IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2024: No. 26

BETWEEN:

K

Applicant/Mother

- and -

A

Respondent/Father

RULING

(Security for Costs)

Before:	**Hon. Alexandra Wheatley, Assistant Justice**
Appearances:	**Georgia Marshall of Marshall Diel & Myers Limited, for the Respondent**
	The Respondent/Father, In Person

Date of Hearing:	15 December 2025
Date Draft Ruling Circulated:	14 January 2026
Date of Ruling:	16 January 2026

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Security for Costs; Starting Point for Costs in Family Cases; Distinction Between Ancillary Relief and Children Applications; Rule 3 of the Matrimonial Causes Rules 2023; Order 62, Rule 3(3) and Rule 3(5) of the Rules of the Supreme Court; Statutory Regime for Costs in Family Cases in Bermuda -vs- Statutory Regime for Costs in Family Cases in the UK

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RULING of Assistant Justice Alexandra Wheatley

INTRODUCTION

1. This is an application made by the Applicant (hereinafter referred to as the **Mother**) in divorce proceedings for the Court to grant her security for costs in the sum of $150,000 (the **Security for Costs Application**) against the Respondent (hereinafter referred to as the **Father**) in respect of his substantive application filed on 29 April 2025 seeking permission for the child of the family (hereinafter referred to as **A**) to be removed from Bermuda to reside with him in the United States (the **Father's LTR Application**).

2. The issues for determination in this interlocutory application are as follows:

    (i) Whether the Court has jurisdiction to order security for costs in these proceedings and, if so, the applicable legal test; and

    (ii) Whether, applying that test and having regard to all the circumstances, it is just to order the Father to provide security for costs.

3. It should be noted that the Mother also filed an application seeking sole custody and sole care and control of A on 30 April 2025 (the **Mother's Custody Application**). Accordingly, there are two substantive child applications before the Court which must be determined. The fact-finding hearing which addresses central issues of both the Father's LTR Application and the Mother's Custody Application has been tentatively listed for a five-day hearing to commence on 26 January 2025.

THE MOTHER'S POSITION

4. Mrs Marshall submits that the Court has jurisdiction to order security for costs in matrimonial and children proceedings notwithstanding the absence of any express provision in the Matrimonial Causes Rules 2023 (**MCR**[1]). The Mother relies on Rule 3(1) of the MCR, which provides that where there is a gap in the MCR, the Rules of the Supreme Court 1985 (**RSC**) apply, notwithstanding Order 1, Rule 2(2) thereof. Rule 3(1) of the MCR provides as follows:

> "*3 (1) Subject to the provisions of these Rules and of any enactment, the Rules of the Supreme Court 1985 shall notwithstanding the provisions of Order 1, rule 2(2) thereof, apply, with the necessary modifications, to the practice and procedure in matrimonial proceedings.*"

5. In addressing the law on costs in the family case context, Mrs Marshall acknowledges that there is a body of Bermuda case law which has treated the starting point in family cases as "*no order as to costs*", particularly following the introduction of Order 62, Rule 3(5) RSC, which disapplies the "*costs follow the event*" rule to proceedings under the Matrimonial Causes Act 1974.

6. In matrimonial proceedings pre-January 2006, costs followed the event subject to the court's discretion as set out in Part II: Entitlement to Costs, Order 62, Rule 3(3) of the RSC which provides as follows:

> "***62/3 General Principles***
> *...(3) If the Court in the exercise of its discretion sees fit to make any orders as to the costs of or incidental to any proceedings, the Court shall subject to this Order, 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 of any part of the costs.*" [Emphasis added]

7. However, Mrs Marshall submits that the post-2006 position has been misstated in certain authorities and should be reconsidered[2]. In January 2006, the RSC were amended to include the following provision in Order 62, Rule 3(5):

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[1] Reference was incorrectly made to the Matrimonial Causes Rules 1974 throughout submissions; however, these were amended and replaced with the Matrimonial Causes Rules 2023. In any event, Rule 3 in both versions is identically worded.

