Hilary Term

[2015] UKSC 20

On appeal from: [2014] EWCA Civ 135

JUDGMENT

In the matter of S (A Child)

before

Lady Hale, Deputy President

Lord Kerr

Lord Wilson

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

25 March 2015

Heard on 28 January 2015

Appellant	Respondent
William J Tyler QC	Andrew Bainham
Hannah M Markham	Amy Stout
Kate Makepeace Grieve	
(Instructed by HB Public Law)	(Instructed by Clifton Ingram LLP)

Intervener (A
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Lance Ashwo
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LADY HALE: (with whom Lord Kerr, Lord Wilson, Lord Hughes and Lord Toulson agree)

1.

This case is about the proper approach to ordering the unsuccessful party to pay the costs of a successful appeal in cases about the care and upbringing of children. It arises in the specific context of a parent's successful appeal to the Court of Appeal against care and placement orders made in a county court. But that issue obviously has to be seen in the wider context of appeals in children's cases generally.

This case

2.

These are care proceedings concerning the four children of Ms A, a girl now aged 13, a boy aged 12, a girl aged seven and a boy aged three. We are concerned only with the seven year old, whom I shall call Amelia. The respondent to this appeal is the father of Amelia and her older brother. He is also the social father of the oldest child, who was born during his marriage to the children's mother. The mother comes from Portugal and the father comes from Nepal. They married in 2002 and separated in 2007, before Amelia was born. The father is not the biological, social or legal father of the youngest child. As it happens, the oldest and youngest have the same biological father, but he has played little part in their lives or in these proceedings.

3.

From May 2009 there were increasing concerns about the presentation and behaviour of the children in their mother's care. Care proceedings were eventually brought in January 2012 and in November 2012 Her Honour Judge Karp found that there had been a serious lack of supervision and neglect of the children; they had suffered physical injuries from each other as a result of not being properly supervised; the mother was unable to meet their emotional, developmental and educational needs; they were at risk of sexual abuse because of their mother's inability to safeguard them from men allowed into the home about whom she knew little; and the two oldest had shown inappropriate sexual behaviour. She found, therefore, for the purpose of the "threshold conditions" in section 31(2) of the Children Act 1989, that they had suffered or were likely to suffer significant harm owing to a lack of proper parental care. This is conceded by the father.

4.

The mother was ruled out as a future carer for any of the four children. The father had had only limited contact with the family since separating from the mother and was not implicated in her neglect of the children during that time. He had since remarried. When the proceedings were begun, it was agreed that the older boy would live with his father and his new wife under an interim supervision order. In breach of his agreement with the local authority, however, the father left the boy with the mother for a short time while he went to work in Norway. And in May 2012 the father asked the local authority to take the boy back into foster care because of his challenging behaviour. He was soon joined by Amelia and their older sister, who had been removed from their mother. They remained together as a sibling group with the same foster family for a year, until the two oldest had to be separated because of their sexual behaviour together.

5.

Between August and October 2012 the father and his wife were assessed by an independent social worker as potential carers for the three older children, including Amelia. The first assessment was positive, but the social worker had not been told that the wife was now pregnant. At that stage, a consultant child and adolescent psychiatrist had reported that Amelia's development appeared normal for a child of her age. An updating assessment, conducted between October and December 2012, became negative, largely because of the couple's lack of candour and the father's lack of insight into

the need to be “resilient, consistent and able to implement firm boundaries” when looking after children who had suffered as these children had suffered.

6.
The father and his wife separated in February 2013, before their child was born. The father decided to move permanently to Norway, where he had obtained steady and well-paid employment and spacious accommodation. He asked to be assessed there as a carer for all three children, but both the local authority and the children’s guardian resisted that. The local authority’s plan was for long term fostering for the two oldest children and a closed adoption (that is without contact with the birth family) for the two youngest. The children’s guardian had originally wanted the three children to stay with the foster family which had looked after them for a year, but when that placement failed because of the older children’s sexual behaviour with one another, he supported the local authority’s plan.

7.
A placement order was made in relation to the youngest child in February 2013. (This has now been implemented; he was adopted in May 2014.) At the final hearing in relation to the elder three children in July 2013, the local authority sought a placement order for Amelia, by now aged five. The father opposed this because it would result in her losing all her established family relationships with her parents and her siblings. He had maintained good contact with the children since his move to Norway and asked to be assessed as her sole carer. This was opposed by the local authority and the children’s guardian. Amelia had been assessed by a social worker and family therapist in 2013 (in contrast to the view of the child psychiatrist in late 2012) as having a “high level of emotional and behavioural need” and their view was that the father did not have the capacity to meet this. Judge Karp accepted their opinions and made a placement order authorising Amelia’s placement for adoption without her father’s consent.

