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S v S (Relocation) *[2017] EWHC 2345 (Fam) (14 September 2017)*

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IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
Royal Courts of Justice The Strand, London 14th September 2017

Before:

MR JUSTICE PETER JACKSON
(In Private)

S (Father) Applicant

- and -

S (Mother) Respondent

MR E DEVEREUX QC and MR R GEORGE (instructed by Messrs Hughes Fowler Carruthers) appeared on behalf of the Applicant. MS D EATON QC and MR N ANDERSON (instructed by Messrs Sears Tooth Solicitors)appeared on behalf of the Respondent.

MR A VINE QC (instructed by Messrs Dawson Cornwell) appeared on behalf of the Children D and A.

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This transcript has been approved by the Judge

HTML VERSION OF JUDGMENT

J U U G M E N T: S v S (Relocation)

MR JUSTICE PETER JACKSON:

1. This is an application made on 3rd April 2017 by Mr S, who I shall call the father, to remove his two sons, D, aged 15 years three months, and A, aged 13 years nine months, to live with him in Switzerland. That application is opposed by the boys' mother, with whom they live. The boys have their own representation in these proceedings. There is also an older child of the family, M, who is now 18 and a half years old. The issue must be decided in accordance with the welfare of the children and I must balance all relevant factors to find which of the available options is the best. I have been fully reminded of the relevant statutory and judicial authorities which need no further specific citation here.

2. What does have to be remembered is that the court can only work with the material with which it is provided. Often, as here, it is not possible to produce a truly good out come but only to choose the one which is least bad. In a case of this kind, where a family has every conceivable material advantage, it is easy to forget the old truth that money cannot buy you happiness. It certainly has not done for this family. Instead, the pursuit and accumulation of wealth that has created conditions that have left everyone spoilt for choice and thoroughly miserable. The fact that the family has spent just shy of 1 million on these proceedings, proceedings of no particular complexity that only began in April, is fairly typical. This is not empty moralising. If the parents and children cannot return to a more considerate, amore normal way of behaving, the future is bleak whatever the court may decide. In saying this, I am not only speaking to the parents but also to the three children who are old enough in their own ways to do their bit to repair the damage that has been caused.

3. The background is that this family is Russian and also have Cypriot citizenship having established a haven there from the time the children were born. The father did so well out of the oil business in Russia that he now feels able to retire in his early 40s. The amount of time he spent on business made the mother the undoubted primary carer for the three boys.

By 2006, the marriage was in ruins, whether or not the parents divorced then. This is disputed and the subject of separate proceedings, but at all events, by 2006 the mother and children were living in Cyprus with the father's blessing and support. Indeed, if D and A identify anywhere as home, it is Cyprus. The eldest boy M lived in Cyprus until 2010 when his parents sent him to a series of boarding schools, two of them in England, one in Russia,and he was asked to leave all of them. He is now living in a flat of his own in Moscow with his girl friend, paid for by his father. His relationship with his mother has broken down and he filed a statement in these proceedings that is highly critical of his mother but, mercifully, he was not required to give evidence.

4. In 2014, with the father's entire agreement and financial support, the mother and the two boys came to England. The boys were installed in private schools. There matters rested. Despite the breakdown of the marriage, the parents managed to agree on most things concerning the children and the father ensured that they and their mother wanted for nothing. The children have grown used to the usual trappings of an opulent lifestyle, lavish homes, privileged schools, incessant international travel, being constantly surrounded by staff of one kind or another. I do not think that the boys (and perhaps the parents either) realise that this is a lifestyle lived only by a tiny minority of people who have a very particular and perhaps rather limited world view. For D and A, this is their norm, but instead of providing them with opportunities, it has only given them problems. In dealing with all this material "success," the family has forgotten how to do the simple things.

