

the father to take stock. He could have made an offer to concede the appeal but, instead, argued successfully for a re-trial and, additionally, the question of the boy's education, which the father believed was best served in this country, had not been decisive in the original judgment or the appeal.

(3) The mother was entitled to the costs of the re-hearing. Where every point she had taken on appeal had succeeded but where the father too readily and quite wrongly took the permission to grant a re-hearing on one aspect of the case as an opportunity to re-argue his case, the appropriate principles applicable to the costs of the re-hearing were much closer to those of an appeal. By his actions in defending the rehearing in those circumstances the father became liable to pay the mother's costs on the principles in *EM v SW*.

(4) If the present court were wrong in regard to the principles applicable to a re-hearing then the principles in *Re T (Order for Costs)* [2005] EWCA Civ 311, [2005] 2 FLR 681 applied. In such a case there should be no order for costs unless the court was satisfied that the father's conduct of the litigation was unreasonable and amounted to misconduct. In the present case the court was so satisfied.

(5) The father had the assets to pay a substantial portion of the costs: £35,000 in relation to the appeal, £65,000 in relation to the rehearing and £5,000 towards the costs of the present application.

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COMMENT

It remains the case that an award of costs against one parent in cases involving children is exceptional: exceptional so as to avoid one party feeling punished and thus reducing co-operation between the parents with the consequent knock-on effect on the welfare of the child. The principles in relation to costs in children cases remain those set out in *Re T (Order for Costs)* [2005] EWCA Civ 311, [2005] 2 FLR 681 with the major consideration being whether one party has been

unreasonable in the conduct of the litigation; that is, as opposed to unreasonable with regard to the child's welfare. If the conduct is found to be unreasonable the question then has to be asked whether it is a proper exercise of discretion in the circumstances of the case, bearing in mind the exceptional nature of the award, to make a costs order. Previous authorities include *Keller v Keller* [1995] 1 FLR 259, *London Borough of Sutton v Davies (Costs)* [1995] 1 All ER 65, [1994] 2 FLR 569, *Re M (Local Authority's Costs)* [1995] 1 FLR 533 and *R v R (Costs: Child Case)* [1997] 2 FLR 95.

Re T now has to be read alongside *EM v SW* [2009] EWCA 311 where Wall LJ considered whether different costs principles applied on appeal as opposed to on an original hearing, albeit he lay down no new principle. His Lordship concluded that, on appeal, the judge had a broad judicial discretion over the question of costs: this was because uncertainties about what the judge would decide had already been removed and the respondent had had time to take stock and make offers to compromise the appeal where appropriate. Litigation misconduct was a factor on appeals but it was not essential before a costs order could be made.

Caroline Bridge

EVIDENCE: ANONYMITY

Re T (Wardship: Impact of Police Intelligence) [2009] EWHC 2440 (Fam)

(Family Division; McFarlane J; 7 October 2009)

A child who had been abducted to India by his father had been returned to the mother's care and made the subject of wardship proceedings. The father was remanded in custody. The police informed the judge who was hearing the wardship proceedings, that an anonymous tip had alleged that the father had taken out a contract to have the mother murdered and that she and the child had been removed into protective custody. The police opposed any disclosure of the material to the parties; at McFarlane J's suggestion, special advocates were appointed for the father

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and paternal grandparents to represent their interests. His Lordship provided guidance to other courts faced with a similar set of circumstances.

- (1) There should be full disclosure to the court of all material relevant to an allegation and its investigation at the earliest possible stage.
- (2) There should be disclosure, at the earliest stage, to the open parties of as much of the police material as is not rendered confidential by public interest immunity (PII).
- (3) Thereafter, the court should establish a process at the earliest stage to evaluate the PII claim and, if appropriate, to arrange for the disclosure of further material to the open parties either in a full, gisted or redacted form.
- (4) In parallel, there should be full disclosure to the police of as much of the family proceedings evidence as not rendered confidential by PII.
- (5) Thereafter, there should be a co-operative process between the police and the family court whereby reasonable requests for further police investigations are considered and implemented.
- (6) The family court should consider providing a clear explanation to the police of the differing priorities and processes that drive the family court proceedings in contrast to those which may apply to the processes of a police investigation and the criminal justice system.
- (7) The police should be reminded of the responsibility upon an applicant for relief, who provides information to the court in the absence of other parties whose interests may be affected, to give a balanced, fair and particularised account of the events leading up to the application and the matters upon which it is based.
- (8) The court should consider, at an early stage, requesting the Attorney General to appoint a special advocate for the party to whom full disclosure of sensitive but highly relevant material may not be made.
- (9) In cases of particular difficulty it may be appropriate to consider whether the police should be joined as a party to the proceedings so that they may be more directly subject to the direction of the court.
- (10) Following disclosure of material to the 'open' parties, those parties should be tasked with identifying any further investigation that they may suggest is

necessary so that a request for such investigation can be made for the police to consider undertaking well before the fact-finding hearing.