8.
The father appealed. In the meantime, in September 2013, the Court of Appeal had delivered judgment in In re B-S (Children) (Adoption Order: Leave to Oppose) [2013] EWCA Civ 1146, [2014] 1 WLR 563, emphasising the need for the court to evaluate all the options for the child’s future where adoption was proposed, analysing the pros and cons of each in the light of the paramount consideration of the child’s future in the long term. The father’s appeal was allowed: [2014] EWCA Civ 135, [2015] 1 FLR 130. The Court of Appeal held that the judge had been “wrong to make the order without further assessment of the situation of the father and child and in any event did not adequately articulate her reasons to proceed to make a placement order in the circumstances of this case” (para 4). We are told that the process of assessing the father and increasing his contact with Amelia since then has been successful and she has now been placed with him in Norway under a child arrangements order.

9.
The issue before us is not whether the Court of Appeal was right to allow the appeal. The issue is whether it was right to order the local authority to pay the father’s costs of the appeal (assessed in the sum of £13,787.70). The father had funded it privately, the non-means-tested legal aid which is available to all parents in care proceedings not being available on appeal. It was not suggested that the local authority had behaved reprehensibly in relation to the child or unreasonably in the stance taken at first instance (para 30). But they had resisted the appeal while recognising the deficiencies in the judgment in the lower court (para 32). A parent should not be deterred from challenging decisions “which impact upon the most crucial of human relationships” (para 30). The decision in this court in

In re T (Care Proceedings: Costs) [2012] UKSC 36, [2012]1 WLR 2281 was distinguishable and the court's discretion broad (para 31).

10.
In their application for permission to appeal, the local authority made it clear that, whatever the outcome, they would not seek to recover the costs awarded and paid to the father. They argued that the case raises matters of public interest which merit consideration by this court, but "it is not intended that Mr S should suffer financial detriment as a result". Permission to appeal was given on that basis. The court is accordingly very grateful to Dr Bainham and the father's legal team, who acted for him pro bono, thus enabling the case to be properly and fully argued.

In re T (Care Proceedings: Costs)

11.
In In re T, care proceedings were brought in respect of two children who had made allegations of sexual abuse against their father and a number of men, in which it was alleged that their paternal grandparents had colluded. The grandparents intervened in the proceedings in order to refute the allegations. As interveners they did not qualify for the non-means-tested legal aid which is available to parents. Their means were modest but above the legal aid threshold. They therefore had to borrow to pay for their own representation. The allegations were investigated at a "split" fact finding hearing, at which the grandparents were exonerated, although no criticism was made of the local authority for putting the allegations before the court. The Supreme Court held that the trial judge had been correct not to make an order that the local authority pay the grandparents' costs.

12.
Lord Phillips, giving the judgment of the court held, at para 44, that

"the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings."

It was irrelevant whether or not a party was legally aided. If the grandparents were entitled to their costs, so too should have been the five publicly funded men who were also exonerated. The local authority had a statutory duty to protect the children, by bringing proceedings where appropriate. It was for the court, and not for the local authority, to decide whether or not the allegations were true. Local authorities should not be deterred from putting such cases before the court by the prospect of having to pay the costs of those who were exonerated. This would reduce the funds available to provide for children in need. There was no warrant for distinguishing between hearings where fact finding was "split" from deciding what was best for the child and hearings where all issues were dealt with together.

13.
There are, of course, several distinctions between that case and this. In re T was a first instance trial, indeed that part of the care proceedings trial in which the essential facts are found, before moving on to discuss what solution will best serve the interests of the child in the light of those facts. Costs at first instance are governed by the Family Procedure Rules 2010, Part 28. This case concerns an appellate hearing, in which the essential facts were not in dispute, and the issue was what would be best for the child. Costs on appeal are governed by the Civil Procedure Rules, Part 44. In re T concerned the costs to be borne by interveners, indeed interveners whose interest was in clearing

their names rather than in looking after the child. This case concerns the costs to be borne by a parent of the child, indeed a parent who wishes to undertake the care of the child himself.

14.

In order to decide whether those are material distinctions, it is necessary once again to examine the issue of costs in children's cases from first principles.

Costs in children's cases

15.

Under section 51 of the Senior Courts Act 1981, costs in the civil division of the Court of Appeal and in the family court are "in the discretion of the court" but subject to the rules of court. Under the Civil Procedure Rules, the "general rule" in civil proceedings is that the "unsuccessful party will be ordered to pay the costs of the successful party" (CPR, rule 44.2(2)(a)). However, this general rule does not apply to first instance proceedings about children (FPR rule 28.2(1) disapplies CPR rule 44.2(2)). Nor does the general rule apply to proceedings in the Court of Appeal in connection with proceedings in the Family Division of the High Court or from a judgment, direction, decision or order in any court in family proceedings (CPR, rule 44.2(3)).

