Neutral Citation Number: [2025] EWCA Civ 183

Case No: CA-2024-002394

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT CANTERBURY
Mr Leslie Samuels KC, sitting as a Deputy High Court Judge
ME22P00646

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2025

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ANDREWS

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E (Children: Costs)

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Samuel Davis (instructed by **Mowll & Mowll Solicitors**) **pro bono** for the **Appellant Father**
Justin Tadros (instructed by **Beck Fitzgerald Solicitors**) for the **Respondent Mother**
The Local Authority and the Children's Guardian were not represented on the appeal

Hearing date : 18 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. The appellant father challenges the refusal of his application for an order in respect of the costs of his legal representation at a substantial fact-finding hearing in Children Act proceedings.

2. The parents married in 2011 and have four children. They are boys aged 11 and 10, a girl aged 8 and a boy aged 3. The parents separated in January 2022 after the father told the mother that he had been unfaithful. The children have remained with the mother and, although they had warm feelings for their father until the separation, they have not seen him since.

3. After the separation, the parents made allegations of domestic abuse against each other. The mother alleged physical abuse, coercive and controlling behaviour, emotional abuse and rape. The father alleged physical abuse, coercive and controlling behaviour and emotional abuse.

4. In addition, by April/May 2022 the mother was making allegations that the father had physically and sexually abused A and B and, to a more limited degree, C and that he enabled other men to sexually abuse A and B as part of a "sex-ring". The father alleged that the mother was making up these allegations in order to alienate the children from him.

5. As a result of the allegations, and particularly those of sexual abuse, the local authority and police became involved. The police conducted three ABE interviews with A and two with B. Their investigation did not lead to any action against the father.

6. As a domestic abuse complainant, the mother was entitled to legal aid. The father, though of modest means, did not have that benefit. By the end of the fact-finding hearing he had incurred legal costs of over £75,000 without so far obtaining any order for contact.

The proceedings

7. On 12 May 2022 the mother obtained a non-molestation injunction.

8. On 24 May 2022, the father, acting in person, applied for contact. In his application, he asserted that the mother "makes up many false allegations against me to weaponise the children."

9. The father's application has had a most unhappy history. It was initially allocated to District Judge level, with a first listing in October 2022, and then reallocated to be heard by a Circuit Judge in July 2023 on the basis that the mother's allegations were, in the words of one order, "of the utmost seriousness". The children were joined as parties. A seven-day fact-finding hearing was listed for November 2023, but at a pre-trial review in October 2023 it emerged that, as a result of an administrative error, no judge was available to conduct the hearing. Later that month, the Designated Family Judge allocated the case to High Court level. That order again recorded that the allegations were "of the utmost seriousness and complexity", including allegations that the father was a member of a paedophile sex ring. At that hearing, the mother confirmed through

her counsel that she could identify the third parties that she alleged to be part of the sex ring. She said that she had not done so previously to avoid prejudice to ongoing police investigations. She was directed to name those individuals by 10 November 2023, but she did not do so.

10. The matter was allocated to Mr Leslie Samuels KC, sitting as a Deputy High Court Judge. He has so far conducted no fewer than eight hearings. These included a fact-finding hearing in January 2024, which had to be abandoned on the third day for numerous reasons, which I summarise to give a flavour of the situation that the judge inherited:

    i. Police disclosure had arrived late. There were no transcripts of the children's ABE interviews, the father's police interview or the police body-worn camera footage.

    ii. A further bundle of medical records for the children had only just been served.

    iii. The mother, who was due to give her oral evidence, had had no opportunity to view any of the recently received police footage.

    iv. The local authority had only recently disclosed unredacted copies of certain documents.

    v. There was a need for further evidence, including from the children's social worker.

    vi. The Children's Guardian had not had an opportunity to review recently received evidence.

    vii. To continue would have placed inordinate pressure on the legal teams in a case where, the judge noted, the stakes were very high and the court's conclusions would have lifelong consequences for the family.

11. The fact-finding hearing was relisted and took place over six days in May 2024, fully two years after the issue of the father's application. Judgment was reserved and the judge in due course provided the parties with a substantial draft judgment that was handed down in final form on 3 July 2024.

