



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2024: No. 26

BETWEEN:

A

Appellant

-and-

B

Respondent

COSTS RULING **(Determination on the papers)**

Before: **Hon. Alexandra Wheatley, Acting Puisne Judge**

Filings: **Adam Richards of Richards Limited for the Appellant**
Nicole Smith of the Legal Aid Office for the Respondent

Date of Filing Written Submissions: 21 March and 10 April 2025
Date Draft Circulated: 3 July 2025
Date of Ruling: 7 July 2025

*Costs in Children Cases; Fact-Finding Hearings; Unreasonable and Reprehensible Behaviour;
Considering All the Circumstances of the Case*

INTRODUCTION

1. This is the Father's application for the Mother to pay the legal costs he incurred for the fact-finding hearing held on 8 and 16 October 2024 which resulted in the Court's determination being handed down on 28 November 2024 (**Fact-Finding Ruling**).
2. The relevant findings made are set out at paragraphs 37 to 39 of the Ruling, the Court concluded, *inter alia*, as follows:

- “37. *I will start by saying that the allegations which have been made by the Mother are of a very serious nature which will undoubtedly have far-reaching consequences for all of those involved. I am reminded; however, of Baroness Hale's statement in paragraph 5 of her ruling in *Ealing London Borough Council v JS and another* “...the standard of proof in finding the facts...is the simple balance of probabilities...Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied to the facts”. The seriousness of the allegation does not set a higher standard of proof.*
38. *Having considered all the evidence presented and applying the legal principles which are set out in paragraphs 13 to 17 above, I am satisfied the Mother has not met the burden of proof regarding each of her allegations. Therefore, on the balance of probabilities, I find that all the allegations of physical and sexual abuse made against the Father did not occur. In particular, I accept that on the balance of probabilities that the Mother's motivation to make the allegations against the Father, taking into consideration the findings set out above and the Chronology, was due to a clear pattern of dissatisfactions with either the courts, DCFS or the Father's Counsel. This inevitably resulted in the continual escalation of allegations, but also obtaining the Temporary DVPO in what I believe to be disingenuous circumstances.*
39. *Furthermore, I find that in relation to allegations (i), (iii) and (v) to (viii) that the Mother believed abuse occurred where none exists which had in turn caused emotional harm to Y. As it relates to allegations (ii) and (iv), I find that on these occasions the Mother falsified evidence to make it appear that the Father had physically abused Y.* [Emphasis added]

THE PARTIES' POSITIONS

3. Counsel for both parties agree that Order 62, Rule 3(3) of the Rules of the Supreme Court 1985 (**RSC**) provides, as a general principle and starting-point, that where the Court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, that costs should follow the event unless it appears to the Court that another order should be made, having regard to the circumstances of the case.
4. However, RSC Order 62, Rule 3(5), excludes proceedings under the Matrimonial Causes Act 1974 (**MCA**) from that general principle, i.e. costs do not follow the event. This position reflects the law in England and Wales in 1992. The leading case on the application of these provisions as it pertains to costs in family cases is contained in the House of Lords decision of *Gojkovic v Gojkovic (No. 2)* [1992] 1 All ER 267. Butler-Sloss LJ considered the impact of the equivalent carve out provision in the UK as to the issue of costs in matrimonial proceedings and stated:

“However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see Cumming-Bruce LJ in Singer (formerly Sharegin v Sharegin 9847 FLR 114 at 119) but may be displaced much more easily than, and 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 cases.....The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs.” [Emphasis added]

5. Mr Richards further relied on the UK Court of Appeal case that recently clarified the position on costs in fact finding hearings in the case of *Re E (Children: Costs)* [2025] EWCA 183. The case concerned a fact-finding hearing where the mother had made unfounded allegations of physical and sexual abuse against the father as occurred in this case. The court ordered the mother to pay costs due to her “*extreme allegations which transformed the proceedings*”, and which was clearly litigation conduct that was unreasonable.
6. *Re E*, at paragraphs 23 and 24 confirms that cost awards in children’s cases remain rare but can be ordered in exceptional circumstances:

“23. There is a general practice of not awarding costs against a party in family proceedings concerning children, but the court retains a discretion to do so in exceptional circumstances. These include cases in which a party has been guilty of reprehensible or unreasonable behaviour in relation to the proceedings. This practice applies equally in public law and private law proceedings, and

irrespective of whether a party is legally aided. Nor is there any difference in principle between fact-finding hearings and other hearings. The court can make costs orders at any time: FPR 28.1.

