Neutral Citation Number: [2026] EWCA Civ 381

Case No: CA-2025-002907

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WEST LONDON
Her Honour Judge Rowe KC
ZW23P01323

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2026

Before :

LORD JUSTICE PETER JACKSON
and
SIR LAUNCELOT HENDERSON

- -

Re M (A Child: Costs)

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- -

The **Appellant Father appeared in person**
Anita Guha KC (instructed by **AFP Bloom LLP**) for the **Respondent Mother**

Hearing date : 12 March 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson :

Introduction

1. This is an appeal by the appellant father ("the father") from an order for costs ("the Costs Order") made against him on 1 October 2025 by Her Honour Judge Rowe KC ("the Judge") sitting in retirement in the Family Court at West London on an appeal from a panel of two lay magistrates in private law proceedings under the Children Act 1989 ("CA"). Those proceedings concerned the young son of the father and the respondent mother ("the mother"), to whom I will refer as "M". M is now aged 5.

2. By the Costs Order, the Judge ordered the father to pay the mother's costs of the appeal from the magistrates which she summarily assessed in the sum of £32,723.50 plus VAT, making a total of £39,268.20. The Judge had previously circulated a written costs judgment ("the Costs Judgment"), also dated 1 October 2025, after receiving written submissions from the parties, who at that stage were both represented by counsel: Anita Guha KC (instructed by AFP Bloom LLP) for the mother, and Charlotte Baker (instructed by Edwards Family Law) for the father.

3. As I shall explain, the appeal from the magistrates in respect of which the Costs Order was made concerned a final child arrangements order under CA section 8 made by the magistrates sitting in private on 25 March 2025, the reasons for which were contained in a reserved written decision delivered by them a week later on 2 April 2025 ("the April 2025 MC Order"). For differing reasons, both the mother and the father were dissatisfied with various procedural and substantive aspects of the April 2025 MC Order, and on 23 April the mother filed an appeal which was soon followed by a respondent's notice from the father raising his cross-appeal on 7 May 2025. Both the appeal and the cross-appeal were then heard by the Judge on 28 July 2025, when she reserved her judgment. On 6 August 2025, she handed down her judgment ("the Main Judgment") which:

    a) allowed the mother's appeal and set aside the April 2025 MC Decision;

    b) dismissed the father's cross-appeal;

    c) directed that the case be listed for a final hearing with evidence from the independent social worker ("ISW") and both parents, with a time estimate of 2 days;

    d) determined that a new ISW should be instructed; and

    e) directed that the child arrangements should remain unchanged for the time being, subject to further order or agreement between the parties to a different arrangement.

4. The general shape of the dispute between the parents about the nature and timing of the care arrangements for M is apparent from the introduction to the Main Judgment, where the Judge provided this helpful summary:

> "1. On 2 April 2025 the magistrates made a final order on the father's application for a shared lives-with order. They implemented a shared care arrangement, building up from the imminent start of overnight stays soon after the hearing through to a full shared care arrangement by September 2026.
>
> 2. The mother had agreed a cautious start to overnight stays, but advocated for a final hearing in the autumn once it was possible to see how that was going. She appeals the order, seeking a final hearing in the autumn with no further increases in the time that [M] is spending with his father.
>
> 3. The father also appeals the magistrates' final order, his Respondent's Notice supporting the making of a final order but criticising the magistrates for departing from what he asserts was the clear recommendation of the ISW for the shared care arrangement to begin sooner than the dates in the final order. He seeks confirmation of the making of a final order, but with a swifter series of steps implementing the final shared care arrangement, which he asserts was the import of the evidence of the ISW."

5. It is apparent, therefore, that the main areas of contention were: first, whether the magistrates had been right to make a final shared care order instead of adjourning the question of making of such an order to a further hearing in the autumn of 2025; and secondly, the pace at which the move to overnight stays of M with his father, which the mother was cautiously prepared to contemplate, should develop. Each of those main issues was decided by the Judge in favour of the mother in the Main Judgment. It is also important to record that there has been no appeal by either parent against the Judge's decision on those issues.

6. The Main Judgment left unresolved the questions of costs, and the identity of the replacement ISW. The Judge dealt with the latter issue on 23 August 2025 in an "Addendum Judgment: ISW", by which she appointed Elena Sandrini to succeed William Walker in that role. She also noted that the mother had applied for an order that the father should pay her costs of the 25 March 2025 hearing before the magistrates and of the appeal to the Judge on an indemnity basis. Since that application was resisted by the father, the Judge gave directions for him to file written submissions, with any reply by the mother to be filed by 2 September 2025. Those directions were duly complied with, and (as I have said) the Judge handed down the Costs Judgment on 1 October without any further oral hearing.

7. I will need to examine the law on the making of costs orders in private law children's proceedings later in this judgment, but it may be helpful at this early stage to record an encapsulation of the general practice recently given by my Lord, Peter Jackson LJ in *Re E (Children: costs)* [2025] EWCA Civ 183, [2025] 1 WLR 2150, at [23] of his judgment, with which Andrews and Moylan LJJ agreed:

> "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 r 28.1."

Background

8. I have already indicated the general nature of the dispute which gave rise to the Main Judgment and the Costs Judgment. I will now give as brief an account as I can of the relevant background facts, largely drawn from paragraphs 7 to 25 of the Main Judgment under the headings "Brief Chronology" and "The March 2025 hearing".

