



IN THE SUPREME COURT OF BERMUDA
DIVORCE JURISDICTION
2016 No: 100

BETWEEN:-

E. E. Y.

Mother

-v-

D. S. Y.

Father

RULING

(In Chambers)

Ruling on Costs in proceedings concerning children

Mr. Adam Richards, Marshall Diel & Myers Limited, for the mother

Mr. Jai Pachai, Wakefield Quin Limited, for the father

Introduction

1. This decision arises from an order made on 21st August 2017 (as anonymised by me) in the following terms:-
 - i. *During the academic year 2017/2018, JD shall attend School X;*
 - ii. *The Father, within 14 days hereof, shall obtain and file a letter from School X confirming JD's registration;*
 - iii. *The Parents shall arrange a psycho-educational assessment of JD within 60 days. Such assessment shall address an individual learning plan for JD; the findings of such assessment shall be disclosed to School X and filed with the Court. The Parents shall bear the costs of such assessment and report on a 50/50 basis;*
 - iv. *JD shall continue to receive private tutoring with the identified service providers and the Parents shall bear the cost of such tutoring on a 50/50 basis;*
 - v. *The Parents shall engage in parenting education, counselling and family therapy as recommended by Mrs. Saunders on page 25 of the Social Inquiry Report;*

- vi. *The educational welfare of JD shall be reviewed by this court in or about January 2018 at which time:-*
 - a. *the Parents shall produce his first term school report, and a report as to his extra-curricular development; and*
 - b. *Mrs. Saunders, the Court Social Worker, shall produce an updated Social Inquiry Report.*

vii. *Costs reserved.*

- 2. On the 17th January 2018, I heard Counsel on the issue of the reserved costs of the application.

General Principles and Practice

- 3. The Court when determining an issue of cost will first consider the general principles set out in Order 62, Rule 3 of the Rules of Supreme Court 1985 which provide at paragraphs (3) (4) and (5) as follows:-

(3) “If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where-

- a) *an Order is made that the costs of one party to proceedings be paid by another party to those proceedings, or*
- b) *an order is made for the payment of costs out of any fund, or no order is required, or*
- c) *no order is required,*

unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.

(5) “Paragraph (3) does not apply to proceedings under the Matrimonial Causes Act 1974.”

- 4. While paragraph 5, Order 62, Rule 3 of the Rules of Supreme Court states that costs following the event do not apply to proceedings under the Matrimonial Causes Act 1974, in *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233, the Court of Appeal stated that:-

“However, in the Family Division there still remains the necessity for some starting-point. The starting point in my judgment, is that costs prima facie follow the event...but may be displaced much more easily than, in circumstances which would not apply in other divisions of the High Court.

One important example is, as the judge pointed out, that it is unusual to order costs in children's cases". [Emphasis added]

5. There is no dispute between Counsel that the law has developed since *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 23, and that it would now be an exceptional order for costs to be granted following a case involving the welfare of a child.
6. In the Court of Appeal Case of *Re L (Costs of Children proceedings)* [2014] EWCA Civ 1437, Gloster LLJ confirmed the now well established principles governing the award of costs in children's cases. They are summarized as follows:-
 - i) The starting point is that the Court retains a discretion to make an order for costs in matrimonial proceedings - *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233.
 - ii) An award of costs against one parent or another are exceptional - *London Borough of Sutton v Davis (Costs) (No 2)* [1994] 2 FLR at 570-571.
 - iii) The conduct of the parties is the major consideration when deciding whether or not an exceptional order for costs should be made-*R v R (Costs: Child Case)* [1997] 2 FLR 95.

Should the Court exercise its discretion to make an Order for costs in these Proceedings?

7. Mr. Pachai, Counsel for the father submitted that the circumstances of this case were such that the Court would be justified in ordering costs against the mother. Mr. Pachai highlighted numerous examples of the mother's conduct including her flagrant disregard of various Court Orders made within the proceedings, including not returning the child to his USA boarding school, refusing access to the father and failing to enrol the child in School X in Bermuda.
8. Mr. Pachai described the mother's conduct as "*unreasonable, egregious and contemptable*" and cited the judgment of Madam Justice Hale in *R v R (Costs: Child Case)* [1997] 2 FLR 95, where the Court held:-

"Nevertheless, there clearly are ... 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".
9. Mr. Richards, Counsel for the mother submitted that the circumstances of this case do not cross the high threshold to justify a costs order being made. He submitted that there is nothing exceptional regarding this case nor could the mother's litigation conduct be considered reprehensible.
10. Mr. Richards argued that the mother's position had at its forefront her desire to support her son in his wishes and her genuine belief that schooling in the UK would be preferable.

11. Mr. Richards relied on the more recent Court of Appeal case of *Re L (Costs of Children proceedings)* [2014] EWCA Civ 1437, in which Gloster LLJ confirmed that the “unreasonable” conduct of a party must relate to the conduct of the litigation rather than the welfare of the child. Mr. Richards cited paragraph 38 as follows:-

“ Indeed there was no real dispute between counsel on the appeal that, as most recently summarised in Re T [2012] UKSC 36, [2012] 4 All ER 1137, [2012] 3 FCR 137, there should be no order for costs in the absence of reprehensible behaviour. In that case, Lord Phillips of Worth Maltravers PSC, handing down the judgment of the court, said as follows:

“44 For these reasons, we concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice...”

Appropriate Order

12. The court has had regard to the submissions of the parties and has considered the authorities to which the court has been referred.
13. Having applied the well-established principles, it is my view, that the mother’s disregard of Orders of this court during the litigation of this matter has been inexcusable. That said, this court echoes the words of Madam Justice Hale in *R v R (Costs: Child case)* [1997] 2 FLR at 98 :-

“The fair point is made that in children cases one must not confuse unreasonableness in relation to the child - because one might say that we are all expected to be unreasonable in our attitudes to our children - and unreasonableness in the attitude to the litigation....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 real prospect of success, still less should they be put through a quite unreasonable involvement in their parents’ disputes”.

14. In the exercise of my discretion, it is my view that to make a cost order in this matter will further exacerbate the already fraught tension between these parents and might well forever rule out any possibility of co-parenting. Thus, impact the welfare of JD. Consequently, there shall be no order as to costs.

Dated this 27th day of February, 2018

