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Citation: *Bennett v. Reeves*, 2014 ONCJ 196

ONTARIO COURT OF JUSTICE
TORONTO NORTH FAMILY COURT

B E T W E E N:	)	
	)	
MICHELE MARIE BENNETT	)	**DAVED MUTTART, for the**
	)	**APPLICANT**
	)	
	)	
APPLICANT	)	
	)	
- and -	)	
	)	
ANTHONY CONSTANTINE REEVES		
RESPONDENT	)	**NATALIA DENCHIK, for the RESPONDENT,**
	)	
	)	
	)	
	)	
	)	**HEARD: IN CHAMBERS**

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

[1] On March 25, 2014 I released my reasons for decision after hearing the trial of this matter. I imputed income of $28,000 per annum to the respondent (the father) and ordered him to pay the child support guideline table amount for one child to the applicant (the mother) in the sum of $228 per month. I also ordered the mother to pay the father spousal support in the sum of

$480 per month for a period of nine years. The support payments were ordered to begin on January 1, 2014.

[2] Both parties have made costs submissions. The father seeks his full recovery costs of $5,775. The mother seeks her partial recovery costs of $3,964. Both claim that they were the successful party at trial.

[3] The Ontario Court of Appeal in *Serra v. Serra,* [2009] O.J. 1905 (Ont. C.A.) stated 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.

[4] Subrule 24(1) of the *Family Law Rules* (the rules) 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).

[5] Subrule 18 (14) of the rules reads as follows:

> **COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER**
>
> 18(14) A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:
>
> 1. If the offer relates to a motion, it is made at least one day before the motion date.
> 2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
> 3. The offer does not expire and is not withdrawn before the hearing starts.
> 4. The offer is not accepted.
> 5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

[6] The father made two offers to settle. The first offer to settle was dated February 24, 2014. He offered to settle for indefinite spousal support of $1,300 per month. He did not offer to pay any child support. The second offer to settle was dated March 11, 2014. He offered to settle for indefinite spousal support of $1,000 per month. Again, he did not offer to pay any child support. Neither of the father's offers attract the costs consequences set out in subrule 18 (14) of the rules. The trial result was not more favourable to him than his offers.

[7] The mother made one offer to settle dated March 7, 2014. She proposed that neither party pay child or spousal support to the other. This offer also did not attract the costs consequences set out in subrule 18 (14) of the rules. The trial result was not more favourable to her than her offer.

[8] The court may take into account any written offer to settle, the date it was made and its terms, even if subrule 18(14) does not apply, when exercising its discretion over costs. (subrule 18(16)). I have considered each offer made by the parties in making this decision.

[9] Where there is divided success in a case, subrule 24 (6) of the rules states that the court may apportion costs that it finds appropriate.

[10] There was divided success in this case based on the offers filed. The father was successful in obtaining spousal support (and establishing an entitlement to spousal support), but he was awarded far less than the amount he sought and the award was time-limited. The mother was successful in imputing income to the father and obtaining a child support order. Additional time had to be spent at trial due to the issue of imputation of income.

[11] The mother was somewhat more successful than the father at trial based on their offers. The offset of the child support payment from the spousal support payment results in a net monthly payment of $252 owing to the father. The mother offered to pay no support. In his best offer, the father asked for $1,000 per month.

[12] In making this decision, I considered the factors set out in sub-rule 24 (11) of the rules, which reads as follows:

> 24 (11) A person setting the amount of costs shall consider,
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> (a) the importance, complexity or difficulty of the issues;
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> (b) the reasonableness or unreasonableness of each party's behaviour in the case;
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> (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.

[13] The case was important for the parties. It was not complex or difficult.

[14] The parties conducted themselves reasonably in the case.

[15] The rates and time claimed by both lawyers were comparable and reasonable.

[16] I have 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.

[17] I also considered the father's ability to pay the costs order. See: *MacDonald v. Magel (*2003) 67 O.R. (3d) 181 (Ont.C.A.). I find that he will be able to pay the costs awarded against him, as they can be offset against the support arrears presently owing from the mother to him ($756), arising from the trial decision.

[18] Taking into account all of these considerations, an order shall go that the father shall pay the mother's costs fixed in the amount of $756, inclusive of fees, disbursements and HST. This sum shall be offset against the support arrears presently owing from the mother to the father. This means that the Family Responsibility Office should fix the arrears at nil and that no costs are owed. It also means that the mother will no longer be required to pay the $108 per month payments (that were supposed to start on May 1, 2014) towards the support arrears arising out of the trial decision. A new support deduction order should be issued reflecting this.

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Justice S.B. Sherr

Released: April 17, 2014