16.

However, CPR 44.2(4) and (5) do apply to children's proceedings both at first instance and on appeal:

"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences of Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed ... any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

17.

As was pointed out in In re T, rule 44.2(4)(b) is relevant in a situation where the general rule applies but has no direct relevance where it does not (para 11). This is not, of course, to say that success or failure is irrelevant in children's cases: no-one has suggested in this case that the successful party should have to pay the unsuccessful party's costs (although, as will be seen, there may be circumstances where this would be appropriate). Nor does rule 44.2(4)(c) readily fit the conduct of children's cases, save as an aspect of the general desirability of the parties co-operating and negotiating to reach an agreed solution which will best serve the paramount consideration of the

welfare of the child. As such, it is part of the general conduct of the proceedings, some aspects of which are listed in rule 44.2(5).

18.
As long ago as Gojkovic v Gojkovic (No 2) [1992] Fam 40, at 57B, the Court of Appeal observed that it was unusual to make an order for costs in children's cases. In Keller v Keller and Legal Aid Board [1995] 1 FLR 259, at 267-268, Neill LJ went further:

"In the last decade, however, it has become the general practice in proceedings relating to the custody and care and control of children to make no order as to the costs of the proceedings except in exceptional circumstances."

He did, however, go on to say that it was "unnecessary and undesirable to try to limit or place into rigid categories the cases which a court might regard as suitable for such an award".

19.
Nevertheless, the cases which might be regarded as suitable may be deduced from the reasons why the courts have adopted the "no costs" approach. The classic explanation is that given by Wilson J in Sutton London Borough Council v Davis (No 2)[1994] 1 WLR 1317, at 1319:

"Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties."

20.
Whenever a court has to determine a question relating to the upbringing of a child, the welfare of the child is the court's paramount consideration: Children Act 1989, section 1(1). This applies just as much to care proceedings brought to protect a child from harm as it does to disputes between parents or other family members about the child's future. Although the proceedings are adversarial in form, they have many inquisitorial features. An application cannot be withdrawn without the court's consent (FPR, rule 29.4). The court is not bound by the cases put forward by the parties, but may adopt an alternative solution of its own. The court is not bound by the choice of evidence put forward by the parties, but can decide for itself what evidence it wishes to hear. The court is very often assisted by the independent investigations and reports of the family court reporter (in private law cases) or the children's guardian (in care and adoption proceedings) and other experts. Even in care proceedings, there are many possible outcomes available to the court. Thus, for example, in a case such as this, the available outcomes ranged from a closed adoption with no contact (other than letterbox contact) with the birth family to the child going to live with her father with no further intervention by the local authority. In between could be, for example, an open adoption, a special guardianship order, long term fostering under a care order with only limited contact with the birth family, medium term fostering with increasing contact with a view to restoring the child to her birth family in due course, placement with the birth family under a care order, placement with the birth family under a supervision order together with a child arrangements order, a child arrangements order or even no order at all. It can

readily be seen, therefore, why in such proceedings there are no adult winners and losers – the only winner should be the child.

21.
Furthermore, it can generally be taken for granted that each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child. It would be difficult indeed for a court to decide how to secure that the child has a meaningful relationship with each parent without hearing from them both. It would be difficult indeed for a court to decide the best way of protecting a child from the risk of harm without hearing from her parents and those whose task it is to protect her. That is why parents are compellable witnesses in care proceedings, even when it is alleged that they have committed criminal offences. No-one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the court achieve the right solution.

22.
It can also generally be assumed that all parties to the case are motivated by concern for the child's welfare. The parents who dispute with one another or with the local authority over their children's future do generally love their children dearly and want the best for them as they see it. There are of course some wicked, neglectful, selfish or merely misguided parents who are not motivated to do their best for their children, but these are not the generality of parents, even those whose children are the subject of care proceedings. Local authorities are not motivated by love, in the way that parents are motivated by love, but they do have statutory duties to investigate and take action to protect children if there is reasonable cause to suspect them to be suffering or likely to suffer significant harm: Children Act 1989, section 47. They will be severely criticised by press and public alike if they fail to take action when they should have done.