- (11) At the start of this process, the court should establish a procedure and practice for the case which supports 'open' and 'closed' sessions. This is likely to involve separate 'open' and 'closed' files, separate hearings where different teams of advocates are present and, from time to time, the giving of both 'open' and 'closed' judgments.
- (12) The court should consider at an early stage the question whether, and if so, which party should 'prosecute' an allegation/assertion which is or may be based upon material which remains partially 'closed'.
- (13) In the above context, consideration may be given both to the role of the guardian ad litem and/or seeking to draw the local social services authority into the case by means of a direction under s 37 of the Children Act 1989.
- (14) It is essential that there is judicial continuity throughout the PII process.
- (15) There is no general duty, absent of a court order, requiring solicitors to disclose information as to the whereabouts of a ward in breach of the duty of confidentiality that is owed to their client. However, the individual solicitor should consider on a case by case basis whether the facts amount to 'exceptional circumstances' as described in the Solicitors' Code of Conduct, amounting to abuse of the child which is sufficiently serious to justify a breach of the duty of confidentiality. Whether or not the solicitor has a duty to contact the authorities himself once he is aware of court orders requiring the immediate disclosure of the child's whereabouts, the solicitor must be under a duty to advise his client of the client's responsibility to make contact with the court or other authorities forthwith. In the circumstances described in this case, it cannot be legitimate for a solicitor to advise their client that there is no need to inform the court or authorities of the child's whereabouts whilst an application for legal aid is being processed.

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COMMENT

In his extensive and thoughtful judgment McFarlane J outlined both the highly unusual circumstances which had led to the appointment of 'special advocates' to represent the interests of the paternal family in the wardship proceedings and the issues and problems that had arisen in handling the interaction between the police involvement and the family proceedings. His judgment repays careful study, although it must be hoped that few courts will be confronted with similar situations. It may be noted that, in that particular regard, he emphasised that any issue of public interest immunity (PII) which raises issues of complexity will come within Art 18 of the Allocation and Transfer Order 2008 on grounds of 'exceptional complexity' and should trigger a transfer to the High Court.

Other aspects highlighted in his judgment include first, that it was accepted that PII was applicable, and determinative of disclosure, if it related to internal police procedures, protection arrangements for the mother and child, or the identity of informants. Secondly, McFarlane J was concerned at the gap in understanding and 'culture' that operated in the police service, and his guidance is aimed at seeking to ensure that the police appreciate the demands of the family proceedings, and the different approach to the receipt of evidence where the duty of the court is to give paramount consideration to the welfare of the child. In this regard, he noted that the 'binary' system within which the court had to operate meant that, since the matter was not proved, the wardship had to proceed on the basis that the father had not contracted to have the mother murdered. Thirdly, the need to keep material from the parties meant that there was no one to

'prosecute' and test out the allegations against the father and his family and, because of the particular circumstances in this case, the material had not been disclosed to the guardian ad litem. However, his Lordship stressed that there is a strong argument that a guardian should see all available material if possible so that their recommendations may be founded on the fullest possible information. The role of the guardian should therefore be given careful consideration at an early stage and, if necessary, kept under active review as the case develops. His suggestion that the local authority be brought into the proceedings through a s 37 direction was also motivated by the concern to see that such serious allegations as arose in this case can be properly tested.

Finally, it may be noted that pending the issue of further guidance from the Family Criminal Interface Committee to which these matters have been referred, judges should proceed in accordance with the guidance offered by McFarlane J.

Gillian Douglas

HUMAN RIGHTS: DISCLOSURE OF INFORMATION

R (L) v Metropolitan Police Commissioner (Secretary of State for the Home Department) [2009] UKSC 3

(Supreme Court; Lord Hope, Deputy President, Lord Saville, Lord Scott, Lord Brown, Lord Neuberger; 29 October 2009)

The appellant had a son whose name was entered on the child protection register on suspicion of neglect. The view of social services was that the appellant had little control over him, and by the age of 13 he had been convicted of robbery. The appellant applied for a job as a 'casual midday assistant' at a school, supervising children during the lunch-break. The employment agency required that an 'enhanced criminal record certificate' (ECRC) be obtained, to which she assented. The police supplied the certificate, and included on it information both about the