[2] As it relates to the reconsideration of the Courts' previous decisions, Mrs Marshall relies on the case of *Jennings* v *Jennings* [2009] SC (Bda) 62 where the Court reconsidered its approach to Letters of Request directed to Bermuda trustees from the English Family Court. In so doing, the Bermuda Court reversed its December 2005 decision in *Charman* v *Charman* [2006] 1 WLR 1053 where the Court, acting upon a Bermuda trustee's application, set aside an order for document production made pursuant to a Letter of Request from the English Family Court.

"*(5) Paragraph (3) does not apply to proceedings under the Matrimonial Causes Act 1974.*" [Emphasis added]

8. Reference was made to this Court's recent decision of this court *Wife* v *Husband (Costs Ruling)* [2025] SC (Bda) 91 Div., wherein the Court stated that in cases involving children the starting point is that there should be no order as to costs. Mrs Marshall says that the principle behind this viewpoint is that as a matter of public policy parents should not be stifled in their right to seek court assistance in relation to matters involving the welfare of children. That being said, Mrs Marshall argued that the Court cannot at this stage prejudge an application which will be made for costs as it will be the Mother's case that the Father has not conducted the proceedings reasonably and will likely continue to do so leading to considerable cost being incurred by the Mother. She further stated that it is the Mother's position that in appropriate cases where circumstances are such that making no order is unjust, the court retains discretion to make such an order.

9. Paragraphs 7 and 8 in *Wife* v *Husband (Costs Ruling)*, addresses costs in family proceedings as follows:

> "*7. In ARMF v AJF [2019] SC (Bda) 4 Div, Subair Williams J explained that the RSC Order 62, rule 3(5) was introduced with effect from I January 2006 and excludes proceedings under the Matrimonial Causes Act 1974 (MCA) from the "costs follow the event" rule. The effect is that the starting point in matrimonial proceedings is "no order as to costs", though the court retains a broad discretion to depart from that starting point where it deems just.*
>
> *8. ...The judgment also explains why the post-2006 regime brings Bermuda practice more closely in line with the English family costs principles, under which there is likewise no presumption that costs follow the event in financial remedies litigation.*" [Emphasis added]

10. Mrs Marshall says that whilst *Wife* v *Husband (Costs Ruling)* correctly quotes the decision of Subair Williams J in *ARMF* v *AJF* [2019] SC (Bda) 4 Div, that the assertion that starting point for costs in family proceedings is "no order as to costs" is incorrect. Mrs Marshall submitted that following the coming into force in Bermuda of Order 62, Rule 3(5) of the RSC by which Rule 3(3) was disapplied to matrimonial proceedings, the position in Bermuda was brought in line with the position statutory position as it was in England prior to the implementation of the Family Procedure Rules 1991 (the **FPR**).

11. The net effect of this, Mrs Marshall argued, was that a lacuna was created as the RSC no longer applied and there is no specific provision in the MCR regarding costs, unlike in England where

the FPR filled that void. Therefore, Mrs Marshall submitted, that Bermuda remains in the landscape as described by Buttler-Sloss LJ in the case of *Gojkovic* v *Gojkovic (No 2)* [1992] 1 All ER 267.

12. In *Gojkovic* v *Gojkovic (No 2)*, Butler-Sloss LJ contrasted the position of costs in civil litigation where the starting point is costs follow the event, to that in the family cases where this rule was disapplied and therefore no longer existed insofar as matrimonial cases were concerned. At page 270, Butler-Sloss commences the analysis of the costs position in family cases in the UK at that time:

> "*What are the principles governing costs in applications for financial relief in the Family Division and, in particular, in cases where open offers and Calderbank offers are made? In particular, what is the starting point of entitlement to costs?*
> *The general principles as to entitlement to costs in civil litigation are to be found in RSC Ord 62. Order 62, r 3(3) states:*
>
> > *'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.'*
>
> *Rule 3(5) states: 'Paragraph (3) does not apply to proceedings in the Family a Division.'*
> *However, in the family Division there will remain 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 [1984] 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 that the judge pointed out; that it is unusual to order costs in children cases. In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved it is usual, and normally in the interests of both parties, that the applicant should obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. 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]

13. Later in her judgment, Butler-Sloss LJ said at page 273:

> "*The concept expounded by the judge of no order for costs where both parties have been reasonable in their approach to the dispute is not, in my judgment, one of general application in the Family Division, save in children cases, and is certainly not one of general application in Calderbank offers.*" [Emphasis added]

14. Mrs Marshall submits that this approach recognises that while costs orders in children cases may be unusual, they are neither improper nor impermissible where litigation conduct or other circumstances justify departure from the usual approach. As such, Mrs Marshall asserts that even in children's cases the *prima facie* starting point that costs follow the event continues to apply where parties have not been reasonable in their approach to the dispute.