5. The big problems arose in the last two years though the roots no doubt go deeper. The father has for many years had a relationship with N. She had worked for the mother while the family were together. The mother is very hostile towards N and makes her feelings known to everyone. In February 2015, the father and N had a baby boy, E, and about a year later they decided to set up home in Switzerland. For reasons that suited him, which he described to me as "keeping a calm atmosphere," the father did not tell the mother or the boys about N and E. The reason for this deception, I find, was so that he could continue to portray himself to his sons as a man of high principle. Of course, it was only going to be a matter of time before the existence of a half-brother came to the knowledge of the children and their mother but the father instead handled it in a weak way. By mid-2016 he had told the boys,first M and then D and A, about N and E, trusting them to keep it from their mother. She only learned about E from her Russian lawyers

in December 2016. Understandably, she was mortified that this knowledge had been kept from her while the boys had known about it for months. The way the father behaved was shabby. It pitted the boys against their mother just to make life easier for himself. He betrayed the mother's trust in him as a parent. Continuing, in February 2017 he took the children to see the Swiss school without their mother knowledge. All of this did much to make these proceedings happen in the way that they did.

6. Alongside this there were stresses in the children's relationship with their mother. At the beginning of 2016 they began to express unhappiness to their father about life in England. They began to complain about their mother's behaviour (I think it likely that these complaints were exaggerated) and to ask their father if they could come and live with him. I believe that they felt that life with him in Switzerland might be more agreeable. Increasingly they became difficult and disrespectful towards their mother who began to struggle to assert her authority. I do not accept the mother's case that the father set out to incite the boys to come to live with him. I understand why she feels that way but in fact the father's approach was of a different kind. He loves his children, but he was perfectly happy to let other people, and in particular the mother, do the day-to-day caring and for him to have lots of holiday fun time. By the beginning of 2016 he had a concealed baby to concern himself with and the problems that the boys were bringing to him cannot have been welcome. I find that his actions, misguided as they have been, were motivated by a genuine wish to help the boys, but what has been unacceptable has been the way that he went about it. Instead of working with the mother to solve their problems, he armed the boys with lawyers paid for by him from February 2016 and the unmistakeable message to them was not that the problems needed to be worked on but that there was an alternative with him and a new life in Switzerland. The father did not actively attack the mother's home situation; instead, he did nothing to defend it. He could have used his influence with the boys to settle them but, instead, his actions unsettled them. Worse still, the mother was entirely in the dark about what was really going on

7. There was a meeting between the parents in September 2016. The mother called this to try to discuss financial issues and because she was trying to divorce the father in England. The father and the children say that at this meeting the mother agreed on a move taking place at the end of the 2017 school year. I do not accept that. There is not a shred of contemporaneous evidence and

even if there had been an agreement, it would be worthless given that the mother knew nothing about the father having set up home with N and about the birth of E. The only discussions that might have taken place about the boys at that meeting were a farce due to the father's deceptions. Nevertheless, the father ran the case at this hearing that the mother had agreed to a move to Switzerland.

8. The boys had a first meeting with their solicitor, Ms Hutchinson, in March 2016 but no further contact for a year after that. In March 2017 the legal aspect of the matter awoke when, in a choreographed manner, the father issued a without notice application concerning Easter holiday contact which was swiftly supported by the children who applied for party status, accompanied by a statement from Ms Fleetwood stating that the children were seen in March 2017 when in fact it had been a year earlier. This was not corrected until 2'" May,by which time the matter had been in court twice. On 1 1th April the relocation application had been issued. All of these events were experienced by the mother as an onslaught in which the father and the children were manipulating her. However, against her arguments, Pauffley J on 18th May gave permission for the boys to be joined as parties, but in the most guarded terms. In the meantime, on 25th April, there had been a meeting between Ms Fleetwood and D at his school without the mother's knowledge.

9. The matter came before me in July for a pre-trial hearing. The summer holidays were divided up by agreement but even when the boys were due to spend the last ten days or so of August with their mother, they instead stayed with their father in Moscow. He did nothing effective to honour the agreement that had been reached. The mother in the end gave up on that part of the holiday and the boys were allowed to reach the conclusion that she did not really care.

