard the case. She was in the position to form those findings and to come to those conclusions about the father's motivation... Those are the starting blocks and the building blocks from which we have to consider the exercise of her discretion on costs".

127. The lower court had made a range of adverse findings before the legally aided mother's costs were ordered to be paid. This was despite acknowledging that due to the father's circumstances, the order may never be able to be enforced. McFarlane LJ saw no error in her exercise of discretion and said the question of enforcement was for another court as it would be in any ordinary civil litigation.

128. The most recent consideration of the award of costs in children cases is *Re A and B (Parental Alienation No 3)* [2021] EWHC 2602 (Fam) where Keehan J reviewed the authorities.

129. He applied the *Re T* test in relation to whether there had been reprehensible behaviour or an unreasonable stance taken by the mother in the conduct of the litigation. Keehan J divided the litigation into time periods reflecting the various applications that were made. He found that where the mother had maintained very serious allegations of abuse of her and the children which she later accepted were not true, this amounted to reprehensible behaviour and a wholly unreasonable stance for the mother to have adopted in the litigation. He made a costs order after considering the quantum which he found to be reasonable and proportionate to the issues raised.

<u>The overturning of a lower's court exercise of its discretion</u>

130. FPR rule 30.12(3) provides that an appeal may be allowed where the decision of the lower court was wrong or unjust for procedural irregularity. ‘Wrong’ means that the lower court erred in law, fact or in the exercise of its discretion. In this case it is said that the Judge erred in the exercise of her discretion.

131. In the case of *G v G* [1985] 1 WLR 647, at paragraph 651G, after reviewing the authorities in relation to the exercise of discretion, Lord Fraser of Tullybelton quoted Asquith LJ in *Bellenden v Satterthwaite* [1948] 1 All ER 343 at 345 where there was an appeal against an order for maintenance payable to an ex-wife:

> “It is, of course not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which the reasonable disagreement is possible, and is in fact, plainly wrong, that an appellate body is entitled to interfere.”

132. Lord Fraser of Tullybelton considered what was meant by expressions used in the authorities such as ‘plainly wrong’ and said at page 652E:

> “All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible”.

133. Lord Fraser approved Lord Scarman's statement of the principle in *B v W (Wardship: Appeal)* [1979] 1 WLR 1041 at page 1055 where Lord Scarman said: "But at the end of the day the court may not intervene unless it is satisfied that the judge exercised his discretion upon a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly".

134. Lord Fraser explained at page 652 G-H that in *In re F (A Minor)(Wardship: Appeal)* [1976] Fam. 238, the Court of Appeal had expressed the same principle in a slightly different way, when it held "that the court had jurisdiction to reverse or vary a decision concerning a child made by a judge in the exercise of his discretion, if they considered that he had given insufficient weight or too much weight to certain factors".

135. I found part of the judgment of Stuart-Smith LJ in the case of *Roache v News Group Newspapers Limited and Others* [1998] EMLR 161 particularly helpful. He says at page 172: "This being an appeal on costs with the leave of the judge, the ordinary rules as to review of the judge's discretion apply. The court must not be tempted to interfere with the judge's order merely because we would have exercised the discretion differently from the way in which the judge did. Before the court can interfere, it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.".

136. *SCT Finance Ltd v Bolton* [2003] 3 All ER 434 was a more recent case where the Court of Appeal considered a decision in relation to costs and when it was appropriate to overturn the exercise of a court's discretion. Wilson J at paragraph 2 said: "this is an appeal brought with leave of the single Lord Justice from the county court in relation to costs. As such it is overcast from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under CPR 44.3(1). For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely".

Discussion

137. I have in mind the principles set out above which show how an appeal court should approach the exercise of discretion carried out by a lower court and also to the general rule in relation to the awarding of costs in children cases.

138. Whilst acknowledging that there were a number of other hearings, I have concentrated on the three main hearings which have led to considerable emotional and financial cost being incurred by the Appellant.

<u>The refusal to grant the Respondent's application to relocate</u>

139. First, the application to relocate, judgment given on 8th April 2015 (my summary at paragraphs 27 to 42 above). The Appellant argues that I should make an order for the costs he incurred on the basis that the Respondent acted reprehensibly and her approach to the litigation was unreasonable when she applied for permission to relocate the children.