9. The parents are both in their mid-thirties, having married in the UK in August 2015. They relocated to Dubai in 2017/18 where the mother found work, and the family remained in Dubai for some years. M was born there in November 2020. As their marriage deteriorated, however, the parents spent increasing time back in the UK with their respective families, and in March 2023 they left Dubai permanently. The mother returned to live with her family, and the father returned to live with his.

10. M lived with his mother, but he also spent time with his father. Unfortunately, the father was abusive towards the mother to such an extent that, according to the mother, handovers had to be professionally supervised. The father disputed at least some of the mother's assertions, and said that the mother unreasonably curtailed his time with M from the outset.

11. In October 2023, the father applied for a child arrangements order, seeking unsupervised and extended time with his son. The case was allocated to magistrates, and was listed for a First Hearing Dispute Resolution Appointment ("FHDRA") on 18 December 2023.

12. On 30 November 2023 the Judge heard an application by the mother for permission to take M with her to Dubai where she had to go for a few days for her work. The Judge granted the application, found that the father was wholly unreasonable in contesting it, and awarded costs against him.

13. At the FHDRA on 18 December 2023, the mother indicated that she did not seek a separate fact-finding hearing and the parents agreed arrangements for supervised visiting time, with third parties present for handovers. Directions were given for the filing of evidence for a further hearing in January 2024.

14. On 19 January 2024, the court concluded that a fact-finding hearing was in fact necessary and gave directions for such a hearing over 2 days in March. The parties also agreed that after the hearing they would jointly instruct an ISW, William Walker, to advise on welfare.

15. At the next hearing on 18 March 2024, the magistrates (Family Justices Mr D Simms and Mrs K Farmer) acceded to the father's submission through his then counsel that they should review the need for a fact-finding hearing, and (having done so) they

concluded that it was not necessary to hold such a hearing. Their written reasons show that they gave careful consideration to this issue, and were referred by counsel to relevant case law. As the Judge records, at para 13 of the Main Judgment:

> "They looked at admissions made by the father at court, and other material including audio evidence of handovers and Whatsapp messages. The father's counsel said that he accepted that his behaviour had been abusive, should not have happened, and that the mother would have felt belittled, humiliated and scared. He also conceded that [M] would have been emotionally harmed through being exposed to this behaviour at handovers. He nonetheless denied that his behaviour was coercive and controlling; the magistrates disagreed and found that it was. The ISW was directed to provide a welfare report by 20 May 2024 and a DRA was listed in June."

The magistrates also ordered that there should be "continuity of Judiciary" for the hearing in June "and all future hearings". Further, the magistrates noted that the father had agreed "to attend an appropriate course for perpetrators of domestic abuse", saying that "the court would expect this to be one which is acceptable to the mother and to Mr Walker, the ISW" (reasons, para 12).

16. In his welfare report, Mr Walker recommended a staged move to overnight stays for M with the father, with the eventual aim of an equal share of his time between his parents.

17. At the DRA on 12 June 2024, the court directed the father to engage in a so-called "Parenting MOT" focussed on his insight into his behaviour, his acceptance of responsibility and his capacity to change, and giving recommendations for future work. The court listed a further DRA in September 2024, and a 2-day final hearing on 18 and 19 November 2024.

18. At the next DRA in September 2024, the parties agreed interim arrangements for M to spend two afternoons a week with his father, and 6 hours on Sundays. This contact remained supervised, with a third party present at handovers. The parents agreed to meet Mr Walker, and then to file evidence responding to his recommendations and giving their own updates. Meanwhile, the 2-day final hearing in November was retained.

19. The meeting with Mr Walker on 27 September was not a success. According to the mother, the father was disrespectful, offensive and dismissive; while even the father accepts that "it did not go well". The Judge adds, at para 17 of the Main Judgment, that at a handover on 18 October 2024, of which the parties gave different accounts, the mother asserted that "the father was belittling and controlling to the point that the contact supervisor asked her whether the father has a problem with women".

20. In the event, the final hearing fixed for 18 and 19 November 2024 was inconclusive. The parties were both represented by counsel, Ms Guha KC appearing for the mother and Ms Baker for the husband. In short, the magistrates decided on the first day of the hearing that they would need to hear oral evidence from the parties before reaching a final decision, contrary to the father's consistent position that oral evidence was unnecessary. The further delay that this would entail would not be time wasted, because

it would allow time for the husband to undertake further therapy recommended by Mr Walker. The parties had an opportunity to reflect overnight and to put forward their proposals on day 2 of the hearing, but this did not deflect the magistrates from the view they had formed on day 1. According to their written reasons as at the end of 19 November 2024, their decision was that "the Court needs to have judicial oversight of any progression of the arrangements to include overnight stays and … it cannot be left to the parties to agree whether conditions have been met." They repeated that "we do not have sufficient evidence that an interim order involving overnight stays is safe for [M] and his mother."

21. Directions were therefore given by the magistrates for the father to undertake further sessions with Parenting MOT and for Mr Walker to file a short updating risk assessment before an adjourned hearing in March 2025 "which shall be a part-heard final hearing to consider the progression of child arrangements", with a time estimate of one day and with Mr Walker to be available to give evidence remotely until 1 pm. The parents were also able to reach agreement in principle to an equal division of M's school holidays "if and when the current child arrangements are able to progress to overnight contact".