10. In the course of the proceedings the court has received two expert reports and the first is from Dr Hans Martin Allemann, the Swiss attorney, who advises that any order of this court can be enforced in Switzerland under the 1996 Hague Convention; that is accepted by all parties. Secondly, there is a report of Ms Helena Ware, an independent social worker, commissioned to investigate. She saw the boys in England and in Switzerland with each parent and her advice is, "Given the strength of the boys feelings and wish to live with their father, I believe that there is no alternative but to agree to his application. "Giving evidence, she said that the boys' opposition to England and their mother has gone so far down the line that to refuse the application now would be very difficult. She would advocate a move however the

boys came to have these views and even if it leads to a further deterioration in the relationship with their mother. In fact, she believes, but cannot be sure, that the relationship is more likely to recover if the boys' wishes are followed rather than refused. She said that even if the father could not be relied upon, even if he had set all this up, her recommendation would not change.

11. I saw the boys shortly before Ms Ware gave evidence. It was a useful meeting in allowing me to get to know them a little and I hope it made the court process easier for them to understand. They conducted themselves well in the meeting, so I was disappointed to hear that on their way out they stuck their tongue out at their mother because they wrongly, as it happens, believed that she had tried to stop them talking to their father.

12. The parents each gave evidence via interpreters and I comment on that below I now step back and consider the boys' welfare through aspects of the welfare checklist.

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AGE, BACKGROUND, CHARACTERISTICS:

14. The boys are aged 15 and 13. Their characteristics are very different. D, the elder boy, is a softer personality than his brother. A, the younger, seems old for his age and he very much has the bit between his teeth.

CHANGE OF CIRCUMSTANCES:

15. Until 2015, when the children were 13 and 12, they had always lived with their mother with their father's full acceptance and they saw him regularly. A move to Switzerland would be a change in circumstance, mainly because it would make the father primarily responsible for their day-to-day care, with the mother seeing less of the boys. However, firstly, a move from England is not such a big deal in this case because these are not English children, they have no real affection for life here after only three years and they have not put down roots. Secondly, this is an itinerant family who move around the world as it suits them. The boys have lived in three countries already and I do not suppose that living in a fourth would make much difference. In reality, the children live in a bubble of wealth that can be recreated anywhere, while the money lasts. A move to Switzerland is in material terms no more than amove from one feather bed to another.

16. Thirdly, education is important. Education is seen as important by both parents though not

so important as to make the parents take the boys to school when the family's social life makes that inconvenient. D is starting his GCSE year and it is obviously not ideal to move schools now but his academic performance is not strong and his commitment to his current school is so weak that his results next summer are not something to look forward to. A is stronger academically and will do okay in any school if he applies himself. The Swiss school makes all the usual promises for new pupils; even if these do not bear fruit, the educational experience in Switzerland is unlikely to be worse and if the boys are prepared to do some work, they may do better. Lastly, the father is capable of dealing with the day-today needs of youngsters, who are adolescents not small children.

THE CHILDREN'S NEEDS:

17. If they are to do well, these children need to return to a normal, emotional atmosphere. This emotional need is far more important than any physical or educational need.

PARENTAL CAPACITY TO MEET THE CHILDREN'S NEEDS:

18. I was impressed by some aspects of each of the parents' evidence. They have intelligence and personality and they care about their boys, but they, and in particular the father, have let themselves down in recent times by allowing this situation to get so out of hand. In fact, I got the impression that, despite all that has happened, the relationship between the father and mother as parents may not be completely beyond repair. They both still see some good in each other. Each expressed some regret for their behaviour which is a start; the father for his deceptions and the mother for her volatile behaviour, for example, about N and for hitting out at A when he misbehaved in the car. Overall, these parents have the capacity to meet the boys' needs if they could find a way of burying the hatchet.

HARM AND RISK OF HARM:

19. Against this background there are two areas of concern. The first is that the children become so spoilt that they drift through life on a raft of money, never achieving anything of which they can be proud and believing that you can get what you want by paying for it and that you can deal with personal conflict by being rude and disrespectful. If the boys end up like this, it will be because their parents have taught them by example. The second and more immediate risk concerns their relationship with their mother. It is, she agrees, at breaking point now. It is

terribly important that it is not damaged beyond repair. The alienation of M from his mother shows how bad things might get. However, I am not satisfied that this was brought about only by the father and I cannot tell whether M's story is a warning about what will happen to D and A if they leave their mother's care or if they stay there. I am, however, fearful that a refusal of this application would leave the boys and their mother in a fairly desperate place. I believe that the boys would go on wrecking the relationship. They do not have the self-discipline to do otherwise and I do not expect that the father would give the mother the support she would need. Ms Ware's central theme is that a move is likely to help the boys' relationship with their mother rather than to harm it and I think that she is probably right.