15. It was further highlighted by Mrs Marshall that in England & Wales the FPR has provided a codified regime in relation to cost awards in the Family Jurisdiction; however, those provisions do not apply to Bermuda as our MCR have not incorporated them and as such, they have no application in Bermuda. Reliance was placed on the Bermuda Court of Appeal case of *Davy* v *Zouppas Davy (Costs)* [2005] Bda LR 51 wherein the learned President of the Court of Appeal emphasised that English authorities decided under a different statutory framework were not determinative in Bermuda, stating as follows:

> "*The cases referred to above were decided under a different statutory framework, namely, the Family Proceedings Rules 1991, as amended, and the Civil Procedure Rules 1998, which have no application in Bermuda.*"

16. Having established the legal principle which applies to costs in matrimonial proceedings, Mrs Marshall submits that the operative provision in the Security for Costs Application is Order 23, Rule 1(1)(a) of the RSC. Order 23, Rule 1(1)(a) of the RSC provided the Court with a discretionary power to order security for costs where a party is ordinarily resident outside the jurisdiction, providing as follows:

> "***23/1 Security for costs of action, etc.***
> *1 (1) 'Where on the application of a defendant to an action or other proceedings in the Court, it appears to the Court—*
>
> > *(a) that the plaintiff is ordinarily resident out of the jurisdiction then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just...*"

17. Mrs Marshall submits that this provision applies equally to matrimonial and children proceedings and that there is nothing in the MCR which excludes or limits the operation of Order 23, Rule 1(1)(a) of the RSC.

18. In support of the principles governing the exercise of the Court's discretion under Order 23, Rule 1(1)(a) of the RSC, Mrs Marshall relies on the case of *Kathleen Dunkley Gill* v *Appleby Spurling & Kempe and Others* (Civil Jurisdiction 1999 No. 234) as the leading Bermuda authority on security for costs. She submits that the case establishes that the Court's discretion is broad and unfettered and must be exercised having regard to all the circumstances.

19. Mrs Marshall contends that the principles which apply to applications for security for costs are addressed by Justice Meerabux in *Gill* v *Appleby Spurling & Kempe and Others* and can be summarized as follows:

    (i) The court has complete discretion in such applications and will act in the light of all the relevant circumstances.

    (ii) The possibility or probability that the Plaintiff will be deterred from pursuing the claim if security is ordered is not, without more, sufficient reason for not ordering security.

    (iii) The court must balance the injustice to the Plaintiff if prevented from pursuing a proper claim against the injustice to the Defendant if no security is ordered and the Defendant is unable to recover the costs incurred by him in defense of the claim.

    (iv) Whilst the court should have regard to the prospects of success, it should not go into the merits in detail unless I can be clearly demonstrated that there is a high degree of probability of success or failure.

    (v) The court will require evidence from the Plaintiff to prove the stifling effect of an award.

    (vi) A person is ordinarily resident in a place if he habitually and normally resides lawfully in such place from choice and for a settled purpose, apart from temporary or occasional absence, even if his permanent residence or "real home' is elsewhere.

20. Accordingly, Mrs Marshall submitted that as the Father is habitually resident in the United States, has no place of abode in Bermuda, and has no assets within the jurisdiction against which a costs order could be enforced. Accordingly, the gateway condition under Order 23, Rule

1(1)(a) is satisfied.

21. Further, Mrs Marshall submits that refusing security on the speculative basis that no costs order may ultimately be made would amount to prejudging the issue of costs and impermissibly fettering the Court's discretion. She contends that where a party is ordinarily resident outside the jurisdiction, has no assets in Bermuda, and there is a real and substantial risk that any future costs order would be unenforceable, justice requires an order for security for costs. Therefore, Mrs Marshall asserts that the sum sought is proportionate, that there is no evidence the order would stifle the Father's application, and that refusing security would expose the Mother to the risk of irrecoverable and escalating legal costs.