140. The order the Judge made on that occasion was that there should be "no order as to costs". I accept Mr Herbert's argument that the order made in those terms, means that the question of costs was raised and then considered and decided by the court. In my judgment that decision cannot be re-opened now. The application for costs in relation to that hearing fails.

Fact-finding judgment - 28th February 2020

141. Second, the fact-finding with a judgment given on 28th February 2020 (my summary at paragraphs 43 and 74 above), HH Judge Sapnara found the Respondent repeatedly failed to comply with orders; she gave false evidence in a number of important respects; she was evasive; she was disingenuous; she was misleading at times; she made serious and unsubstantiated allegations of sexual and physical abuse against the father to professionals and in her evidence; she manipulated professionals to undermine the Appellant's case; she misrepresented the evidence of others to give the impression it supported her case; she made allegations which significantly increased the hearing times; she changed the nature of her case and finally she refused mediation.

142. The mother had *pro bono* counsel so was not a litigant in person and despite the undoubted assistance she would have obtained from very experienced counsel, Miss Wilbourne, her case twisted and turned and what started off as a four-day case became a fully contested ten-day hearing at the end of which the mother's allegations were rejected by the Judge.

143. I am very conscious that by the time of the costs hearing, HH Judge Sapnara had had extensive conduct of these proceedings. She had heard the mother give evidence in the application for permission to relocate, in the fact-finding and in

the welfare hearing and she had been able to observe the mother during the costs hearing and the many other hearings that had taken place.

144. HH Judge Sapnara would have had a much better feel for the case than this court would have done looking over papers and then hearing argument for a day. I remind myself that it is not what I would have found in these circumstances that matters. I must not be tempted to interfere with HH Judge Sapnara's decision merely because I would have exercised the discretion differently.

145. The question is whether in the exercise of her discretion she has either erred in principle in her approach, or has left out of account, or taken into account, some feature that she should or should not, have considered, or that her decision is 'wholly' or 'seriously' wrong because the court is forced to the conclusion that she has not balanced the various factors fairly in the scale.

146. I bear in mind particularly the serious nature of the allegations made by the Respondent against the Appellant. The Judge found that the Respondent's allegations of the father sexually abusing the children were unsubstantiated and the court noted that it was not even clear what the mother was saying the children had told her.

147. When A made an allegation of sexual abuse in late 2018, the Judge was satisfied that the Respondent had used the children to create a narrative of sexual abuse. These allegations had not just inflamed emotions, but the Judge said that they had taken up a considerable amount of time at the hearing.

148. The mother had tried to deny she was making allegations of sexual abuse against the father, but the Judge said she was being disingenuous. The Judge was

satisfied that she had "deliberately chosen" (para 76 B139) to present facts in a particular light to third parties to raise the question of the father sexually abusing both children.

149. In relation to the allegations made that the Appellant had physically abused the children, the Judge said that it was "abundantly clear" that the Respondent was coaxing and leading A to say what he did in a video six years before. The mother was determined to manipulate the evidence and this evidence was evasive and unsatisfactory. The Judge said the mother knew this evidence was not a true reflection of what had happened.

150. The allegation made in December 2018 that the Appellant had physically abused B, had been "propelled" by the mother realising that there were no allegations of abuse prior to October 2017. She said she had witnessed rough handling of the children by the father. The Judge said the mother's evidence on this point was "highly conflicting, inconsistent and illogical". It was new evidence and the Judge thought she was making it up as she went along.

151. The Judge said that although the Respondent said she was relying on what the children had told her, the mother's evidence was so unsatisfactory it could not be relied on.

152. As a result of the allegations made by the mother of the children being abused, the father's contact became supervised for a six-month period, he had to pay for the supervision at a considerable cost.

153. Finally, when I come to consider the reasonableness or otherwise of the mother's approach to the fact-finding is her allegation that she was raped by the

father. She had made the allegation to the school, but it was not explored with the father and no findings were sought.