20. My conclusion on this issue is that the loss of an active relationship between the boys and their mother if they go to Switzerland is possible but I do not think that it is probable given the position taken by the father and the orders that could be made by this court to ensure the continuation of the mother's role in the boys' lives.

THE POWERS Of THE COURT:

21. The court can make child arrangements orders for the children to live with one or both parents or to live with one and spend time with the other. It can make orders that are likely to be recognised swiftly in Switzerland. It can attach conditions to its orders.

THE CHILDREN'S WISHES AND FEELINGS:

22. I finally turn to the children's wishes and feelings in the light of their age and understanding. It is not disputed that D and A are expressing the most adamant views in favour of a move to Switzerland and that they have done so for many months. They are, to put it bluntly, in revolt against life in England with their mother. She argues that these views have been incited by father and that if the revolt is put down by a court order, and if he changes his approach, the children can be made to settle down. I am sympathetic, very sympathetic, to the mother's point of view but I do not agree with it. I see no possibility of these head strong boys settling down and I do not think that the father has the necessary qualities or intentions to make them do so.

23. There is another point to be made; these boys are old enough to instruct lawyers to ensure that their wishes and feelings are fully represented. At their age, those wishes and feelings are a very important element in their welfare. That is so even if the wishes and feelings are unwise.

There is nothing in the law that says that the wishes and feelings of older children should be wise or reasonable. They may be foolish or immature but respecting children's points of view must, in the case of older children, accept to some extent the risk of them making mistakes. Unless the consequences of mistaken choices are profoundly harmful, the court cannot protect older children from every mistake that they may make. Here, in my view, a move to Switzerland may or may not turn out to have been a good choice but the wishes and feelings of these children have, in my view, made it the only viable choice. If it turns out to have been an unwise one, then the boys and their parents will have to live with it. This is not, as Ms Eaton QC puts it, the court washing its hands of the boys but, rather, taking a practical view of the real life of this family.

24. I, therefore, conclude that the boys' welfare is better served by a move to Switzerland and I shall grant the father's application subject to the terms to which I now come. Firstly, following the move, the children will be subject to a child arrangements' order for them to live with both parents. I will settle the terms of the division of time after hearing from counsel but, in principle, I consider that the children should have a home with each parent even if their time is unequally divided. Secondly, on 2311 August the father said in a message to the mother that he would "do anything" to help maintain communication between the children and herself. At my invitation, he has made proposals amounting to some £5000 monthly, on top of the existing levels of support, to allow the mother to create a pied-a-terre in Switzerland along, no doubt, with some short-term support until that arrangement can kick in. The mother's response to counsel is that this level of extra support is far too low. In reality, the financial affairs of this family will, in my view, sort themselves out and whether or not the precise figure is too low, it is, in my view, a reasonable first proposal and I will make it a condition of the permission to remove the children that this support is provided. The mother is able to top it up from other funds provided by the father if she wishes and it may well be on the facts of this case that she will recoup at least some of her legal costs from the father, giving her additional access to funds which she can use to support herself in Switzerland. I will hear submissions of course on the costs aspects.

25. Thirdly, the order will be drawn in such a way as to make it readily enforceable in Switzerland. Dr Allemann can advise before it is finalised.

26. Fourthly, subject to any further submissions on this point, the date for departure will be 22th

September. The children can then start school on 25th September. Any more rushed departure is, in my view, unnecessary and disrespectful to the mother, even allowing the week for the children to start school reasonably quickly. Apart from anything else, the children and mother need to have some time together, possibly even time to start making their peace with each other.

27. I end this part of my decision by saying that I recognise that this decision causes the mother great distress but it is not the end of the world. Other parents have got into difficulty with their teenagers and come through it. Having seen the mother in court, my view is that if she can be patient I am sure that she has the ability to restore her relationship with D and A and to let them see her as the loving parent that she truly is.