12. The judgment runs to 68 pages, and it is only necessary to extract observations and conclusions that are relevant to the issue of costs:

    i. The mother had made eight witness statements in which details of her allegations had emerged in a piecemeal way. She gave accounts of statements made to her by A and B that described the most serious kinds of sexual abuse. There was, the judge said, considerable force in the argument that the allegations only emerged once it became clear to the mother that this was the only way to prevent the father from having contact with the children.

    ii. The mother denied that she knew who had abused her sons. She further denied that she had told the court in October 2023 that she knew their names, but the judge did not accept that.

    iii. The mother gave evidence over two days. The judge found that she was not a compelling witness and that some of her evidence was simply untrue. She was

vague, confused, passive and easily led. Her answers were rambling and avoidant. This was in marked contrast to her clear and determined approach outside the courtroom when trying to persuade professionals that the children had been sexually abused, and her anger when they did not accept her viewpoint.

iv. The judge's impression of the father's evidence was mixed. His evidence about his behaviour towards the mother during the course of their relationship and his behaviour after separation was unconvincing, and his evidence in support of his allegations of domestic abuse against the mother was entirely unconvincing, indeed untruthful. In contrast, his evidence when challenged about the allegations of sexual abuse against his children was markedly different. He was upset, and appeared bemused and defeated. He could not understand why anyone would believe him to have perpetrated such gross abuse upon his children or how anyone could put such ideas into their heads. His responses on this issue appeared measured, appropriate and genuine.

v. The judge described the case as extremely troubling. The children's accounts of abuse, which he considered in detail, were not convincing. However (at paragraph 184):

> "The mother has convinced herself that the father sexually abused her children. Secure in her belief that the central allegation is true, she has pressed relentlessly for other professionals to accept her perspective and act accordingly. When they have not acted or not acted in the way that she has wanted, she has redoubled her efforts. She has, in my judgment, pressured her children to 'start talking'. She has convinced them that the father is a bad person and that he poses a danger to her and to them. The father's actions in attending the property and threatening the mother, once seen by the children or relayed to them, have reinforced that view."

13. The judge summarised his findings at paragraph 7:

> "(1) The father was aggressive and threatening towards the mother in the course of their relationship and after it ended. This behaviour includes threats of violence towards her, threats to damage their home and throwing a bottle to the floor and a glass at a door.
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> (2) The father pressured the mother for sex on occasions during the marriage. He threatened to look elsewhere for sex and his infidelity in December 2021 brought the parties' marriage to an end.
>
> (3) The father kicked A on the foot in anger on at least one occasion.
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> (4) Neither parent has made sufficient effort to protect the children from their marital discord. The mother has not

> attempted to shield them from her own anxiety about and dislike of the father.
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> (5) The mother has behaved in an alienating way towards the children by expressing an ongoing pattern of negative attitudes and communications about the father which had the potential or intention to undermine or destroy the children's relationships with the father.
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> (6) I have not found the mother's allegations of rape or sexual abuse of the children against the father to be proved."

14. The order resulting from the fact-finding hearing provided for the court to receive expert advice on how the children could be freed from "the false narrative that they have been sexually abused by their father". A Dispute Resolution hearing is due to take place before the judge in March 2025.

The costs issue

15. After the fact-finding judgment, the father sought an order that the mother pay his costs "of the fact-finding process". The judge directed that he would decide whether an order for costs should be made in principle, with any argument about the amount of costs to follow on another occasion.

16. The application was considered at a hearing on 8 October 2024, along with two other matters that are not the subject of appeal. On the father's behalf, Mr Samuel Davis submitted that the mother had made grave allegations that had led to the need to adjourn the hearing from January to May 2024. The litigation had been financially crippling for the father and he could not afford further legal costs, or continue unrepresented. He recognised that the mother could not herself meet a costs order, but pursued an order as a gateway to a proposed application to the Legal Aid Agency under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') for some or all of his costs to be met by the Lord Chancellor. The mother opposed the making of a costs order.

17. The judge directed himself in some detail on the conventional legal principles in respect of costs in cases of this kind. He expressed considerable sympathy for the father's position and accepted that the financial cost of the proceedings had taken an enormous toll on him. However, he made no order for costs, giving these reasons:

> "59. In my analysis, these are proceedings where both parents have made cross-allegations against each other. In respect of each parent I made findings on some of their allegations but did not make findings on all of them. The fact-finding hearing had not been listed just to consider the mother's allegations of sexual abuse against the father. They had also been listed to consider the mother's allegations of domestic abuse against the father, the father's allegations of domestic abuse against the mother and the father's allegations of alienation against the mother.

60. As confirmed to me today, Mr Davis has not sought to argue that any different legal test should apply whether ultimately any costs order is to be paid by the mother herself or, as in his submissions in this case, by the State through application to the Legal Aid Agency. The principles I must therefore apply are the same.