22. The Parenting MOT report was filed on 12 March 2025. It was generally positive in tone, noting that the father was sad not to be seeing his son more and was "trying hard to remain calm in the moment". The report supported "quality time" for the father with M.

23. Mr Walker's additional report, filed on 14 March 2025, commended the father for his work on himself and also supported the move to overnight contact, concluding that "the protective factors outweigh the potential risks for [M] having overnights with the father".

24. At the adjourned hearing on 25 March 2025, however, matters took an unexpected turn. As the Judge recorded in the Main Judgment, at paras 23 and 24:

> "At the outset of the hearing, the magistrates indicated their intention to make a final order. The mother objected but the father agreed. Mr Walker was waiting online to join the hearing, and the magistrates decided to ask Mr Walker his views on whether there could be a final order. In effect, the hearing simply went straight into Mr Walker's evidence. In his evidence Mr Walker remained of the view that the ultimate aim should be for [M] to share his time equally between his parents. He made recommendations about how [M's] time with his father should progress, however overall he agreed that increases should proceed at [M's] pace and that [M] would be further harmed were he to be exposed to further parental conflict.
>
> The magistrates heard submissions but no evidence – not least because there was no time for this at the March hearing. They adjourned the conclusion of the case for them to prepare their reasons, which were handed down on 2 April 2025."

25. The magistrates' written reasons run to 10 pages. They explained why they had decided to proceed to make a final order, and provided a detailed account of Mr Walker's oral

evidence and the submissions of the parties. They stated that they accepted Mr Walker's evidence and agreed with his recommendations. They went through the welfare checklist in CA section 1(3), and after reminding themselves that M's welfare was their paramount consideration they briefly reviewed the father's admissions of domestic abuse and the work done by him to address his behaviour under Mr Walker's supervision. They rejected the mother's submissions that there had been procedural unfairness and she had not had a fair hearing. They said they had read the evidence filed by both parents, and the parents had been given an opportunity to ask questions of Mr Walker, so "the parents' right to a fair hearing has been protected". The magistrates then set out their decision on the division of time to be spent by M with both his parents, beginning with the current arrangements which were to continue until 3 May 2025 and then building up to M starting school in September 2025 (when M would spend alternate weekends with the father from Friday to Monday) and to "50/50 shared care on basis of a two week pattern" with effect from the start of the new school year in September 2026.

26. These arrangements were then embodied in a Child Arrangements Order under CA section 8 also dated 2 April 2025. This is the order which I have defined in [3] above as "the April 2025 MC Order". Paragraph 21 of this order recorded that "There is no order for costs".

The appeals of the mother and the father against the April 2025 MC Order

27. I have already explained at [3] above how the mother, and then the father, appealed against the April 2025 MC Order, and I have summarised the relief granted by the Judge when she allowed the mother's appeal and dismissed the father's cross-appeal. The Judge's reasons for doing so are contained in the Main Judgment. Since those reasons formed the backdrop to the Costs Judgment, a short account of them is necessary.

28. The mother had 5 grounds of appeal: (a) the magistrates erred in law by failing to provide adequate reasons to support their decision that an order for equal shared care was safe and in M's best interests; (b) they also erred in law by failing adequately to consider or apply the relevant provisions of PD 12J FPR 2010; (c) their refusal to adjourn the final hearing was unjust because of a serious procedural irregularity; (d) they also erred in law by adopting a linear approach in their evaluation of the competing welfare options for M; and (e) their decision to make an order for equal shared care was irrational and wrong.

29. The Judge took grounds (a), (b) and (c) together as there was significant overlap between them. One of the main arguments for the mother in support of these grounds was that the magistrates could not evaluate the risk to M on disputed facts without hearing oral evidence from the parents on which those facts could be tested. Instead, submitted the mother, they effectively delegated the assessment of risk to Mr Walker, whose evidence (including his cross-examination) was the only live evidence they heard. The magistrates also failed to explain how they felt able to withdraw the oversight of the court, in a situation where one of the parents had been found to be a victim of domestic abuse by the other. Further, the mother contended that they were wrong to decide to make a final order when both parents had submitted formal documents confirming that the order should be an interim one, followed by the filing of evidence, a supplementary report from Mr Walker and a final hearing in the autumn. The father's volte face in March in accepting the magistrates' decision to make a final

order was said to be opportunistic, and could not be taken to be a reasoned change of position which validated it.

30. The father's case was essentially that the magistrates had been entitled to proceed as they did. He had engaged with Parenting MOT and other therapy, with positive outcomes. The mother's counsel, Ms Guha KC, had the opportunity to cross-examine Mr Walker at length, and to make lengthy submissions. The reasons of lay magistrates are not to be scrutinised as if they were judgments, and in the 10 pages of their reasons delivered on 2 April 2025 "the magistrates did what needed to be done". Nor had they delegated their assessment of risk to Mr Walker. Rather, they simply accepted his evidence. Because the principle of overnight contact was accepted, the magistrates were entitled to take a proportionate view and to hear only the evidence of the ISW.