28. I now add a coda concerning the impact of the legal representation of these children upon their welfare. The sequence of events concerning the children's lawyers is this; in February 2016 the father's Russian lawyer, prompted by his English solicitor, contacted Ms Hutchinson who happened to be in Russia at the time. In March 2016, on her return Ms Hutchinson met the boys in a café close to their school, unknown to the mother. Dawson Cornwell's fees were paid by the father and nothing happened until a year later. In March and April 2017 when the father's first application was issued, the boys communicated a number of times with Ms Hutchinson and her colleague, Ms Fleetwood, by social media. In April Ms Fleetwood met D at the school with out the mother's knowledge. She wrote to the mother's solicitors subsequently that D had made her aware of the relocation application that the father had now issued; in fact Dawson Cornwell had learned about this from the father's solicitors a fortnight earlier.

29. In May 2017, the boys came to court and later that month they were joined as parties by Pauffley J. In June 2017, the boys met their solicitors at Dawson Cornwell's offices twice with the knowledge of the parents, and in July 2017 they met the solicitors and counsel locally to their home with the knowledge of both parents.

30. The mother understandably complains that, entirely without her knowledge and at a time when she was having difficulty parenting the children, the father was funding a legal Page 8 of 10 for the boys, now to the tune of 174,000. She says that this just added to the other ways in which the father was undermining her authority.

31. At my request, Mr Vine QC has addressed the duties of solicitors in these circumstances ina short position statement. That reads as follows:"In so far as there is further clarification on the

obligations of a child's solicitor in this difficult area:

(1) The Solicitor's Regulatory Authority (SRA) Code of Conduct secures the obligations to act with integrity (Mandatory Principle2), not to allow the solicitor's independence to be compromised (Mandatory Principle 3), and to protect the client's interests (Mandatory Principle 4 and Chapter 1.1);

(2) The Solicitor's Regulatory Authority (SRA) Code of Conduct further requires the solicitor to keep the client's affairs confidential unless disclosure is required or permitted by law or the client consents (Chapter 4.1);

(3) The SRA Practice Note Acting in the absence of a children'sguardian suggests the solicitor is mindful of a guardians PD16Aduties;

(4) As a matter of general principle, parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision, Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 11, Lord Scarman at 186;

(5) On familiar principles, a child has an Article 8 right to respect for their privacy in the setting of client/professional information;

(6) Again on familiar principles, a child has a right to confidentiality in the same setting;

(7) The entire area of a child's Article 12 UNCRC right to participation in proceedings concerning them is one that continues to evolve, Re W (A Child) [20161 EWCA Civ 1051, Black U §26and Re F (Children) [20161 EWCA Civ 546, Sir James Munby P§41.

There would appear to be no direct guidance on the obligations in question, and the answer must be that the obligations will depend upon the nature of the information presented and the instruction given to the solicitor by the child, and their judgment as to their child client's best interests. Information relating to child protection or the safety of others will generate a more obvious response than information relating to a private dispute.

The child's solicitor is in a delicate position, calling for sensitivity to the competing interests of the child and parent."

32. I agree with all of that and I particularly wish to record that the lawyers acting for these two

children are among the leading experts in representing children, particularly in international cases. However, I am left with a sense of unease. I am not sure that Mr Vine's analysis, correct as far as it goes, is the whole picture. There is a tension between the right of children to receive legal advice and the need for parents to know what is happening in children's lives so that they can look after them properly. For the lawyers to be having secret meetings with children in cafés and at school without the knowledge of their primary carer inevitably leaves a sour taste. How, for example, is the school to react? Is it right that one parent should know what is happening and pay for it while the other is left in the dark? These are also child welfare issues that need further thought but, having identified them, I say no more about it on this occasion. (After a short time)

33. [Discussion of the terms of the order.]

34. The remaining issue between the parties concerns the incidence of legal costs which led both parties to indicate an intention to make an application against the other, although the father very swiftly and, in my view wisely, retracted his position, seeking instead that there should be no order for costs. That leaves the mother's application for her costs to be paid by the father. They amount in round figures to £271,000. The father, as I will explain, resists that application.