61. Whilst there is some force in the submissions made on behalf of the father, ultimately I do not consider this to be a case where I should exercise my discretion to make a costs order in his favour. This is for the following reasons:

(1) The reasons I gave to adjourn the hearing in January 2024 were not reasons that related in any way to the mother's litigation conduct. I accept, therefore, the submission that is made on this point on behalf of the mother. The decision to adjourn was the result of late or non-disclosure by third parties, namely, the police and the Local Authority. Arguably, it is them not the mother who should have faced a costs application in relation to the adjournment.

(2) This is not a straightforward case where allegations were made by one party and found to be proved against the other party, or else where allegations were made by one party and dismissed in their entirety. The mother did establish some of her allegations of domestic abuse against the father despite his denial. He has been found previously to have harassed her in breach of a non-molestation order. The father did not establish his allegations of domestic abuse against the mother which had no substance as I found and were very much raised as a counterweight against the allegations she had made against him. Each party succeeded and failed in part on the cases advanced before me.

(3) I made critical observations about each parent in the course of my judgment. My observations of the mother are at paragraphs 82 to 85 of the judgment and of the father, at 142 to 148. I concluded that neither parent was a wholly reliable witness.

(4) The mother is right to point out that my finding in relation to the allegations of sexual abuse in relation to the children was not that the mother had maintained allegations which she knew to be wholly false. It is, as I set out in paragraph 184 of my judgment, that she has convinced herself that he did these things. This is an important distinction.

(5) The conclusions that I reached about both parents are set out in the concluding part of my judgment. As I have said, I concluded that the mother had convinced herself that the father sexually abused the children. So far as the father is concerned,

> he did not escape in any sense unscathed from the observations in my judgment. I said this about him at paragraph 186:
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> *"The father was aggressive and threatening towards the mother in the course of their relationship and after it ended. This behaviour included threats of violence towards her, threats to damage their home, throwing a bottle to the floor and a glass at her door. The father pressured the mother for sex during the marriage. He threatened to look elsewhere for sex and his infidelity in December 2021 brought the parties' marriage to an end. The father kicked A on the foot in anger on at least one occasion".*
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> 62. In conclusion, therefore, this case represents a much more mixed and nuanced picture than as presented on behalf of the father and can be distinguished from those cases where costs orders have previously been made against one party in favour of the other. I appreciate the father feels that there is an injustice in that the mother has been entitled to public funding and he has not. However much sympathy I have for that contention, it does not of itself justify an order for costs and thereby the opening of a gateway to redress that injustice through an application under s.26 to the Legal Aid Agency. As Mr Davis rightly accepts, that would not be a good reason for making a costs order in his favour.
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> 63. I therefore make no order as to costs insofar as the fact-finding process is concerned."

The appeal

18. The father, who has had the good fortune to have been represented pro bono before us by Mr Davis and his instructing solicitors, appealed on a number of grounds. When granting permission, I noted that some had better prospects of success than others.

19. We should be clear about the scope of the appeal. It concerns the judge's decision to decline to make an order that the mother should pay some or all of the father's costs. It does not concern three subsequent stages that would only arise if an order for costs in principle was made:

    (1) Assessment of the amount of the father's costs.

    (2) Consideration, if appropriate, of the amount that it would be reasonable for the mother to pay under section 26 of LASPO.

    (3) Consideration of whether the father could recover any costs not ordered to be paid by the mother from the Lord Chancellor in the light of the Civil Legal Aid (Costs) Regulations 2013 ('CLA(C)R').

    When granting permission to appeal, I invited the parties to address the position that might arise under LASPO and CLA(C)R if a costs order was made, so that we could

understand the wider context in case it was relevant to the issue before us. We are grateful for their helpful submissions, which reveal significant areas of disagreement that may require consideration on another occasion. These subsequent stages, and the disagreements about them, are beyond the scope of this appeal and I say no more about them.

20. The father now seeks an order that the mother should pay all of his costs, or the great majority of them. His arguments can be summarised in this way:

    (1) The judge should have recognised that the mother's pursuit of the sexual allegations (meaning the allegations of rape of herself and sexual abuse of the children, leading to the father's cross-allegation of alienation) in and of itself justified a costs order on the basis that it was reprehensible or unreasonable litigation conduct. He failed to recognise the 'warping' impact of those allegations on the proceedings and the resulting costs. He should have separated them out for the purposes of the decision.

    (2) In declining to make any costs order, the judge wrongly relied on matters that could at best have led to a reduced costs order, namely (a) the adjournment of the January hearing, (b) the fact the mother established some of her allegations, (c) the fact that critical observations were made about both parents, and (d) the fact that findings were made about the father's behaviour.

    (3) The judge in any case should have found that the adjournment of the January hearing was a consequence of the mother's sexual allegations.