23.
Another consideration is that, in most children's cases, it is important for the parties to be able to work together in the interests of the children both during and after the proceedings. Children's lives do not stand still. Their needs change and develop as they grow up. The arrangements made to cater for those needs may also have to change. Parents need to be able to co-operate with one another after the case is over. Unless there is to be a closed adoption they also need to co-operate with the local authority and the people who are looking after their children. The local authority need to be able to co-operate with them. Stigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future.

24.
There is one final consideration. In certain circumstances, having to pay the other side's costs, or even having to bear one's own costs, will reduce the resources available to look after this child or other children. Thus, for example, if a mother who is bringing up the children on modest means had not only to bear her own costs but also to pay the father's costs, when unsuccessfully resisting his application for more contact with the children, the principal sufferers might well be the children. Nor can it be ignored that, if local authorities are faced with having to pay the parents' costs as well as their own, there will be less in their budgets for looking after the children in their care, providing services for children in need, and protecting other children who are or may be at risk of harm.

25.
On the other hand, there is one consideration which cannot be taken into account. The automatic availability of non-means-tested and non-merits-tested public funding for parents at first instance in

care proceedings has masked the issue. It has only surfaced on appeal, as here, or for interveners, where public funding is means-tested. But the question of whether it is just to make an order for costs should as a matter of principle be determined irrespective of whether any of the parties are publicly funded. As Baker J put it in G v E (Costs) [2010] EWHC 3385 (Fam), [2011] 1 FLR 1566, para 39. "Gone are the days when it is appropriate for a court to dismiss applications for costs on the basis that it all comes out of the same pot". (The consequences of making a costs order for or against a publicly funded litigant are a separate matter.) Thus, as Lord Phillips pointed out in In re T, at para 41, if in principle the local authority should be liable in costs to interveners against whom allegations, reasonably made, have been held to be unfounded, this liability should arise whether or not those interveners were publicly funded. The other five men who were exonerated in that case should also have got their costs. Parents, automatically publicly funded, who successfully resist care proceedings would also get their costs. It might even be said that successful local authorities should get their costs against the parents (or interveners) irrespective of public funding.

26.
All the reasons which make it inappropriate as a general rule to make costs orders in children's cases apply with equal force in care proceedings between parents and local authorities as they do in private law proceedings between parents or other family members. They lead to the conclusion that costs orders should only be made in unusual circumstances. Two of them were identified by Wilson J in Sutton London Borough Council v Davis (No 2): "where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable: Havering London Borough Council v S [1986] 1 FLR 489 and Gojkovic v Gojkovic [1992] Fam 40, 60C-D" (p 1319). Those were also the two circumstances identified in In re T, at para 44.

Should this case be distinguished?

27.
Two questions arise: first, is there any reason to depart from the general approach in In re T in this case; and second, are there any other circumstances, beyond the two identified in In re T, in which a costs order might be justified?

28.
It cannot be a valid distinction that the people claiming costs in In re T were interveners wishing to clear their names rather than parents wishing to care for their children. All the reasons why costs orders are inappropriate in children's cases apply much more strongly to parents and local authorities than they do to such interveners. The fact that parents are resisting the claim of the state to take their children away from them is undoubtedly relevant, but it is relevant to whether one of the exceptions should apply. As a general proposition, I would accept Dr Bainham's argument that parents are always entitled to resist the claim of the state to remove their children from them. They will usually be reasonable in doing so. They should not have to pay the local authority's costs if they lose. But it does not follow from that that if the local authority lose, they are unreasonable in seeking to protect the child: that will all depend upon the particular circumstances of the case.

29.
Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in EM v SW, In re M (A Child) [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, "nobody knows what the judge is going to find" (para 23), whereas on appeal the factual

findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to "take stock" and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal.But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case.

30.
Secondly, however, are there circumstancesother than reprehensible behaviour towards the child or unreasonable conduct of the proceedings which might justify a costs order in care proceedings? It is clear from the authorities cited above that there may be other such circumstances in private law proceedings between parents or family members. Should care proceedings be any different?

31.
I do not understand that Lord Phillips, giving the judgment of the court in In re T, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just. That would be to ascribe to para 44 of the judgment the force of a statutory provision. Such a rigid rule was unnecessary to the decision in that case and cannot be treated as its ratio decidendi.

32.
On the other hand, it was necessary to the decision in that case that local authorities should not be in any worse position than private parties when it comes to paying the other parties' costs. There is an attraction in regarding local authorities in a different light from private parties, because of their so-called "deep pockets". But, as Lord Phillips observed, at para 34,

"Local authorities have limited funds. Their costs in relation to care proceedings are met from their children's services budget. There are many other claims on this budget. … No evidence is needed, …, to support the proposition that if local authorities are to become liable to pay the costs of those [whom] they properly involve in care proceedings this is going to impact on their finances and the activities to which these are directed. The court can also take judicial notice of the fact that local authorities are financially hard pressed, …"

While it is true that appeals are comparatively rare and their costs comparatively low compared with the costs of care proceedings generally, that is not by itself a good reason for making an exception in their case.