24. These propositions can largely be extracted from the decision of this court in the private law case of *R v R (Costs: Child Case)* [1997] 2 FLR 95 (Staughton LJ and Hale J) and the decisions of the Supreme Court in the public law cases of *Re T (Children) (Costs: Care Proceedings: Serious Allegation Not Proved)* [2012] UKSC 36, [2013] 1 FLR 133 and *Re S (A Child) (Costs: Care Proceedings)* [2015] UKSC 20, [2015] 2 FLR 208.” [Emphasis added]

7. Mr Richards also drew the Court’s attention to paragraph 35 of *Re E* which confirmed that a distinction should not be drawn between allegations the wife knew to be false and those which she had convinced herself to be true:

“35. The judge placed significant weight on his assessment of the mother's motivation: see paragraph 61(4), referring back to paragraph 184 of the fact-finding judgment. He differentiated between allegations known to be wholly false and allegations that she had convinced herself were true. That is a subtle distinction, and I cannot see how it avails the mother in this case. The Delphic finding that she had convinced herself that the father had sexually abused the children, not further explained, could not be the end of the matter. In the first place, the court was not considering whether the mother regarded her litigation conduct to be reprehensible or unreasonable, but making its own objective assessment. As Staughton LJ said in *Re R*:

“The real point that has been argued before us seems to me to be this: the judge evidently found that the father had behaved unreasonably in the litigation. I do not doubt that Mr R genuinely believes that his arguments are perfectly reasonable. I do not question his good faith, but I am afraid I do agree with the judge that they did not, in reality, represent a reasonable attitude for the father to take.”

8. Ms Smith for the Mother accepted this is the correct position in law, i.e. that the Court must be satisfied that the Mother is guilty of unreasonable and reprehensible behaviour; however, she reminded the Court in the Bermuda case of *F v F* [2019] AC (Bda) 4 Div (9 January 2019) wherein Justice Subair Williams dictum at paragraph 18 states as follows:

“It is important to note, however, that the Court is unfettered in its discretion in deciding whether to grant a costs order. After all, the court must not be constrained

or restricted from making a costs order which is just and fair in all circumstances of the case.”

9. It was therefore submitted by Ms Smith that even if the court found there to be unreasonable and reprehensible behaviour on the part of the mother, the court must look at all the circumstances of the case and decide which is just and fair in the circumstances.

The Father

10. Mr Richards submitted that findings made in the Fact-Finding Hearing confirm that the allegations made by the Mother were very serious and noted that in relation to four allegations the Mother had persuaded herself that the abuse had occurred.
11. However, Mr Richards highlighted that *Re E* confirms, the Court is not considering whether the Mother regarded her litigation conduct to be reprehensible or unreasonable but is making its own objective assessment.
12. It was further submitted by Mr Richards, that in relation to two allegations, the Court found that those were fabricated, and that the Mother had falsified her evidence. Mr Richards argued that those are extremely serious findings and bring the matter squarely within the exceptional circumstances required to make a costs order against the Mother.
13. Mr Richards also drew the Court’s attention to the fact that the Court found that the Mother’s motivation for the complaints against the Father was her dissatisfaction with the courts, DCFS or Counsel. Moreover, the Court questioned the legitimacy of the allegations the Mother made against the Father in order to obtain the Temporary Domestic Violence Order in the Magistrates’ Court.
14. In contrast to the Mother’s conduct, Mr Richards raised the fact that there is no criticism of the Father in the judgment. He also noted that the Father did not seek to make spurious counter allegations, nor were any findings made that he had behaved in any way inappropriately.
15. In conclusion, Mr Richards submitted that in applying the principles in *Re E* and having regard to the Mother’s extreme allegations along with the very serious findings of falsified evidence, that the Mother should be required to pay the Father's costs of the Fact-Finding Hearing.

The Mother

16. It is the Mother’s position that the case of *Re E* is distinguishable. Ms Smith submitted that both at first instance and in the Court of Appeal, the mother had the benefit of legal representation. Ms Smith highlighted that from the commencement of these proceedings up to

13 December 2024 (the date upon which the Mother obtained a Legal Aid Certificate), the Mother was self-represented. Ms Smith raised that the Father has had the benefit of seasoned Family Law Counsel throughout and submitted that this “*inequity; the inequality of arms, is the starting point for the rationale that costs should not be awarded against the [Mother]*”.

