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## **When can bad behaviour trigger an adverse costs order?**

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**Family analysis: Adam Langrish, a barrister at College Chambers, says the Court of Appeal's judgment in *Re L* reaffirms the established general rule that, in children's proceedings, a judge's discretion to make an adverse order for costs should only be exercised in exceptional circumstances or where there has been unreasonable behaviour.**

### **Original news**

*Re L (Costs of Children Proceedings)* [2014] EWCA Civ 1437, [2014] All ER (D) 65 (Nov)

*The Court of Appeal, Civil Division, allowed a mother's appeal against an order that she pay the father's costs in respect of all applications relating to the children since May 2012 and held that it had been wrong in principle and on the facts for the judge to have made an order for costs against her.*

### **What is the significance of the Court of Appeal's decision?**

The appeal related to an order for costs (and for transfer of management of children's trust funds) made in the absence of the mother at the final hearing of private law proceedings. The mother had previously attempted to withdraw her application for a residence order in relation to the subject children and to concede residence to the father in light of the children's change of views and an unfavourable report from the Children and Family Court Advisory and Support Service (Cafcass).

On appeal, the court reaffirmed the established general rule that, in children's proceedings, a judge's discretion to make an adverse order for costs should only be exercised in exceptional circumstances or where there has been unreasonable behaviour. The court also highlighted the significance of a party having specifically been given leave (permission) to pursue an application at the outset--particularly when such application was consistent with the child's reported wishes and feelings. In such circumstances, it is unlikely that a litigant's conduct can properly be characterised as unreasonable or reprehensible.

The importance of providing proper and explicit notice of an intention to pursue costs (beyond it being recorded that costs were reserved at previous hearings) was another matter emphasised by the court in this case.

### **In what circumstances will the court make an order for costs in private children proceedings?**

There needs to be a justifiable basis, and formal finding based on evidence, that a party's conduct has been reprehensible. The conduct in issue must relate to the litigation rather than the welfare of the child. Additionally, it should be made clear in advance of the hearing that such findings and costs will be sought.

## **How important is notice of intention to seek an order for costs on the basis of a party's unreasonable litigation conduct?**

The lack of notice was an important issue and, on the facts of this case and due to the way that litigation had been conducted previously, merely serving a costs schedule in advance of the final hearing was not deemed to provide the mother sufficient notice of an intention to actively pursue costs against her.

The court found that the judge at first instance should at least have afforded the mother an opportunity to make representations to the court, either by adjourning the issue of costs or providing the mother with express liberty to apply.

## **To what extent does the judgment clarify the law?**

The Court of Appeal held that the principle of there being no order for costs in the absence of reprehensible behaviour, most recently summarised in *Re T (Children)* [2012] UKSC 36, [2012] 3 FCR 137, was applicable notwithstanding that case being a public law matter involving a local authority.

## **What should lawyers do next?**

Two main areas of guidance can be gleaned from this judgment:

- o the importance of affording an opponent (particularly one appearing in person) with express and consistent notice of an intention to pursue an application for costs (or, as in this case, transfer of trust funds)--the serving of a costs schedule and previous orders stating 'costs reserved' were at odds with the issues identified by the father for final hearing in position statements, orders and correspondence, and
- o that in order to then obtain a secure order for costs, it is important to ensure that findings are made by the court as to reprehensible behaviour within the opponent's litigation conduct--this is likely to require more than just highlighting issues to the court and will require reasoned findings to be made by the court

Adam Langrish is a family law practitioner. He regularly appears in all tiers of the Family Court in matters relating to children (public and private law) and financial remedy. Adam represented the appellant mother in *Re L (Costs of Children Proceedings)*.

*Interviewed by Kate Beaumont.*

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