31. The Judge found all 3 of these grounds to be made out in her "analysis and decision" at paras 43 to 55 of the Main Judgment. She introduced her discussion by saying in para 43:

> "Whilst the mother was prepared to move cautiously forward with starting overnight stays under the watch of the court, a key issue in relation to the arrangements going forward remained the extent to which the father had achieved insight into his coercive and controlling behaviours and whether he had sufficiently demonstrated the ability to make and sustain change."

The Judge was then critical of a passage in the father's written statement in which he said he wanted to "focus on moving forwards rather than revisiting the past", but he made no apology to the mother for his previous controlling and coercive behaviour, and repeatedly criticised her for raising concerns about him.

32. The Judge then pointed out that in November 2024, in the face of resistance from the father, the magistrates had decided that they needed to hear oral evidence from both of the parties before reaching a final decision; and the hearing on 25 March 2025 was the part-heard adjourned final hearing for that purpose. The Judge expressly accepted, at para 48, that "[t]he issue for determination in March remained … the very issue identified by the court in November, which led the court to conclude that oral evidence from the parties was necessary". The Judge might have added, in my view, that the one-day time estimate for the adjourned hearing on 25 March was clearly predicated on its *not* being the entire final hearing, because a 2-day estimate would have been the minimum needed if the oral evidence of both parents was to be heard as well as the evidence of Mr Walker. The Judge further accepted, at para 46, that neither side had expected the hearing on 25 March to be a final one, with the consequence that "the position of the magistrates was unexpected, as was the father's immediate change of stance to agree."

33. In a key passage in para 53, after reviewing the magistrates' written reasons, the Judge said:

> "These reasons confirm my conclusion that the magistrates delegated their decision on risk to Mr Walker: they actually say as much in their reasons. In my judgment, having accepted Mr Walker's assessment of risk, the magistrates fell into error by

> identifying the essential issue for them to determine in March as simply the issue of timescale. They simply failed in their reasons to refer to, let alone to determine, the disputes between the parents as to the father's behaviour over the recent months and the likelihood that left to themselves, the parents would be able to agree matters relating to the progression of overnights. They did not explain why they no longer considered that they needed to hear the parents' oral evidence …"

34. The Judge then said, in para 54:

> "The magistrates accepted that PD 12J was engaged, but did not analyse the ongoing impact of that abuse on the mother. They did not explain, contrary to the requirements of that PD, how the mother – a victim of domestic abuse for which the father made no written apology (preferring to look forward rather than back) - could navigate the stepped changes proposed and reach a fully workable co-parenting arrangement with the father. As Ms Baker herself submitted, the magistrates simply "left them to it"…"

35. As the Judge observed at para 55, her decision on grounds (a), (b) and (c) of the mother's appeal was sufficient to dispose of both the appeal and the cross-appeal. However, she went on to deal briefly with grounds (d) and (e), finding that they too were made out, save that she did not find the magistrates' decision on shared care to be irrational given the evidence of Mr Walker: see para 63. The Judge was also critical of the vacillating nature of some of Mr Walker's evidence (para 58), which led her to conclude that a new ISW should be instructed.

The law on costs in proceedings about children

36. There is no disagreement between the parties about the principles which the court should apply when deciding whether to make a costs order in proceedings involving the welfare of children. The summary by Peter Jackson LJ of the general practice of not awarding costs in such cases which I have already quoted at [7] above is a recent statement of the general rule, which this court has even more recently described as "well established and uncontroversial": see *Pringle v Nervo* [2026] EWCA Civ 266 ("*Pringle*"), in which judgment was handed down by a constitution comprising King, Males and Stuart-Smith LJJ on 13 March 2026, at [25], referring to an agreed document submitted by the parties in that case headed "Legal Framework Regarding Costs". Since the judgment in *Pringle* was handed down the day after we heard argument in the present appeal, we informed the parties of its imminent appearance and gave them an opportunity to comment on it by brief written submissions within a short timeframe should they wish to do so. In the event, counsel for the mother had nothing to add, but the father, appearing before us in person, took the opportunity to make some commendably brief submissions on 16 March 2026 which we have taken into account.

37. Since the law in this area is so well established, there would be nothing to gain by another comprehensive exposition of it in this judgment, and I can instead highlight a few points which seem to me to merit particular attention in our case, while referring any reader who may wish for a fuller account of the law to the judgment of King LJ in

Pringle at [25] to [35] and to the decisions of the Supreme Court in two public law children cases: (a) *In re T (Children) (Care Proceedings: Costs) (CAFCASS and another intervening)* [2012] UKSC 36, [2012] 1 WLR 2281, ("*Re T"*) at [39] to [44] per Lord Phillips of Worth Matravers PSC giving the judgment of the court; and (b) *In re S (A Child) (Access to Justice Foundation intervening)* [2015] UKSC 20, [2015] 1 WLR 1631, (*"Re S"*) at [15] to [33] per Baroness Hale of Richmond DPSC with whom the other members of the court agreed.

38. The first point I wish to emphasise is the interaction between Part 44 of the Civil Procedure Rules 1998 ("CPR") and the Family Proceedings Rules 2010 ("FPR"). Rule 28.2 FPR disapplies the general rule in CPR 44.2(2) that "the unsuccessful party will be ordered to pay the costs of the successful party" but "the court may make a different order". This is often described as the general rule that costs shall follow the event. Instead, FPR 28.1 simply says that "The court may at any time make such order as to costs as it thinks just". As a matter of jurisdiction, therefore, the discretion to order costs under the FPR could hardly be wider, with the only stated criterion being what the court considers to be just.