17. Additionally, Ms Smith argued that *Re E* is distinguishable as the allegations made in that case by the mother were far more serious compared to this matter. She says the mother in *Re E* deliberately and intentionally fabricated a narrative which had the “*real risk of destroying the relationships between the children and the father*”. Ms Smith argued that in this case the Mother simply reported legitimate concerns after Y’s access with the Father.
18. Ms Smith further submitted that in circumstances where the Court has deemed there to be unreasonable and reprehensible behaviour on the part of one parent, the Court must dissect each allegation to be able to consider “*all the circumstances of the case*”.
19. Overall, the Mother says that the reports she made to DCFS against the Father were made from genuine concern for the welfare of Y. In addition to this position, the following is a summary of Ms Smith’s submissions as it relates to each of the eight allegations adjudicated:
 - (a) 1st Allegation: Y’s incontinence could have been a stress response Y had as a result of his interaction with the Father.
 - (b) 2nd, 3rd and 4th Allegations: The explanation for these instances of bruising may be explained by virtue of the play fighting between the Father and Y.
 - (c) 5th and 6th Allegations: Thorough investigations were not conducted by DCFS.
 - (d) 7th Allegation: The Mother accepted under cross-examination that the cut on Y’s lip and the scratches on his chest were likely self-inflicted.
 - (e) 8th Allegation: The SART exam conclusion was that there were no significant findings of sexual abuse. Therefore, the SART exam was not conclusive and do not say that there were no blisters surrounding the anus.
20. It was further submitted by Ms Smith that the Mother’s limited means should be taken into consideration as there is no realistic probability of the Mother being able to satisfy a costs order.
21. In addition, Ms Smith argued that this application made by the Father “*simply serves to terrorize the [Mother], and to put her in her place; to stop her from bringing applications which she felt were meritorious*”.

22. Unrelated to the Mother's conduct, Ms Smith submitted that this is a case where the Father has not come with "*clean hands*" as she says that Y's school fees are currently \$4,000 in arrears. She says that it cannot be the case that this Court would grant costs against the Mother when the Father "*has fallen short in the performance of his obligations*".
23. Ms Smith also relied on the case of *Kenneth Hurt Williams v HM the Queen* [2020] CA (Bda) 17 Crim where the Court of Appeal stated that the task of case management was one for the magistrate, and that the magistrate is responsible for regulating the proceedings, which includes dealing with meritless applications. Ms Smith argued that this is also applicable in civil litigation; particularly in cases where litigants are self-represented. She says it is the function of the judge to provide guidance to the litigant in person to assist in the avoidance of "*spurious applications and proceedings*".
24. In closing, Ms Smith submitted that whilst the Father considers these allegations to be tantamount to unreasonable and reprehensible behaviour on the part of the Mother, she says that the threshold for an award of costs against the Mother has not been crossed or indeed met.

CONCLUSION

25. As it relates to the Mother's position that the reports she made to DCFS against the Father were made from genuine concern for the welfare of Y, the Court found that the Mother's motivations in making the allegations was due to her "*dissatisfactions with either the courts, DCFS or the Father's Counsel*". The motivations of the Mother are therefore *res judicata* and cannot be reconsidered for the purposes of the cost application. This applies equally to the submissions relating to each allegation summarized at paragraph 19 above.
26. I reject Ms Smith's submission that the means of the Mother should be taken into consideration. There is no principle in law to support this position. Indeed, if this was a circumstance the Court should take into consideration, it would allow those with limited means to have no regard to his or her litigation conduct.
27. Likewise, the fact that the Mother was not represented by Counsel has no bearing on whether costs orders should be made against her. One representing him or herself in court proceedings simply cannot use that as a shield for cost orders.
28. I do not agree that the Father has made this application for disingenuous reasons. The Father is entitled to make this application and has done so. It is not frivolous, vexatious or an abuse of process.

29. Furthermore, I do not accept the assertion that a costs order cannot be made against one party due to the other party allegedly being in non-compliance with a court order, and particularly where the subject matter of the suggested non-compliance was not a matter for the Court to determine.
30. I do not follow Ms Smith's submission as it relates to a judge providing guidance to a litigant in person as a part of case management, and her suggestion that the purpose of such guidance is to avoid "*spurious applications and proceedings*". The purpose of the Fact-Finding Hearing was clear. It was to address the allegations of abuse that the Mother made against the Father. It can however, be asserted that as a direct result of the Mother making false allegations against the Father, these proceedings were protracted as a fact-finding hearing was required. Clearly, the Court plays no role in a party making allegations to DCFS against the other parent. No case management decisions could have assisted in this regard other than ascertaining that a fact-finding hearing was necessary.
31. Ultimately, I accept Mr Richards' submission that given the findings made in the Fact-Finding Hearing, the Mother's actions were unreasonable and reprehensible. This is a case which falls squarely within in the 'exceptional' category of children cases where the Court must divert from the usual position that there should be no order as to costs. Accordingly, I award the Father the costs of the Fact-Finding Hearing on a standard basis, to be taxed if not agreed.

DATED this 7th day of July 2025



**ALEXANDRA WHEATLEY
ACTING JUSTICE OF THE SUPREME COURT**