154. Another aspect of her behaviour is that the Respondent complained that she had been assaulted by the Appellant at the children's school and the police were called. They said the allegations were unfounded and possibly malicious. By making a false complaint of assault to the police, the Appellant was at risk of arrest and being held in custody and conceivably prosecuted.

155. I have picked out the allegations of sexual and physical abuse as they must be particularly upsetting for a parent to have to deal with. It is easy for those involved in the courts to become case hardened and perhaps not to give sufficient weight to the effect of in particular allegations of sexual abuse on a party to a case.

156. The Respondent also manipulated others and that is dealt with at paragraphs 61-64 above.

157. The Judge's findings in the costs judgment are set out above. The Judge accepted that the Appellant had suffered obvious prejudice in having to respond to the unsubstantiated allegations the Respondent had made and had incurred substantial cost and debt.

158. Judge Sapnara said that the Respondent's emotional and psychological position mitigated against a finding that her conduct had been reprehensible or unreasonable. She also gave weight to the fact that the Respondent had been acting as a litigant in person which meant she did not have the benefit of advice which might have modified her approach.

159. In terms of the size of any award, the Judge said that she could not be satisfied that the Respondent would be able to satisfy any order made and if an order was made then it might impact on her ability to fund the therapy that she needed. An order might also affect the household income available to her son and husband.

160. I adopt the findings of HH Judge Sapnara that the Respondent made up her evidence, exaggerated or embellished incidents and made the unsubstantiated allegations of physical and sexual abuse. Her behaviour led to a four-day hearing becoming a ten-day hearing.

161. Based on those findings, I would have found the Respondent to have behaved reprehensibly and that her approach to this part of the litigation was unreasonable. This would have opened the door to an award of costs for the fact-finding hearing.

162. As is clear from the principles set out above, it is not my view of the Respondent's behaviour that matters in an appeal, it is whether the Judge, when declining to find that the Respondent had acted reprehensibly or unreasonably, was acting within the wide or generous ambit of her discretion.

163. I have four particular criticisms of HH Judge Sapnara's decision. The first is that she found that the Respondent's emotional and psychological position mitigated against a finding of unreasonableness. I remind myself that the psychologist Dr Willemson had found no mental health reason for the Respondent's approach to the father and to his contact with the children.

164. The long and short of the expert's evidence was that the Respondent was anxious and was affected by a dysfunctional childhood. To take up the approach of HH Judge Sapnara (which I will criticise below), many of the parties before the family courts have issues of that sort. The Judge recognised she was intelligent and articulate and in raising the complaints she did, the Respondent knew what she was doing (a finding also made by HH Judge Brasse). I did not consider it was correct for the Judge to suggest that the mother's psychological or emotional presentation excused her conduct during the fact-finding.

165. The second criticism I have of the Judge's decision is that she said she took into account the fact that the Respondent had been acting as a litigant in person at all material times so lacked the benefit of advice which might have modified her approach. This was not in fact the case.

166. The mother had had the benefit of representation by Miss Wilbourne and instructing solicitors from 2015 at the beginning. At some point, Miss Wilbourne remained involved under the Direct Access scheme and then was acting *pro bono*. Miss Wilbourne is extremely experienced counsel. The Respondent was certainly not a litigant in person in the usual sense of the word.

167. The third criticism I have is of the Judge's comment that the Respondent's conduct was not unusual in the context of proceedings of this kind. I am not convinced that was an appropriate thing to say. In any event, the Respondent's behaviour as set out in the judgments is unusual even in the context of fact-finding proceedings. Unsubstantiated allegations particularly of the sexual abuse of children are fairly unusual. The Respondent's manipulation of

professionals and the way in her evidence she "made it up as she went along" were unusual too.

168. The fourth factor I take issue with is the weight HH Judge Sapnara gave to the cost to the father financially and emotionally of being engaged in proceedings for a number of years. I accept that he had to instruct leading counsel because of the seriousness of the allegations made by the Respondent.