39. Nevertheless, FPR 28.2 then incorporates by reference most of the provisions of CPR Part 44, including (importantly) rules 44.2(4) and (5). Rule 44.2(4) provides that:

> "In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
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> a) the conduct of the parties;
>
> b) …"

Rule 44.2(5) then explains what is meant by "conduct" in this context, saying that it includes: "(a) conduct before, as well as during, the proceedings …; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; …" There is accordingly a close focus on the litigation conduct of the parties.

40. The next point to which I draw attention is the underlying rationale for the general rule in children's cases. According to Lady Hale in *Re S* at [19], the "classic explanation" is that given by Wilson J in *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317, 1319:

> "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party."

41. Lady Hale then enlarged on this theme at [20] to [26]. For example, she observed at [21] that "it can generally be taken for granted that each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child", and "No one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the court achieve the right solution". Lady Hale added, at [23]: "Another consideration is that, in most children's cases, it is important for the parties to be able to work together in the interests of the child both during and after the proceedings" and "Parents need to be able to co-operate with one another after the case is over … Stigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future."

42. Finally, it is important to bear in mind what Lady Hale said in [29] about the position where, as in *Re S* itself, the disputed costs are those of an appeal:

> "Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, 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 *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" (para 24), 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."

The Costs Judgment

43. The Costs Judgment began by recording that the mother sought her costs on the indemnity basis in the sum of £21,429.50 for the first instance hearing before the magistrates in March/April 2025, and £45,222 plus VAT for the appeal hearing before the Judge (including the preparation of written costs submissions). The Judge then directed herself impeccably on the law at paras 3 to 11, referring (among other things) to the disapplication by the FPR of the general rule in the CPR that costs follow the event; to the existence of "a powerful body of authority … why a costs order is unusual in cases concerning children" (referring to *Re S* at [18] to [26]); and to the position on an appeal (quoting *Re S* at [29]). The Judge also set out the relevant provisions of CPR 44.2(4) and (5) relating to conduct, and she quoted the description of the general practice given by Peter Jackson LJ in the *Re E (Children*) case at [23].

44. Next, the Judge set out the mother's case on the merits at paras 12 to 15. The mother submitted that costs should be awarded to her "on the basis that costs follow the event and/or that the father's litigation conduct has been unreasonable and/or reprehensible". She relied on the fact that her appeal succeeded on all grounds, while the father's cross

appeal was dismissed. She submitted that she sought to avoid the need for the March 2025 hearing by accepting Mr Walker's recommendation of introducing overnight contact building up to 2 nights in July pending a final hearing, and she proposed that the March hearing be vacated and re-listed in the autumn on that basis. The father refused, and argued in March for a swifter increase in overnight stays by M leading to equal shared care in October 2025, but this was rejected by the magistrates, who also rejected his "wholesale attack" on the mother's approach at the March hearing. Further, despite cross-appealing on the basis that the magistrates' reasoning was deficient the father opposed the mother's appeal, and his solicitors asserted in correspondence that it had no prospect of success, threatening the mother with a costs application should she persist with her appeal. The "key factor" in the case was "conduct", and having rejected proposals to vacate the March hearing the father had "wasted the costs of both hearings". As to quantum, the mother's costs were reasonable, and she was entitled to continuity of counsel, having appointed Ms Guha to represent her before Ms Guha took silk.

45. The Judge then set out the father's case at paras 16 to 18. His core submission was that "All of the powerful factors behind the usual principle of not awarding costs in cases concerning children" applied, both at first instance and on appeal. He submitted that his conduct up to and at the March hearing was "not unreasonable", and the summer holiday orders made by the magistrates "went well beyond the dates proposed by the mother who was also unsuccessful in removing Fridays from alternate weekends when they began". Nor had his appeal been dismissed as "without merit". The mother had not sought a costs order against him at the March hearing, and the first indication that she would do so came after receipt of the Judge's Main Judgment on 14 August 2025. He had been entitled to try and preserve on appeal the order that ultimately there would be shared care of M, and the Judge had allowed the mother's appeal "on the basis of errors by the magistrates". On quantum, the father also had a number of points, not least that the fees of Ms Guha KC, both at first instance and on appeal, had been over 4 times as much as those of his own counsel. He also argued that he would be unable to afford an award of costs, as he had no income or savings and lived at home with his parents. He said that he already owed over £25,000 in unpaid legal fees. Finally, he argued that nothing took the case "out of the norm" so as to justify an award of costs on an indemnity basis: see the principles reviewed by Tomlinson J in *Three Rivers District Council and others v Bank of England (No 6)* [2006] EWHC 816 (Comm), [2006] 5 Costs LR 714, at [25] and following.

46. Having thus set the scene, the Judge dealt first with the principle of an award. As she said at para 21, she refused the application for costs of the first instance hearing, but she made a costs order in respect of the appeal.