21. In his grounds of appeal, the father also advanced two novel arguments in respect of the test for making costs orders in children cases:

    (1) Where, as here, a costs application is made in an acrimonious case for the purpose of seeking recovery from the Legal Aid Agency, the judge should have adopted a clean sheet approach instead of the normal test of reprehensible or unreasonable litigation conduct.

    (2) Where, as here, co-parenting is not possible, the court in private law children proceedings should have adopted a clean sheet approach to costs applications.

    In a supplementary skeleton argument, Mr Davis abandoned the second of these contentions, but he maintained the first argument in oral submissions. A considerable part of his presentation was taken up with that argument, but we were not persuaded by it and did not require submissions in response.

22. Responding with moderation on the other issues, Mr Justin Tadros, who did not appear at trial, argued that the judge directed himself correctly in law and reached a conclusion that was open to him in the exercise of a broad discretion. His extempore judgment should not be read unduly critically. His findings of fact are not challenged. He was entitled to put the sexual allegations into a context where the father had been domestically abusive and to balance all factors, including that the mother genuinely believed in the allegations, or at least that she was not found to have known that they were false. She was not unequivocally found to have intentionally alienated the

children from their father. Both parties had lied and no order for costs was the right outcome.

Orders for costs in proceedings about children

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.

25. These authorities do not support the drawing of distinctions between different kinds of proceedings and there is no advantage in doing so. The fact that orders for costs in care cases will be even rarer than they are in private law cases is not a reason for applying a different test. In any event, private and public law applications not infrequently co-exist within the same set of proceedings.

26. In support of the submission that a different test should apply to the costs of fact-finding hearings in private law proceedings, Mr Davis relied on *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893 (Ward and Wilson LJJ), where that concept was endorsed. At a fact-finding hearing, a mother had substantially succeeded in proving her allegations against a father. This court made an order that he should pay two-thirds of the costs of the hearing. It was said by Wilson LJ at paragraph 17 that the ring-fenced hearing meant that this was not the paradigm situation to which the general proposition in favour of no order as to costs applied. At paragraph 19, the costs of the fact-finding hearing were said to fall into a separate and unusual category.

27. I do not consider that this approach has survived the Supreme Court decisions. *Re T* was an appeal from a decision of this court in which Wilson LJ again gave the only reasoned judgment, finding that the trial judge had been wrong to apply the conventional 'no-costs' approach where a local authority had failed to prove facts in care proceedings. At paragraph 22, Lord Phillips of Worth Maltravers noted that the decision in *Re J* could have been justified on the basis of the father's unreasonable approach, but that Wilson LJ had reasoned that liability for costs could be imposed whether the conduct had been reasonable or not. At paragraph 31, he described that approach as being at odds with a series of other decisions. At paragraph 28, he observed that the decision to have a split hearing cannot affect the principles to be applied by the court when dealing with costs, although it may have a practical impact on the court's decision. At paragraphs 43-44 he stated:

> [43] … Wilson LJ in *Re J (Costs of Fact-Finding Hearing)* at para [19] disclaimed any suggestion that it was appropriate 'in the vast run of these cases to make an order for costs in whole or in part by

> reference to the court's determination of issues of historical fact'. But, as I have indicated, there is no valid basis for restricting his approach in that case to findings in a split hearing. The principle that he applied would open the door to successful costs applications against local authorities in respect of many determinations of issues of historical fact. The effect on the resources of local authorities, and the uses to which those resources are put, would be significant.
>
> [44] For these reasons we have 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 and which should not be subject to an exception in the case of split hearings…"

28. The proposition that a different test applies to fact-finding hearings has therefore been rejected by the Supreme Court in *Re T*, and it gains no support from the later decision in *Re S*. It would in any event be undesirable if the position were otherwise, as that would create cost-based incentives for parties to seek, or seek to avoid, separate fact-finding hearings.

29. Further unnecessary distinctions were suggested in *A Mother v A Father* [2023] EWFC 105(B), in which a recorder hearing private law proceedings made an order that a father pay a mother's costs of a fact-finding hearing. The decision was plainly justified on the basis of the father's unreasonable litigation conduct. However, the recorder carried out a lengthy analysis of the law relating to costs in children cases in order to deduce what he described as elementary principles. He concluded that there were different rules as between fact-finding and welfare hearings and as between private law and public law cases, and set out what he considered to be the proper approach for the court to take when questions of costs arise in respect of private law fact-finding hearings. The judgment is wrong in a number of respects. It was not appropriate for a recorder sitting in the Family Court to seek to give guidance in this expansive manner, it was in any case unnecessary as the costs order was justifiable on conventional grounds and, more fundamentally, the decision draws a number of unsound distinctions. The correct approach is set out at paragraph 23 above. It is simple, flexible and well-established, and there is no reason to depart from it.