THE FATHER'S POSITION

22. The Father, appearing in person, opposes the Mother's application for security for costs and submits that it should be dismissed. He relies on Order 23, Rule 1 of the RSC as the relevant statutory provision governing security for costs and contends that the conditions for the exercise of that power are not met, and that, in any event, it would be unjust to make such an order in the circumstances of this case.

23. The Father characterizes the Security for Costs Application as a tactical abuse of process, intended to delay the determination of the substantive issues, exert financial coercion upon him, and deny him access to justice. He submits that the application operates as a collateral attempt to stifle his relocation case rather than being a legitimate costs-protection measure.

24. In addressing the basis of the costs relied upon by the Mother, the Father submits that those costs are self-created. He relies on Order 18, Rule 7(1) of RSC, which requires pleadings to be concise, and argues that the Mother has acted in breach of that rule by filing an excessively long pleading containing extensive historic, evidential, and collateral allegations. He submits that ordering security for costs in those circumstances would improperly reward procedural non-compliance and the inflation of litigation.

25. The Father further submits that granting the Security for Costs Application would have a "*chilling effect*" on the proceedings and would stifle a meritorious claim. He contends that his financial resources are limited, that he has been forced to appear in person as a result of the Mother's litigation conduct, and that the imposition of security would prevent him from pursuing an application which he says is necessary, urgent, and child-focused.

26. He places particular emphasis on the prejudice to the child's welfare that would result from delay. The Father submits that a stay of proceedings pending the provision of security costs would impede timely resolution of issues relating to the child's lawful residence and schooling,

at a time when immigration deadlines are imminent and certainty is required in the child's best interests.

27. A central plank of the Father's opposition concerns the attribution of costs. He submits that the principal driver of costs is the Mother's application for sole custody, care, and control, an issue he did not raise. He argues that the Mother's allegations of parental unfitness were never made during the marriage, the divorce, or the post-divorce period, despite his role as a primary caregiver. He says these allegations only emerged once he commenced his relocation application. He submits that this demonstrates that the issue was manufactured tactically to oppose relocation and that the bulk of the costs associated with that issue should not be attributed to him.

28. In support of his legal position on costs in family proceedings, the Father relies on *MG* v *AR* [2021] EWHC 3063 (Fam). He submits that this authority establishes that, in the family jurisdiction, the normal rule is that there should be no order as to costs unless litigation misconduct or other exceptional circumstances are demonstrated. He expressly relies on the passage stating that:

> "*In the family sphere the normal rule … is no order for costs unless litigation misconduct or other exceptional circumstances were demonstrated.*"

29. The Father further relies on *MG* v *AR* for the proposition that security for costs is only just where the applicant can demonstrate a "good chance" of obtaining a costs order at the final hearing. He submits that, given the correct starting point of no order as to costs, and the asserted necessity and reasonableness of his application, the Mother cannot meet that threshold.

30. He also relies on the principle articulated in *MG* v *AR* that security should not be ordered where it would stifle a meritorious claim. He submits that his application is objectively meritorious because it is driven by immigration realities, including the expiry of his visa and the impending expiry of the Mother's and child's visas, and the absence of any secure legal basis for the family to remain in Bermuda. He contends that continuing the status quo would require him to rely on repeated tourist entry, exposing him to immigration breaches and risking future denial of entry, with serious consequences for the child's relationship with him.

31. It should be noted that Mrs Marshall response to the Father's reliance on *MG* v *AR*, she reiterated that the decision is based on the application of the FPR which does not apply in Bermuda. She also highlighted that in Mostyn's judgment, the factors to be considered in accordance with the FPR are different from those set out by Meerabux J in *Gill* v *Appleby Spurling & Kempe and Others*.

32. The Father further submits that the child's wishes support the urgency and legitimacy of his application. He contends that the child has consistently expressed a desire to return to the United States over a number of years, including in therapeutic and school settings, and that the Mother's resistance to an independent wishes-and-feelings assessment undermines her asserted reliance on welfare concerns.