47. In relation to the first instance hearing, the Judge said this:

> "22. While the parties had agreed that the hearing in March would not be a final hearing, they did not agree on interim issues. I accept that the mother had taken reasonable steps to save the costs of a contested hearing. I do not accept that the father was unreasonable in wishing to retain the hearing to deal with what should happen in the interim.

> 23. It is true that the father readily and swiftly accepted the magistrates' decision to make a final order, however in my judgment, however unwelcome that was for the mother, it cannot be said that the father was unreasonable to do so. It was their decision not his, and within litigation he was entitled to take advantage of the position of the court and to seek the best possible result with the tribunal he was appearing before.
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> 24. It is true that the mother was not able to apply for costs at the end of the first hearing – because, of course, she was not the "successful" party. That said, she had not prepared and served an N260 prior to the first hearing, and she had not indicated an intention to seek costs when she faced the fact that the father would not agree to vacate the hearing. She was not, on that basis, intending to make an application for costs whatever the outcome in March.
>
> 25. The reasons why costs orders are not generally made in first instance trials apply in full in this case.
>
> 26. There should be no order for costs."

48. Why, then, did the Judge make a different order in relation to the appeal? She gave her reasons at paras 27 to 30, as follows:

> "27. This was in my judgment a powerful appeal. The court had earlier determined that the findings admitted by or determined against the father were relevant to welfare – indeed the case was adjourned for the father to work on those issues. The mother's case in March was that the father had not demonstrated any or any sufficient change and that the progress of the spending time arrangements should therefore be appropriately cautious. The father disputed this. The magistrates gave the parties no forum in which to litigate that key issue. Not only that but while on the one hand describing the mother's appeal as having "*no prospect of success*", the father actually launched his own appeal, criticising the very reasons of the magistrates that he stalwartly defended in the face of the mother's challenge.
>
> 28. The father himself, along with his solicitors, plainly took the view that costs should follow the event: his solicitors said this explicitly in their letter to the mother's solicitors dated 23 June 2025,
>
> > '*If [the mother] refuses to withdraw her appeal, and her appeal is unsuccessful, we put you on notice that [the father] will be seeking a costs order.*'
>
> The father has failed to explain how he was entitled to costs should he "win" but the mother was not entitled to her costs should she "win".

> 29. In my judgment the case falls squarely into the category of case envisaged by Baroness Hale as being an unreasonable conduct of litigation. He knew the basis of the appeal, and he had the opportunity to take stock and decide whether it was reasonable to oppose the appeal. What was reasonable at first instance became, in this case, unreasonable on appeal.
>
> 30. The father may not have the funds to pay an award of costs, and it is true that money paid by the father cannot be spent on the children. He chose, however, to take the gamble of an appeal in the face of the merits which I have assessed above. And the fact is that money paid by the mother, [M's] main carer, on legal costs also cannot be spent on [M]. It will be for the father to negotiate with the mother as to payment of the costs award and, if necessary, to address the court on issues of enforcement should the mother make such an application."

49. Having reached this decision, the Judge then dealt with quantum at paras 31 to 35. With one relatively minor exception, she declined to assess the mother's costs of the appeal on an indemnity basis, but she reduced the mother's total costs claimed by one third to reflect the great disparity between the fees of her counsel and those of the father's counsel. The amount awarded on an indemnity basis (for the fees of counsel and solicitors working on the mother's written costs submissions) came to £3,525.50, and the father was also ordered to pay in full the cost of obtaining a transcript of the first instance hearing (£1,398). Apart from those two items, the aggregate costs of the mother's solicitors and counsel, after application of the one-third reduction, were summarily assessed in the sum of £27,800, making a total of £32, 723.50 plus VAT to be paid within 28 days.

The father's appeal to this court

50. The father now appeals to this court, with permission granted on 3 February 2026 by Baker LJ, who also stayed the Judge's costs order of 1 October 2025 pending determination of the appeal.

51. The grounds of appeal of the father, now acting in person, challenge in various ways the approach and reasoning of the Judge in determining his liability for the mother's costs of the appeal. The principal ground appears to be ground 4, which contends that the Judge's conclusion "that the matter fell within the realms of 'exceptional' was not adequately reasoned and was irrational and wrong". In granting permission to the father to appeal on all grounds, Baker LJ observed that while the grounds all had a real prospect of success, "under ground 4, which seems to be the principal ground, there is a real prospect that the appellant will succeed in showing that the case fell outside the category of children's cases in which a costs order should or may be awarded."

52. For completeness, the other grounds of appeal are that:

(a) the Judge erred in law by failing to provide adequate reasons for her findings on principles on costs, failed to support her decision to make a costs award and erred in law on quantum (ground 1);

(b) she erred in law in her approach to evaluating and then concluding that there was unreasonable litigation conduct on appeal, but not in the first-instance hearing (ground 2);

(c) she failed to give due weight to the fact that the father did not have time to take stock in respect of the appeal in light of the way the mother's case was put prior to and then at the appeal hearing (ground 3);

(d) she misunderstood the father's position in respect of his cross appeal (ground 5); and

(e) she gave incorrect and undue weight to the father's position on costs in the pre-appeal correspondence (ground 6).