30. I also reject Mr Davis's submission that a different approach should be taken where an application is made in an acrimonious case against a legally aided party as a gateway to seeking recovery against the Lord Chancellor. This is said to be justified because in such cases the three common justifications for the 'no order' approach are absent: not depleting family funds, not deterring parties from putting forward their cases, and not increasing acrimony. Again, there is no advantage in creating a nebulous special category when the court, acting on ordinary principles, is well able to make any costs order that meets the interests of justice in individual cases.

Analysis and conclusion

31. Turning to this individual case, I acknowledge the generous latitude enjoyed by a judge making an evaluative decision after a substantial trial, and remind myself of the limits on the role of an appeal court and the obligation to read extempore judgments sensibly and not over-critically. It should also be noted that, with this one exception, none of

the judge's primary decisions in this difficult case have been subject to any appeal by either party.

32. To start with, the judge was right to take account of the whole picture. The cross-allegations of domestic abuse were sadly commonplace, and were never likely to lead to a costs award. Similarly, and in disagreement with the father's argument, there was in the light of the overall findings no basis for penalising the mother in costs because she failed to prove that he had raped her.

33. However, the judge should have acknowledged that the mother's extreme allegations that the father had sexually abused the older children and had handed them over to a paedophile sex ring were of an entirely different character and that different costs considerations consequently arose. His starting-point that "these were proceedings where both parents had made cross-allegations" was an inadequate reflection of the true position. He should have recognised, firstly, that there was no equivalence between the sexual allegations involving the children and the other allegations, and secondly, that those allegations had completely transformed the proceedings, leading to extraordinary delay and hugely increased costs. He should also have appreciated that the adjournment of the January hearing was a direct result of the mother's pursuit of the sexual allegations, and that it was incorrect to say that it was not related in any way to her litigation conduct. In short, he should have separated out the unfounded sexual allegations involving the children.

34. I also accept that the judge was mistaken in treating the fact that he had made a mixture of findings as a reason for making no order for costs, without considering his power to order that a proportion of the father's costs should be paid.

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."

36. In any case, the judge's approach to the mother's motivation was in my view unduly indulgent. He should have taken into account a number of striking features of the litigation:

i. The link that he had identified between the sexual allegations and the mother's realisation that this was the only way to prevent the father from having contact with the children.

ii. The lack of any objective foundation for the sexual abuse allegations, other than the children's statements under pressure.

iii. The mother's lie about knowing the names of other members of the paedophile ring, which was bound to cast doubt on the genuineness of her belief.

iv. Her choice to make lurid allegations (including that the father had involved a child in bestiality with a family pet) that she neither pursued nor withdrew.

v. Her continuous production of witness statements, arising from her pressure on the children to 'start talking' and leading to the court having to accommodate the results of repeated interviewing of the children.

vi. Her deletion of a recording of one child before it could be heard by other adults, supposedly to protect his privacy.

vii. The court's "considerable doubt" about the genuineness of a drawing that the mother said had been made by a child.

viii. The wholly unsatisfactory quality of the mother's oral evidence in relation to the sexual abuse allegations.

37. In the light of these matters the judge's conclusion that the mother's litigation conduct was not reprehensible or unreasonable cannot stand. We cannot remit the question to the judge, who is continuing to hear the substantive proceedings, and there is no reason why we should not reach our own conclusion.

38. After the hearing, we received submissions from the parties about the scope of our order. A number of the Family Court hearings led to orders that there be no order for costs, and it would not have been open to the judge to disturb them. Other orders were silent as to costs, and it was open to the judge and to this court to make orders in respect of those costs at a later stage. The same applies to the order of 6 February 2024, made at the end of the abandoned fact-finding hearing, by which the costs were reserved.

39. Taking all matters into account, I would substitute for the judge's costs order an order in these terms:

> The mother shall pay half of the father's costs of the Children Act proceedings up to 3 July 2024, excluding the costs of the father's representation at any hearing in respect of which an order was made that there be no order for costs; this order shall not be enforced against the mother without the leave of the Family Court.

That portion of the father's costs is the least that can be properly ordered in the circumstances as a reflection of the impact on the proceedings of the mother's false allegations that the father and others have sexually abused the children, and the father's cross-allegation of alienation. I repeat that the costs order does not relate to the mother's allegation of rape.

40. To that extent, I would allow the appeal.

Lady Justice Andrews:

41. I agree.

Lord Justice Moylan:

42. I also agree.