33. In conclusion, the Father submits that the Mother's application for security for costs is designed to obstruct the timely and child-focused resolution of the Father's LTR Application. He seeks dismissal of the application, a declaration that the Mother's sole custody application has artificially inflated costs and should bear its own costs consequences, and directions for the expeditious determination of the substantive issues.

DISCUSSION

34. Suffice to say, there does not appear to be any Bermuda case law which addresses the legal basis for which one would be entitled to obtain security for costs in family proceedings, particularly when the substantive application surrounds the issues of custody and care and control of children. This is therefore a novel application which its decision will most likely be precedent setting in the family arena of Bermuda.

35. I begin by addressing the competing submissions as to the correct legal starting point on costs in matrimonial proceedings. Having carefully considered the authorities cited and the historical development of the RSC, I accept the legal position advanced by Mrs Marshall that, following the disapplication of the statutory "costs follow the event" rule, the correct articulation of the starting point in matrimonial proceedings is that costs prima facie follow the event but may be displaced much more easily than, and in circumstances which would not apply, in other division of the Supreme Court. That formulation accords with the reasoning expressed in *Gojkovic v Gojkovic (No. 2)* at which time the statutory position in England & Wales was identical to Bermuda.

36. However, my acceptance of that formulation does not, in my judgment, resolve the Security for Costs Application in the Mother's favour. The question before the Court is not whether costs *may* ultimately be awarded in matrimonial proceedings, but whether the Court ought, at this interlocutory stage, to order security for costs against a parent in proceedings concerning the custody, care and control of a minor child.

37. In my view, the distinction is critical. The amendment to the RSC which came into force in January 2006 expressly removed the statutory rule that costs follow the event in proceedings under the Matrimonial Causes Act 1974. Whatever the proper articulation of the post-2006 starting point may be, the clear legislative intent of that amendment was to differentiate family

proceedings from other civil proceedings. Thus, removing the automatic or presumptive application of civil costs principles to disputes arising out of family breakdown.

38. Given that legislative context, it would be an overreach to argue that simply redefining the starting point as "prima facie" costs following the event is enough to justify importing security for costs principles from general civil litigation into the family jurisdiction. The statutory removal of that rule was intentional, and in my view, its practical effect cannot be reinstated indirectly through security for costs applications.

39. That conclusion is reinforced by the reasoning in *Gojkovic v Gojkovic (No. 2)* itself. Whilst the Court articulated a prima facie starting point, it was made clear that this approach was not of general application in all family cases, and in particular that it would not ordinarily apply in children proceedings. The present case is not merely a matrimonial dispute with incidental children issues; it squarely concerns the custody, care and control of a minor child, with both parents advancing substantive applications before the Court.

40. The tentatively listed fact-finding hearing in these proceedings is relevant to both the Father's LTR Application and the Mother's Custody Application. The fact-finding process is therefore not collateral, nor is it attributable solely to the Father's LTR Application. It is an integral part of the Court's welfare analysis and necessary to determine the competing applications before it.

41. In these circumstances, it would be neither fair nor just to impose security for costs on the Father, even acknowledging his residence outside the jurisdiction. Such an order would create a significant financial barrier to his ability to participate in proceedings that are fundamentally about the welfare of a child and the resolution of competing care arrangements. This is exactly the type of injustice the post-2006 family costs regime was designed to prevent.

CONCLUSION

42. Even having accepted the Mother's position on the starting point for costs in matrimonial proceedings, that does not, in my judgment, establish a sound jurisdictional or principled basis for granting security for costs here. These proceedings are fundamentally about the welfare of a child, and the statutory rule that once anchored civil costs principles has been deliberately removed from the family context. To reintroduce those principles through an interlocutory security order (or even a security for costs order for the substantive hearing) would undermine that legislative intent and risk creating an unjust barrier to meaningful participation in child applications.

43. For reasons set out herein, I conclude that the Mother's application for security for costs is not well-founded and must be refused.

DATED this **16th** day of **January 2026**

ALEXANDRA WHEATLEY
ASSISTANT JUSTICE OF THE SUPREME COURT