



Neutral Citation Number: [2024] EWHC 1120 (Fam)

Case No: FA-2023-000338

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 2 May 2024

**Before :**

**MR JUSTICE CUSWORTH**

-----

**Re: A and B (children: expert’s reports)**

**Judgment on Costs**

-----  
-----

The **Appellant**, acting as a Litigant in Person  
The **Respondent**, acting as a Litigant in Person  
**Ms Krishnan** (instructed by Blaser Mills Law) for the children’s guardian.

Hearing date: 20 March 2024

-----

**JUDGMENT**

This judgment was handed down remotely on 8 May 2024 and by circulation to the parties or their representatives by e-mail and by release to The National Archives on 10 May 2024.

.....

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family OR the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

**Mr Justice Cusworth :**

1. This is an application for costs made by the mother following my determination of her appeal from a case management order made by HHJ McPhee in private law children proceedings following a hearing before me on 20 March 2024. Although represented at the hearing of the appeal, the mother now acts in person for the purposes of making this application. The father is also in person, and was at the appeal hearing, although unlike the mother he had been represented by leading counsel at the hearing when the original order, for the appointment of a psychologist to carry out a global psychological assessment of the family, was made. The mother seeks her costs of the appeal hearing against him, and also against the children's guardian, who, along with the father, resisted the appeal.
2. I allowed the appeal, and set aside the judge's direction for the appointment of a psychologist, in a judgement which can be found reported as *Re A & B (Children: Expert's Reports)* [2024] EWHC 948 (Fam). I have now received written submissions from all 3 parties to the appeal, the most recent, due to counsel for the guardian's unavailability, not until 1 May 2024.
3. The mother in making her application relies on the principles for determination to be found in FPR r.28.3. This rule applies only to financial remedy proceedings, and not to this hearing, which was an appeal in private children proceedings. In family law proceedings, the normal rule that costs will follow the event has been disapplied, But CPR 1998 r.44.2(4) and (5) apply both at first instance and on appeal. These are private law children proceedings where costs orders generally are rare, but the court nevertheless retains a discretion to make such order as to costs as it thinks just (FPR 2020 r.28.1), and in deciding what order if any to make the court will have regard to all of the circumstances including the conduct of the parties, and whether a party has succeeded on all or part of their case (CPR 1998 r.44.2(4)).
4. Baroness Hale made clear in *Re S (a Child)* [2015] UKSC 20 that the general practice in children cases, confirmed in *Re T (care proceedings: serious allegations not proved)* [2012] UKSC 36, of not making an order for costs in the absence of reprehensible behaviour or an unreasonable stance, was one that applied to appeals as well as first instance trials, and to private law as well as public law children

proceedings. However, she made it clear that there may be different factual considerations on an appeal.

5. In *Re S* (above), Baroness Hale said at [29]:

*‘...the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in *EM v SW, In re M (A Child)* [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, "nobody knows what the judge is going to find" (para 23), whereas on appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to "take stock" and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case.*

6. I also take note of CPR 1998 r.52.19, which enables an appeal court to limit or exclude the recoverable costs of an appeal in circumstances where costs recovery is ‘normally limited or excluded at first instance’. Whilst the Family Court is not strictly a ‘no costs’ jurisdiction, as explained it generally operates on that basis in the absence of unreasonable or reprehensible behaviour. I consider that by analogy in proceedings such as these, where no costs order was in fact made by HHJ McPhee at first instance at a hearing where the father was represented and the mother was not, it is appropriate similarly to consider whether it is appropriate to limit any award of costs or to make no order at all.
7. I will deal first with the application against the guardian – noting as I do that counsel who represented the mother at the hearing of the appeal has suggested that the mother’s application is in fact against CAFCASS. I agree with Ms Krishnan for the Guardian that in the absence of an application for a 3<sup>rd</sup> party costs order, the application must in fact be one against the children who were represented by a CAFCASS guardian, under a legal aid certificate. I accept that that would not have been the mother’s intention. However, whether made against CAFCASS as a third party, or against the children’s CAFCASS guardian, the outcome would, I am clear, have been the same.
8. Whilst there is no rule that an order for costs cannot be made against a child, or a child’s litigation friend, such orders will be unusual, and I do not consider that the

**High Court Approved Judgment**

guardian's position before me was unreasonable or reprehensible in any way. It would be, in my view, a difficult precedent if guardians in such proceedings as these found that, if ever there was an appeal by a parent against a court's decision, they might find themselves liable for a costs order if they had not supported the winning side on that appeal. Their role is to make submissions to the court from the point of view of the child, not coloured by the competing interests of the other parties, and I am entirely satisfied that this is what the guardian in this case has done. I am consequently not persuaded that a costs order against the guardian is merited in this case, following my determination of the appeal in the mother's favour.

9. I now turn to the application against the father. Prima facie, the mother says that she is entitled to an order for costs against the father, having succeeded in her appeal. I do not however consider that the father's position was unreasonable in the appeal, in that he was defending the order made by HHJ McPhee, and supported in his position by the guardian, and I excuse, as he has been a litigant in person since the original hearing before that judge, both his emailing my clerk directly without copying in other parties, and his direct expressions of dissatisfaction with the outcome of the appeal, in the absence of any legally trained filter. I also must have regard to the reality of the situation in an appeal such as this, against a case management decision made in private law children proceedings, which is that whilst a discrete issue, all of the arguments advanced have been aimed at serving the best interests of the children who are its subjects. I note also that the father has paid his own costs of representation below, at a time when the mother was unrepresented; the position on appeal was reversed. I would also add that, given the already fraught relations between the parents in this case with which the Family Court has been seeking to deal, the making of a costs order would only be likely to further entrench the parties, which would not serve the interests of the children at all.
10. In all the circumstances, I am not persuaded that there is sufficient good reason in this case to depart from the general practice, and so I decline to make any order for costs in relation to this appeal.
11. That is my judgment.