169. The Appellant can afford only to rent now and will be unlikely to be able to afford to buy a house in the future. He is the one who has the expense of the two children although I accept that the Respondent pays maintenance. The Respondent, meanwhile, is left with a home (apparently solely owned by her husband), a financial position where she and her husband are earning and possibly with savings. It was her own behaviour during the litigation which has led to the large costs being incurred by the father.

170. In the circumstances, I consider that the Judge failed to give sufficient weight or gave too much weight to the factors above and I find that she acted outside the ambit of her discretion and was wrong when she found that the Respondent had not acted reprehensibly or unreasonably in her approach to the hearing. I find the Respondent had acted reprehensibly and unreasonably in her conduct of the fact-finding hearing.

Welfare hearing – judgment of 9th November 2020

171. Third, the welfare hearing with the judgment given on 9th November 2020. Before an addendum report, the guardian's final report for the welfare hearing which started in September 2020, advised that the best interests of the children

would be better met by them remaining with the Respondent under a shared care arrangement.

172. During the course of the eight-day welfare hearing, the guardian listened to nearly all of the evidence and particularly to the evidence of Dr Willemson whose view it was that the welfare interests of the children would be better met by them moving to live with the Appellant.

173. It was in the context of that evidence that the guardian's position shifted to supporting a move to the care of the Appellant. The guardian gave evidence and unsurprisingly Miss Wilbourne, for the Respondent, had to cross-examine her extensively on the shift in her position.

174. Based on what was a well-articulated and perfectly reasonable position taken by the guardian in the run up to the welfare hearing, I do not accept that the mother's attitude to the litigation in pursuing the position that the children should remain in her care was unreasonable.

175. I do not find that the Judge's findings that the mother had not acted reprehensibly nor unreasonably in that hearing can be impugned. I would not have considered an application for costs in relation to this hearing and the Judge's decision is well within the wide ambit of her discretion.

<u>Costs order or not?</u>

176. The threshold so far as the fact-finding hearing is crossed (paragraph 170 above). The question is whether to make an order for costs or not. HH Judge Sapnara said that even if she was wrong in relation to the behaviour of the Respondent, she would not make an order for costs. She wanted the Respondent

to spend the money on therapy. The Respondent had another child. She did not want an award of costs to make the relationship between the Appellant and Respondent even more difficult.

177. I take into account the matters I have set out above in relation to the respective financial and residential positions of the Appellant and Respondent. Any savings the Appellant had have been used up. He owes money to the family and friends who have supported him through the lengthy proceedings. The money available to the Respondent and her new family may be reduced but both she and her husband are in employment. I cannot see that the therapy which the Respondent is to engage with will be stopped as a result of this payment. Very sadly, an order for costs will not worsen the relationship between the Appellant and Respondent, which is at the lowest possible ebb.

178. In terms of grounds one, two and four, I allow the appeal. The Respondent's behaviour was reprehensible and her approach to the fact-finding was unreasonable in a variety of different ways, and this was not the sort of behaviour that many litigants in family proceedings commonly engage in.

179. It would be wrong too for a party to behave in this way with impunity as it comes with a tremendous cost to the privately funded litigant, the legal aid fund when the party is legally aided and to the court in terms of the length of time this case ended up taking.

180. I consider that not making a costs order may encourage the Respondent to feel that she can raise allegations at will which are later unsubstantiated at no cost to her. At the same time, an order to contribute towards the Appellant's costs

is not made to prevent or deter the Respondent from pursuing reasonable applications.

181. In terms of ground three, the Judge used the word 'exceptional' when she should not have done. This was a slip of the tongue, and it was clear elsewhere that HH Judge Sapnara had applied the correct principles when considering the question of an order of costs against the Respondent. That ground is rejected.

182. Despite the great respect I owe towards the considerable work HH Judge Sapnara has done on this case and her knowledge of the Respondent's behaviour gained over a number of years, I have concluded this is one of the unusual cases where it would be appropriate to displace the usual principle of 'no order'.

183. The amount of costs I have in mind is most probably less than the costs to the Appellant of the mother's behaviour during the fact-finding but is not so high that it would interfere with the mother continuing with therapy. I make a summary assessment and order that the Respondent shall pay the Appellant the sum of £37,000. I consider this is a just and reasonable amount.