4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re S (Leave to Remove: Costs)

[2010] 1 FLR 834

22/09/2009

Court
Family Division

awarding the mother £105,000 in costs –
(1) Although he had not been laying down any new principle, when Wall LJ made the distinction in EM v SW [2009] EWCA Civ 311 between costs principles applicable to children cases at first instance and those which applied on appeal, he had been stating the law. On an appeal a different approach was justified, because a respondent to an appeal had had the opportunity to take stock and to make offers to compromise the appeal if appropriate. This did not mean that costs followed the event in an appeal in a children case, but that on appeal the court should adopt a broader discretion in the circumstances of the particular case; while the litigation misconduct of one party might be a factor on an appeal, it was not essential for the making of a costs order (see paras [42]–[45], [62]).
(2) Even after the father had received the mother's grounds of appeal, which had correctly identified the fundamental flaws in the first instance judgment, the father, represented by experienced family lawyers, had failed to offer any compromise. However genuine the father's opposition, his decision to defend the appeal and to do so
[2010] 1 FLR 835
without any offer of compromise had been wrong; the mother was entitled to her costs of the appeal (see paras [63], [67]–[70], [130]).
(3) Principles probably did not exist in respect of the costs of a rehearing; in some instances, where a complete rehearing was necessary, the principles on costs would be likely to follow those applicable at the original hearing; other cases would lack the element of a complete rehearing and the appeal court might have expressed some views on the outcome, in which case the principles applicable on the rehearing would more naturally follow those applicable to an appeal (see paras [73], [74]).
(4) The mother was entitled to her costs of the rehearing. Given that the father had started the rehearing after receiving not only a strong steer from the appeal judge but also two reports adverse to his case and influential evidence concerning the mother's health and financial situation, the applicable principles were closer to those for an appeal than to those for a first instance decision. The inevitable result of the rehearing should have been clear to the father beforehand; by defending the rehearing in these circumstances, especially given his awareness of the mother's financial position, the father had become liable to pay the mother's costs on the principles in EM v SW. The mere grant of permission could not have been taken to be an indication of the outcome, and the father could not reasonably rely on it (see paras [79], [83], [96], [98], [99], [129], [130]).
(5) In any event, there had been unreasonable conduct by the father in relation to the litigation, amounting to litigation misconduct, in his attempt to denigrate the mother as a person and as a mother. This was litigation misconduct that could have influenced the outcome of the litigation, and had in fact

added to the preparation time, the length of the hearing, and the expense of the litigation. The issue was not the genuineness of the father's views, but whether, in putting them forward, and in particular the manner in which he had conducted the litigation, his litigation conduct had been unreasonable. When a parent gratuitously exceeded the reasonable bounds of criticism in respect of the other parent, their proposals, and their relationships, then, in an appropriate case, the court might well be justified in making a costs order, despite its exceptional nature in a children case. This principle applied with great force in this case, given that: (i) the father had known from medical reports that the mother was vulnerable to stress; (ii) actions, as well as words, had been involved; and (iii) the child had himself been unreasonably involved (see paras [82], [103], [114], [115], [116], [121], [122], [130]).
During the marriage the Swedish mother and the English father lived in London with the child. When the marriage ended, the child's time was split between, on the one hand, the mother, and, on the other hand, the father and the paternal grandparents; the latter looked after the child while the father was at work. Having formed a relationship with a Swedish man, who lived in Stockholm, after about 18 months of this arrangement the mother applied to the court seeking permission to relocate to Sweden with the 8-year-old child; she explained that she was in financial difficulties in England and that the Swedish man had tried, but failed, to find work in England. Despite a Cafcass report indicating that the child would cope well with change, and recommending that permission be granted, permission to remove the child to Sweden was refused at first instance, on the basis that the current arrangement was one of shared care, and that the move would cause the child long-standing distress and disappointment. However, the mother's appeal was allowed; the appeal judge found that the mother had been the primary carer and that the judge below had not only failed to give appropriate weight to the conclusions of the Cafcass officer, but had also failed to take account of the impact of a refusal of permission upon the mother. The appeal judge then granted the father a rehearing, primarily because the father's recently announced loss of employment would allow him to care for the child to a greater extent. The rehearing judge, taking into account the potential impact of a refusal on the health and financial wellbeing of the mother and her partner, and how that would affect the child, granted the mother permission to relocate to Sweden. The mother sought her costs of the appeal, of the rehearing and of the costs hearing, a total of £144,725.13. The parties invited the judge to dispense with an oral hearing and to rely on written submissions.
,1,
Permission

Permission
Lawtel