35. I record that the legal costs globally in this case are outrageously high. The estimates that I have been given concern only these proceedings relating to the boys. They do not concern the other costs that the parties are responsible for in relation to the divorce and any financial aspects. The father estimates his costs of this application at £493,000. He has also paid or taken responsibility for costs of £174,000 in relation to the children's costs, so taken together with the mother's costs, the total comes to some £938,000 of which the father is already responsible for two thirds of a million.

36. There is helpful guidance in relation to the award of costs in children's cases, the overall objective being to make a just order in all the circumstances of the case. In the vast majority of cases involving children, the appropriate order will be no order for costs for all the reasons stated in the authorities, particularly the case of Re T from 2012 in the Supreme Court.

37. This is a highly exceptional case. The figures, high though they are, may in fact be of less significance to this family than costs expenditure of a or even a 100th of those amounts might

be to another family.

38. I direct myself with reference to a helpful summary contained in the judgment of Cobb J in E-R (Child Arrangements) [20161 EWHC $05 at para.77 which I will not read into this judgment. Having set out the normal rule, Cobb J states at sub-paragraph 5:

"An award of costs in family proceedings may be justified if it is demonstrated that the conduct of the party (before as well as during the proceedings and/or in the manner in which a case has been pursued or defended) has been 'reprehensible or unreasonable' (Re T)."

39. I am in agreement with Mr Devereux that it is not principled to make orders for costs in children cases simply because one party has all or most of the assets. I am also in agreement that if an award of costs is to be based upon reprehensible or unreasonable behaviour, that behaviour has in some clear way to be linked to the consequences in costs terms of the resulting proceedings. So, on the one hand, costs orders are not made simply because of narrow litigation conduct; on the other hand, they cannot be made simply to reflect the court's unhappiness with some unrelated aspect of a litigant's behaviour.

40. In this case, however, I have found the father's behaviour to have been reprehensible in certain respects in a way that has directly fed into the manner in which these proceedings arose, the way in which they have been pursued and the fact that they had to come to a final hearing.

41. Mr Devereux makes these points which I take into account. He says that the father has succeeded in his application and that it would be highly unusual for him to be ordered to pay any costs in such circumstances. I have already said that the circumstances are, in my view, very abnormal, but, further to that, I only accept that the father has "succeeded" in the narrow sense that his application has been granted. In this case, frankly, I do not think that anybody has succeeded.

42. Next, it is said that following the receipt of Ms Ware's report in July, the mother should have settled the case. I am afraid that this overlooks the fact that the father's conduct had by then not been acknowledged. He continued to assert matters which I found to have been untrue. Likewise, it has been suggested that the mother should have settled the case out of court through alternative dispute resolution. I have described in my judgment how the mother in this case faced what I think I called an onslaught and it is to my mind quite understandable that she

felt the need for a judicial ruling. Mr Devereux also, with restraint,advanced the argument that it would damage the healing process if anybody was ordered to pay costs. I think that the father is experienced enough in life to be able to cope with disappointments of that kind alongside outcomes that have been happier from his point of view.

43. The one argument that Mr Devereux is I think right about is that, probably without much thought, orders for costs were made on three occasions in the interlocutory stages of the proceedings, namely no orders for costs, and I agree with him and not with Ms Eaton that I cannot make different orders for costs to those that have already been made. Those orders would first have to be set aside on the basis that they were obtained without full knowledge of the circumstances.

44. I consider in this case that the mother is entitled to a substantial contribution towards her cost to reflect the fact that the father's conduct substantially contributed to the way in which this dispute had to be resolved. I do not think that she is entitled to all of them because she, too, bears some responsibility for the unhappy situation that has led us to being where we are. I also make a discount for the occasions on which orders have already been made as mentioned a moment ago. Inevitably I have to use a broad sense of what is just in the circumstances rather than approach it as an accounting exercise. I note that the father was willing to pay £173,879.71 for his children to be represented. I have been tempted to make him pay a similar amount as a contribution towards the mother's costs but in all the circumstances
I think the appropriate amount, payable within 28 days, is the sum of £150,000.

That is my decision.