Submissions on the appeal

53. The father's written arguments in support of his appeal are mainly contained in a concise and well-argued skeleton argument prepared by him at the permission stage on 13 February 2026. He argued that the Judge had rightly accepted the general principles in the case law I have reviewed, but she had failed to identify any truly exceptional circumstances to justify her order. The mother's appeal had succeeded due to procedural failures by the magistrates, not due to misconduct of a reprehensible nature by the father. The Judge had also mischaracterised the father as taking "the gamble of an appeal", when he had merely responded defensively to the mother's appeal. His own cross-appeal was orthodox and limited in scope, and it was dismissed by the Judge without adverse comment. The costs warning letter sent by his solicitors was no more than a "commonplace protective practice". The Judge fell into error by equating unsuccessful resistance to an appeal with unreasonable resistance. She also misdirected herself in relation to indemnity costs, and she failed to identify conduct which satisfied the indemnity threshold of being "outside the norm", particularly because the "norm" in children's cases was to make no order as to costs. The father therefore invites the court to allow his appeal, to set aside the Judge's costs order, and instead to make no order as to the costs of the appeal to the Judge.

54. In his oral submissions to us, the father amplified the main points made in his skeleton argument with clarity and courtesy, for which the court is grateful.

55. On behalf of the mother, Ms Guha KC relies strongly on the litigation history which I have recounted in the background section of this judgment and on the history of domestic abuse perpetrated by the father, as set out by the mother in her witness statements and as found by the magistrates. Ms Guha also reminds us that in November 2023 the Judge was obliged to make a specific order permitting the mother to remove M to Dubai on a work trip in the face of wholly unreasonable opposition by the father, for which a costs order was made against him. Ms Guha goes on to submit that the findings by the magistrates of coercive control on the part of the father are highly material to his failure to "take stock" in deciding to oppose the mother's appeal despite her powerful complaints of procedural unfairness by the magistrates at the March 2025 hearing. Ms Guha reserves particular criticism for the decision by the magistrates to proceed to make a final order without hearing any oral evidence from the parties, despite their earlier decision that it was necessary to hear such oral evidence to inform their assessment of risk. She is also critical of the father's refusal to agree to vacate the

March 2025 hearing, emphasising that nobody had contemplated that the court could, or should, finally determine the highly controversial issue of an equal shared care arrangement at a one-day hearing in March. She submits that the father then adopted an unreasonable litigation stance in the appeal to the Judge by failing to take stock of the overwhelming merits of the mother's case.

56. More generally, submits Ms Guha, the Judge was fully entitled to conclude that the father's litigation conduct was unreasonable when regard is had to all the relevant factors, including the strength of the mother's case, the active pursuit of his own cross-appeal, his failure to reflect on his own position during the appeal, his threat (through his solicitors) to seek costs from the mother should her appeal be unsuccessful, and the fact that he does not now challenge in this court the Judge's determination of the mother's appeal from the April 25 MC Judgment.

Discussion and conclusion

57. It is convenient to begin with the fact that the Judge in the Costs Judgment declined to order the father to pay the whole or any part of the mother's costs of the first-instance hearing before the magistrates on 25 March 2025, holding in para 25 that "the reasons why costs orders are not generally made in first instance trials apply in full in this case": see [47] above. The mother has not challenged that finding by a respondent's notice in this court, nor did Ms Guha KC seek to cast doubt on it directly in her written and oral submissions to us. Thus, it must in my judgment be taken as established for the purposes of the father's appeal to this court that the aspects of his litigation conduct which the Judge expressly took into account in concluding as she did that no costs should be awarded against him in respect of the 25 March hearing, cannot be held against him as constituting unreasonable conduct in the context of the mother's subsequent appeal to the Judge. Those aspects concerned (a) the father's wish to retain the 25 March hearing to deal with interim issues, which the Judge did not accept was unreasonable (para 22), and (b) his ready and swift acceptance of the magistrates' unexpected decision to make a final decision, which the mother sought to characterise as opportunistic but which the Judge again refused to say was unreasonable (para 23). As the Judge realistically observed, the decision was theirs, not his, and he was entitled to take advantage of the position of the court "and to seek the best possible result with the tribunal he was appearing before".

58. Accordingly, it seems to me that if a justification is to be found for the Judge's decision to award the mother the costs of her appeal to the Judge, it must be found primarily in the further factors which she took into account at paras 27 to 30 of the Costs Judgment and which in her view evidently made all the difference.

59. The first of those factors was the strength of the mother's appeal, which the Judge described as "powerful" (para 27). But the mere fact of resisting an appeal, even if brought on grounds which appear to be strong, is in my view unlikely to amount to conduct which is unreasonable or reprehensible, even if with the benefit of hindsight, after the appellate court has given its ruling, the appeal may be characterised as a strong one. It is important in my judgment to guard against the dangers of being wise after the event. Looking at the matter objectively, and without hindsight, it is far from obvious to me that the father's decision to resist the appeal was from the beginning doomed to failure, when it is remembered that the magistrates were exercising a partly inquisitorial jurisdiction with its paramount focus on the welfare of M, and they were not legally

bound to proceed in accordance with the wishes of the parents. Further, they had the assistance of the expert evidence of the ISW, Mr Walker, and he gave oral evidence at some length and was cross-examined before the magistrates decided on their order. This is not to say that I doubt the cogent reasons given by the Judge in the Main Judgment for allowing the mother's appeal from the magistrates' order, but only that the high bar of unreasonableness in this context must involve a lot more than the mere fact of ending up on the losing side of an appeal where the welfare of a child is at stake and where the views of both parents as well as independent expert evidence need to be considered.

