

Family Law/2010/December/Case Reports/Ancillary Relief: Costs – K v B [2010] EWHC 2151 (Fam) – [2010] Fam Law 1262

**Family Law**

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**December 2010**

**Ancillary Relief: Costs – K v B [2010] EWHC 2151 (Fam)**

(Family Division; Sir Christopher Sumner; 13 July 2010) [\[2011\] 1 FLR 1745](#)

The husband and wife were both of Iranian origin. They had one child now aged five. After their separation the wife and child lived in London and the husband in Dubai. In ancillary relief proceedings there was an issue as to the wife's dowry. Under Sharia law she had a right to dowry worth £55,000. Unless her claim to dowry were dismissed by the English court, she could claim it in Iran. Under Sharia law the husband had rights of custody after the child reached the age of seven, unless he formally transferred his rights to the wife. The wife was willing to give up her dowry rights if the husband transferred his custody rights and provided a fund in respect of future litigation costs. The parties appeared to have reached agreement on ancillary relief matters but were unable to agree the full terms of the order, because the husband was argued that there was no jurisdiction to include a reference to custody rights in an ancillary relief order. The district judge gave a clear indication as to an appropriate form of words and accordingly the recital to the order as approved by the district judge allowed the wife to apply for return of the dowry if the husband challenged her rights of custody.

The husband appealed on the ground that the recital left the issue of dowry open and that if the wife were to consider that he had breached the condition, he would be unable to defend himself and would face possible imprisonment. The appellate court heard expert evidence as to Sharia law. The parties agreed terms whereby the husband relinquished his custody rights and provided a litigation fund and the wife agreed to change the terms of the recital to the order. The husband sought his costs of the appeal.

**Held** – ordering the husband to pay £17,000 of the wife's costs of £28,500 –

- (1) Traditionally when parties reach agreement in civil proceedings on all point save costs, the court declines to rule on that issue. However, this approach had been modified in family cases, particular where it was possible to conclude that the unreasonable litigation conduct of one of the parties was responsible for all or part of the costs incurred.
- (2) The court was not bound by the strict terms of the appeal and the parties were inviting the court to consider litigation conduct in a broad sense. In the alternative, r 44(3) of the Civil Procedure Rules 1998 did not require the court automatically to make an order for costs in favour of the party who had been successful on the one point raised on an appeal: the court had a discretion as to costs, taking into account the question of litigation conduct.
- (3) The husband had acted unreasonably and his litigation conduct had been blameworthy. Prior to the hearing he had not indicated his willingness to relinquish his custody rights, nor to provide security. He had failed to respond to reasonable suggestions of the wife. His unreasonable litigation conduct had been

a major cause of the substantial costs of the appeal, and should be reflected in costs. The husband should – most unusually – be condemned in costs despite having succeeded on the appeal.

## **COUNSEL (Solicitors)**

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## **Comment**

This case illustrates a very unusual outcome in respect of costs on an appeal in family proceedings. Under CPR r 44.3(1) the court has a discretion to make a costs order. The general rule in r 44.3(2)(a) that costs follow the event is disappplied in family proceedings: see Family Proceedings Rules 1991, r 10.27(1)(b). Matrimonial and Family Proceedings Act 1984, [s 32](#) and Supreme Court Act 1981, Sch 1 para 3(a). Under CPR r 44.3(4) the court in deciding what order (if any) to make about costs must have regard to all the circumstances, including litigation conduct, success and admissible offers. Litigation conduct is elaborated on in CPR r 44.3(5). In this case the conduct of the husband in relation to the appeal was given such weight in the exercise of the court's discretion that he was ordered to pay part of the wife's costs, notwithstanding that agreement had been reached on the appeal and in terms favourable to his notice of appeal.

For a recent illustration of the wide discretion as to costs in a non-family case, see *Walsh v Singh (Costs)* [\[2010\] EWHC 1167 \(Ch\)](#) (comment at [\[2010\] Fam Law 1169](#)). There the outcome was no order for costs despite the claimant's success and offer, given his litigation conduct.

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