33.
But nor should local authorities be in any better position than private parties to children's proceedings. The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk. (It may be that this is one of the reasons why parents are automatically entitled to public funding in care cases.)

Pro bono costs

34.
The Access to Justice Foundation (whose legal team has also acted pro bono) has helpfully intervened, principally in order to argue that the principles applicable to pro bono costs orders should be the same as those applicable in other cases. Under section 194 of the Legal Services Act 2007, the court may make a pro bono costs order in favour of the Access to Justice Foundation in respect of legal representation which has been provided free of charge. In making such an order the court has to have regard to whether it would have made a costs order had the pro bono represented party been represented on a fee paying basis and if so what such an order would have been (section 194(4)). In In re E (B4/2014/0146), the Court of Appeal made a pro bono costs order against a local authority which had unsuccessfully opposed a father's appeal in care proceedings. In a short written ruling, they explained that they did so on the basis that this created an exception to the general position:

"There is a public interest in the Bar Pro Bono Unit being compensated on a reasonable basis by an award of costs where such an award is available under the legislation."

The Foundation argues that it was right to make the order but the reasoning was wrong. The general position should be that local authorities are ordered to pay the costs of parents who successfully appeal in care proceedings. Pro bono costs should be no exception. However, we have decided that the general position should be that local authorities, like any other party to children's proceedings, should not be ordered to pay the costs. The logic of the Foundation's argument is that no exception should be made for pro bono costs. Indeed, it would be hard to reconcile such an exception with section 194(4), but the point does not arise in this case.

Application in this case

35.
It is not suggested that the local authority have behaved in any way reprehensibly towards these children or their parents. It is not a case like A and S (Children) v Lancashire County Council (Costs) (No 2) [2013] EWHC 851 (Fam), [2013] 2 FLR 122, where the local authority's conduct towards the children over many years was "blatantly unlawful and unreasonable … and led inexorably to substantial litigation" (para 22). Indeed, the only criticism which could be levied against them was that they might have taken action to protect these children earlier than they did (see para 10 of the Court of Appeal's judgment).

36.
There is, perhaps, a faint suggestion (see para 32 of the Court of Appeal's judgment) that the local authority behaved unreasonably in relation to the appeal, by resisting it despite the deficiencies in the first instance judgment. In this case, I consider any such suggestion to be unwarranted. It is true that Judge Karp had not gone through the pros and cons of the various possibilities in the detail expected since the judgment in In re B-S. But had the Court of Appeal considered that she had reached the right conclusion on the merits of the case, I have little doubt that they would have remedied this deficiency. The crux of the matter is that they considered that there should have been an assessment of the father's ability to care for his daughter in Norway. It is not difficult to understand why: there were several positives in his favour and the evidence of Amelia's particular needs was contentious. But neither is it difficult to understand why the local authority maintained their stance, supported as it was by the children's guardian as well as the independent social worker and the psychotherapist, that Amelia should be placed for adoption. The Court of Appeal would have been surprised indeed had the local authority failed to respond to the appeal (and risked the criticism incurred by the local authority which failed to respond to application for permission to appeal in In re S (Children) Care Proceedings:

fact-Finding Hearing) [2014] EWCA Civ 638, [2014] 3 FCR). In the circumstances, it was also in my view reasonable of them to have maintained the stance that they had taken at first instance.

37.
As to the question of whether a refusal to award costs might indirectly create hardship for the child, this would have required the Court of Appeal either to reserve the costs of the appeal until the outcome of the assessment had been known and the child's future decided or to remit the question of the appeal costs to be decided at the future first instance hearing. At that point it would have been clear where Amelia was to live and evidence could have been filed as to the impact upon her of the father having to bear his own costs in the appeal. It has not been suggested that that would have been an appropriate course in this case.

38.
In these circumstances, it is unnecessary to address the alternative argument mounted by the local authority, that the costs should have been apportioned between the authority and the children's guardian, as both were opposing the appeal, although the guardian took no part in the hearing. We note that the Legal Aid Agency has expressed the view that they "do not think that there is any lawful way that a proportion of the father's costs can be paid by the child under his certificate". That issue is not before us and I would prefer to make no comment.

Conclusion

39.
For all those reasons, none of the exceptions to the general approach applicable to awards of costs in children's cases applies in this case. The appeal should be allowed and the costs order made in the Court of Appeal set aside (the local authority having given the assurance referred to in para 10).