

ONTARIO COURT OF JUSTICE

B E T W E E N:

H.F.

APPLICANT

- and -

M.H.

RESPONDENT

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)
) NATALIA DENCHIK, for the
) APPLICANT
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) Acting in Person

) HEARD: In Chambers

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

[1] On September 2, 2014, the court released its reasons on two motions. The court made temporary orders that the respondent (the father) have supervised access to the parties' three children in Ontario and prohibited the father from removing the children from Ontario. It also made temporary orders that the father pay the applicant (the mother) child support of \$1,331 per month and spousal support of \$350 per month.

[2] The court gave the parties permission to make written costs submissions. The mother made submissions, the father did not.

[3] The mother seeks her full recovery costs of \$9,859.69, or in the alternative, partial recovery costs of \$6,017.69.

[4] The Ontario Court of Appeal in *Serra v. Serra*, [2009] O.J. 1905 (Ont. C.A.) confirmed that modern costs rules are designed to foster three fundamental purposes, namely: to partially indemnify successful litigants for the cost of litigation, to encourage settlement and to discourage and sanction inappropriate behaviour by litigants bearing in mind that the awards should reflect what the court views is a fair and reasonable amount that should be paid by the unsuccessful party.

[5] Subrule 2 (2) adds a fourth fundamental purpose for costs: to ensure that the primary objective of the rules is met – that cases are dealt with justly. This provision needs to be read in conjunction with rule 24. Subrule 2 (4) states that counsel have a positive obligation to help the court to promote the primary objective under the rules. Clauses 2 (3) (a) and (b) set out that dealing with a case justly includes ensuring that the procedure is fair to all parties and saving time and expense. See: *Sambasivam v. Pulendrarajah*, 2012 ONCJ 711 (CanLII).

[6] Subrule 24 (1) creates a presumption of costs in favour of the successful party. Consideration of success is the starting point in determining costs. See: *Sims-Howarth v. Bilcliffe* [2000] O.J. No. 330 (SCJ- Family Court). To determine whether a party has been successful, the court should take into account how the order compares to any settlement offers that were made. See: *Lawson v. Lawson* [2008] O.J. No. 1978 (SCJ). The position each party took at the hearing of the motions should also be examined.

[7] Neither party made an offer to settle. This is disappointing, particularly when a party is represented by counsel. It is also unreasonable behaviour. The court repeats its comments made in paragraphs 4-5 of *Klinkhammer v. Dolan and Tulk*, [2009] O.J. No. 6370 (OCJ) where it wrote:

4 It was surprising that there were no formal offers to settle in this case. It is reflective of the polarity of the parties. It should be a fundamental step in any family law case to serve at least one offer to settle. Parties and their counsel now have a mandate under subrule 2(4) of the rules, to promote the primary objective of the rules; to deal with cases justly (subrule 2(2)). Dealing with a case justly includes taking steps to save time and expense (subrule 2(3)). Offers to settle play an important role in saving time and expense in a case. They are an important vehicle in promoting settlements, focus the parties and often narrow the issues in dispute.

5 There are consequences in the rules for not making or accepting reasonable offers to settle. Subrule 18(14) sets out the costs consequences of not accepting an offer to settle that is as good as or better than the final result. When determining the reasonableness of a party's behaviour in the case, clauses 24(5)(b) and (c) of the rules direct the court to examine the reasonableness of any offer made, withdrawn or not accepted. This does not preclude the court from examining the *failure* of a party to make an offer to settle.

[8] These comments apply equally to making offers to settle on contested motions.

[9] Unfortunately, these comments have to be continuously repeated. This court hears far too many motions and trials where no offer to settle has been made.

[10] The failure of the parties to make offers to settle means that the court must look at their respective positions on the motions to determine who was successful. The mother claims that she was the successful party.

[11] The mother was the successful party on the access issue. The father sought extended unsupervised access to take place at his home in North Carolina. The court felt that this request was premature and ordered supervised access to take place in Ontario. A temporary order was also made that the father shall not remove the children from Ontario.

[12] There was divided success on the support issues, although the court considered that the mother had to bring this motion to receive any spousal support. There was no dispute about the father's income. However, the mother wanted the father to contribute to the children's special expenses pursuant to section 7 of the *Child Support Guidelines*. The father resisted this request. The mother asked that the father contribute to one child's future orthodontic expenses. This claim was dismissed as being premature. The mother's claim for the father to pay his share of eyeglasses for the children was granted.

[13] The mother asked that the father pay temporary spousal support of about \$1,100 per month. The father asked that no spousal support order be made. An order was made that the father pay the mother temporary spousal support of \$350 per month. The mother's claim was premised on software calculations that were prepared incorrectly.

[14] The mother's request that the father deposit his passport with the court was dismissed.

[15] In making this decision, I have considered the factors set out in subrule 24 (11) which reads as follows:

24 (11) A person setting the amount of costs shall consider,

- (a) the importance, complexity or difficulty of the issues;
- (b) the reasonableness or unreasonableness of each party's behaviour in the case;
- (c) the lawyer's rates;
- (d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;
- (e) expenses properly paid or payable; and
- (f) any other relevant matter.

[16] The issues before the court were important for the parties. They were not difficult or complex.

[17] The parties' failure to make offers to settle was unreasonable behaviour. Otherwise, the parties acted reasonably on the motions.

[18] The rates claimed by the mother's lawyer are reasonable.

[19] The mother's bill of costs lacked any meaningful detail. It is important for counsel to indicate in their bill of costs how they spent the time claimed. Otherwise, it is very difficult for a court to ascertain if the time spent on a case is appropriate or to determine if the time claimed is attributable to the specific step in the case. The judge should not deal with requests for costs that were addressed or should have been addressed at prior steps in the case. See: *Islam v. Rahman* 2007 ONCA 622.

[20] The time claimed by the mother's counsel to prepare for and argue the motion is not proportional. The court documentation on the motion was straight-forward. The motions did not take a long time to argue. A detailed bill of costs might have persuaded the court to assess this issue otherwise.

[21] The father has the ability to pay the costs that will be ordered.

[22] The court also considered both *Boucher et al. v. Public Accountants Council for the Province of Ontario* [2004] O.J.No. 2634 (Ont. C.A.) and *Delellis v Delellis and Delellis* [2005] O.J. No. 4345. Both these cases point out that when assessing costs it is "not simply a mechanical exercise." In *Delellis*, Aston J. wrote at paragraph 9:

However, recent cases under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended have begun to de-emphasize the traditional reliance upon "hours spent times hourly rates" when fixing costs....Costs must be proportional to the amount in issue and the outcome. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant.

[23] Taking into consideration all of these factors, the father shall pay the mother's costs of the motions in the sum of \$3,800, inclusive of disbursements and HST. The father shall pay these costs to the mother within 45 days.

Justice S.B. Sherr

Released: October 8, 2014

