



# HNW Divorce

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# LITIGATING RESPONSIBLY



## COSTS IN CHILDREN PROCEEDINGS

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Ben Parry-Smith and Luke Scarratt acted for the respondent father in the recent private children case *YE v ZY* [2024] EWFC 293 (B) which emphasises the need to be reasonably when conducting litigation or face potential penalties in costs.



### Costs in children proceedings

It is rare for costs orders to be made in private children proceedings as the focus is upon finding a resolution that is in the best welfare interests of the child. The rationale behind this approach on costs is that parents should not be prevented from taking steps that they believe to be in the best interests of their child due to fear of costs orders being made. However, the Court has shown itself to be increasingly willing to make costs orders where one party has been unreasonable in the way in which they have conducted the litigation.

### *The relevant costs provisions can be found in Part 28 of the FPR and practice direction 28A.*

The court has discretion to make such costs orders as it considers just<sup>1</sup>. The general rule that costs follow the event are disapplied in private law proceedings and costs orders have been rarely made historically. CPR 44.2(4)-(5) applies within private law proceedings and requires the court to have regard to whether a party has succeeded in full or in part and the conduct of the parties before and during the proceedings. This includes considering whether it was reasonable for a party to raise, pursue or contest an issue and the manner in which they have conducted their case.



### The facts

In September 2024 the mother made an urgent application seeking the sole care of C (14 year old boy). At the time of her application C was hospitalised and believed that he was paralysed. In fact, he was suffering from a functional neurological disorder that caused him to believe that he could not use his limbs. However, there was no physical reason why he could not move normally. It is believed that the conflict between the parents was at the root of the issues being experienced by C. The mother had alleged domestic abuse against the father which he denied.

Early on in the proceedings the father's solicitors wrote to the mother's advisers setting out a comprehensive set of proposals providing for how the child would divide his time between them and proposals to establish significant therapeutic support for C.

*This letter was described by the judge as, "a comprehensive and thoughtful letter. It was a letter that was deserving of a response."*

The mother failed to respond constructively to the father's proposals. Ultimately the proceedings were compromised by a consent order which substantially reflected the father's original proposals. However, it was the mother's delays in responding to correspondence that brought the parties to the door of the court and caused them to incur substantial costs.

The father argued that the mother's failure to engage and her continued allegations of abuse were unreasonable and amounted to litigation misconduct. The mother would not accept the expert's views and continued to maintain that the father was controlling. She maintained that his behaviour was abusive and controlling when the experts characterised this as a difference in approach - put simply, that the father had a more boundary led parenting style than the mother. The mother was also misleading in her presentation to the court that social services were concerned about parental alienation – the mother implied it was concern about the father's behaviour when in fact they were concerned about her behaviour.

The father alleged that the mother's litigation misconduct spanned the whole case - before proceedings were issued, since issue and thirdly in implementing the terms. Taking a proportionate approach he sought one-third of his costs. M said that her behaviour was entirely driven by her concerns for C and as such could not be characterised as unreasonable.

Expert psychological evidence was provided which indicated that the mother had a tendency to demonize the father and to encourage C to believe he was ill. The expert emphasised that the mother needed to undergo significant therapeutic help herself. The conflict between the parents was believed to be at the heart of the problems experienced by C and needed to be addressed.



## The court's findings

The court found that the mother was completely entrenched in her belief that the father was abusive but there was no evidence to support her claims. Her failure to engage with the father's proposals to resolve the matter had continued and exacerbated the parental conflict.

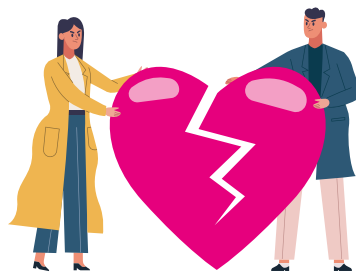
***She had not behaved reasonably and had been “myopic.... Fixated on the father, rather than on her own conduct.”***

The necessary therapeutic work had still not begun.

The mother had also failed to engage with the father's solicitor's correspondence on costs which was sent in April before the hearing in August.

***The judge remarked, “It was a robust letter, but it wasn't unkind or unreasonable.”***

She wholly ignored that correspondence until five working days before this hearing, and even then, refused properly to engage: instead she characterised the fact of the notice of application to seek costs and additional further attempts to negotiation as simple abusive behaviour.” The mother had started the proceedings. The father had engaged fully and been constructive in making child focussed proposals throughout. He had followed the advice of the medical and safeguarding professionals but “he has at times been frustrated by the mother's failure properly to engage.” The mother had not conducted herself reasonably within the proceedings. The court ordered the mother to pay one-third of the costs.



## Implications

This decision sits comfortably with the courts increased emphasis on the need for the parties to engage properly in NCDR and to conduct themselves properly in efforts to resolve matters at all times before the matter falls to be adjudicated upon by a judge.

***As the judge in this case said, “litigation is expensive, but it has consequences.”***

At the heart of the court's decision making in respect of children is the need to carefully consider the welfare of the child. In *Re B (A Child) (Unnecessary Private Law Applications)* [2020] EWFC B44 HHJ Wildblood warned parties,

***“do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so.... If you do bring unnecessary cases to this court, you will be criticised and sanctions may be imposed upon you.”***

In that case the parties were arguing over the minutiae of drop off arrangements for contact.



## Conclusion

Whilst historically the courts have been slow to make costs orders in private children law proceedings the tide may be turning very slightly. Applications should not be made if they are capable of resolution outside of the court and the court will look dimly on applications dealing with minor details.

Proper efforts must be made to explore and engage in NCDR and to revisit that possibility throughout proceedings.

And above all litigation must be conducted in a proper and reasonable manner; if reasonable proposals are made by one party, the Court will expect a reasonable response by the other party. Failure to adhere to the highest standards of principled litigation conduct may result in costs sanctions.