60. The second and third factors taken into account by the Judge also relate to the father's conduct in relation to the appeal from the magistrates. The second factor is the father's decision to cross-appeal, which the Judge criticises in para 27 apparently on the basis that he was acting inconsistently in attacking the reasoning of the magistrates in his appeal on the one hand, while at the same time seeking to uphold their approach and reasoning in resisting the mother's appeal. I do not think this is a fair criticism. The cross-appeal was responsive in nature, and once it was clear from the mother's grounds of appeal that there was going to be a comprehensive challenge made by her to the magistrates' decision, raising issues of procedure as well as the substantive merits of the timetable for moving towards shared overnight care for M, it was clearly incumbent on the father to raise by way of a respondent's notice all the further points which he wished to run so that the appellate court would be fully able to adjudicate on the matter in the round. It is also commonly the case that a litigant wishes to run arguments in the alternative which are mutually inconsistent, and it is not normally an abuse of process to do so. Here, the father was in my view fairly entitled to make the point that the timetable decided upon by the magistrates was in some respects slower than that recommended by Mr Walker, with no apparent explanation for the discrepancy, and to cross-appeal on that basis.

61. The Judge's third related factor (para 29) was the alleged failure of the father to take stock and decide whether it was reasonable to oppose the mother's appeal. The implication is that the strength of the appeal should have been so obvious to him and his lawyers that he should have made an open offer to concede the appeal at an early stage (presumably subject to the court's approval, given the involvement of a child) and that his failure to do so was again unreasonable. In the light of what I have already said about the Judge's first and second factors, and with the greatest respect to her, I am again unconvinced by this argument which is heavily dependent on the benefits of hindsight. Nor does the Judge anywhere explain precisely why, or how, in her words "[w]hat was reasonable at first instance became, in this case, unreasonable on appeal".

62. The Judge's fourth factor (para 28) relates to the solicitor's letter sent on behalf of the father to the mother's solicitors on 23 June 2025, putting her on notice that the father would be seeking a costs order if her appeal was unsuccessful. The Judge thought that this letter showed an acceptance by the father that costs should in principle follow the event, and he nowhere explained why the reverse proposition should not apply if the mother's appeal succeeded. In truth, however, there can be no place for routine tit-for-tat reasoning of this nature to play any part where costs in children's cases are in issue. The threat in the letter of 23 June was, in my view, at worst an inept (though familiar) tactical manoeuvre which may merit some censure, but it cannot in itself come anywhere near to justifying a departure from the general rule of no order as to costs.

Nor can it reasonably be treated as a tacit admission of liability, whether by estoppel or otherwise.

63. The Judge's final factor, before she turned to quantum, was that money paid by the father on costs could not be spent on M, but it was his choice "to take the gamble of an appeal in the face of the merits" (para 30). It is unclear whether in the Judge's view the gamble taken by the father was in deciding to resist the mother's appeal, or in his own decision to cross-appeal. I incline to the view that the Judge probably meant the former, but in either case this factor adds nothing to those which I have already discussed apart from the obvious point that any costs order made against a parent in a case concerning the welfare of their child will prima facie reduce the money available to be spent by the paying parent on the child's welfare. This melancholy fact of forensic life cannot, however, itself be a reason for making an adverse costs order against one of the parents, although it is one of the considerations which cumulatively justify the existence of the general rule in the normal run of cases: see *Re S* at [24].

64. Having reviewed the reasons which led the Judge to order the father to pay the mother's costs of the appeal, I am reluctantly driven to the conclusion that, although the Judge directed herself correctly on the law, she erred in principle in distinguishing as she did between the costs of the first instance hearing before the magistrates and the costs of the appeal. In my judgment there were no grounds of sufficient weight to justify the distinctions which she drew, and there was, on the contrary, every reason to make the same order for costs on the appeal as she rightly did in relation to the first-instance costs below. All the considerations which explain the existence of the general rule apply in my judgment with equal force to the costs of the appeal, including in particular those so eloquently stated by Wilson J (as he then was) in the *Sutton* case, quoted in *Re S* by Lady Hale at [19].

65. For these reasons, I conclude that the father's appeal must be allowed, and the costs order made by the Judge against the father must be discharged and replaced by no order for costs.

Lord Justice Peter Jackson :

66. I agree that the appeal should be allowed for the reasons given by my Lord. His account of the background shows that this was a parental dispute of a sadly familiar kind and that, whatever the outcome of the first appeal might have been, there was no indication that the litigation conduct of the unsuccessful parent was likely to be characterised as reprehensible or unreasonable. Nevertheless, on receipt of the Main Judgment, the mother applied for an order that the father should pay her costs in both courts on the indemnity basis in a total amount of some £80,000. Even the Judge's order granted her barely half that sum, and now that that order is to be set aside she must also bear her own costs of this appeal, which are in the region of £20,000. This case and the very recent decision in *Pringle* are unfortunate reminders of why satellite litigation about costs in child welfare cases is to be discouraged by maintaining the general principle that there should be no order for costs unless there has been reprehensible or unreasonable conduct in relation to the proceedings.