ONTARIO COURT OF JUSTICE

CITATION: *M.M. v. K.M.,* 2023 ONCJ 427
DATE: 2023·10·05
COURT FILE No.: Woodstock D90/20

B E T W E E N :

M.M.

Z.L.

I.L.

Applicants

— AND —

K.M.

C.M.

J.M.

Respondents

Before Justice S. E. J. Paull
In Chambers
Reasons on Costs Released on October 5, 2023

Kristy A. Maurina ..... counsel for the applicants
Respondents ..... on their own behalf

PAULL J.:

[1] Before the court is the issue of costs following the trial in this matter which preceded over 9 days between February 21, 2023 and June 6, 2023. Reasons for Judgment were released on July 13, 2023. In the Reasons the court invited written submissions on the issue of costs if the parties were not in agreement.

[2] The applicants seek full recovery of costs in the amount of $130,000 inclusive based on their success at trial, and what they submit was an approach by the respondents which was both unreasonable and in bad faith.

[3] The respondents seek an order for no costs. They submit that there was divided success and they dispute that their approach was unreasonable or in bad faith.

Background

[4] The only issue at trial was what, if any, contact the applicants have with the child, S.M. born […], 2014. The applicants sought an order for regular in-person contact. The respondents sought an order dismissing the application.

[5] The applicants, M.M. and I.L., are the maternal aunt and uncle of S.M. Z.L. is the maternal grandmother. The respondent K.M. is S.M.'s father, and C.M. and J.M. are the paternal grandparents.

[6] S.M.'s mother, A.L., passed away on July 20, 2017 following a battle with cancer.

[7] The application seeking contact was first returnable on November 30, 2020. The applicants sought a liberal and structured contact order in their application and at the beginning of trial. At the end of trial their counsel indicated that they would essentially accept any contact that they could get.

[8] The applicants position was that the close and loving relationship that they had with S.M. had been unreasonably curtailed by K.M. with the support of his parents.

[9] The respondents filed a joint answer dated November 12, 2020 seeking an order that any contact by the applicants to S.M. be determined jointly by the respondents, that the applicants pay for any therapy/treatment S.M. requires, an order that the applicants not attend at the respondent's home, and a restraining order against M.M. and I.L.

[10] At trial their position was that they were not seeking any orders against the applicants except that the application be dismissed. What, if any, future contact between S.M. and the applicants would be determined by K.M. as the sole decision-making parent.

[11] The respondents submitted that as the sole decision-making parent, K.M.'s decisions about contact to the applicants were entitled to deference, and he had acted reasonably in terminating contact with M.M. and I.L., and significantly restricting it for Z.L.

[12] The court found that K.M., with the support of his parents, has acted unreasonably in limiting or terminating the maternal family's relationship with S.M., and that her best interest supported regular in-person and unsupervised contact with the applicants after a short period of reintegration.

[13] The respondents made several serious allegations against the applicants which the court did not accept. Rather, the court found the applicants to be a close and loving family who were involved in providing primary care for S.M. for a significant period of time. Further, the applicants represent the only connection she will have with her mother.

[14] Modern costs rules are designed to foster four fundamental purposes (1) to partially indemnify successful litigants; (2) to encourage settlement, (3) to discourage and sanction inappropriate behaviour by litigants and; (4) to ensure that cases are dealt with justly under Rule 2 (2) of the *Family Law Rules*. *Mattina v. Mattina*, 2018 ONCA 867.

[15] Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2002, S.C.C., paragraph 25.

[16] Rule 24(1) of the *Family Law Rules* creates a presumption of costs in favour of the successful party. Consideration of success is the starting point in determining costs. *Sims-Howarth v. Bilcliffe* [2000] O.J. No. 330 (SCJ-Family Court). To determine whether a party has been successful, the court should examine who was the successful party, based on the positions taken in the litigation. *Lazare v. Heitner*, 2018 ONSC 4861. This assessment includes the positions taken in the pleadings, and the specific relief sought at the hearing, if different. *Kyriacou v. Zikos*, 2022 ONSC 401. The court may also take into account how the order compares to any settlement offers that were made. *Lawson v. Lawson* [2008] O.J. No. 1978 (SCJ); *Todor v. Todor*, 2021 ONSC 3463; *Kyriacou v. Zikos*, supra.

[17] Rule 18 (14) of the *Family Law Rules* reads as follows:

> COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER
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> 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:
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> 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.

[18] The court has a discretion to take into account any written offer to settle, the date it was made and its terms, even if Rule 18(14) does not apply, when exercising its discretion over costs. (Rule 18(16)).

[19] The applicants submitted an offer to settle dated February 14, 2023 which outlines contact to include continued FaceTime visits with graduated in person contact which, after six months, would expand to one weekend per month from Saturday to Sunday. After a further two months it would extend from Friday to Sunday once per month and at other times for holidays including two weeks in the summer. The offer includes that if S.M. was still in Singapore in person contact would include periods of time in Ontario including during Christmas break, spring break, and summer holiday time. The offer also includes counselling for the parties and child with the costs to be shared.

[20] The respondents submitted an offer to settle dated January 26, 2023 which included contact for Z.L. to include one FaceTime visit per week. Further, after the return of S.M. to Canada, Z.L. would have four hours of supervised access in alternate months, four hours of supervised access in the community during the week of S.M.'s birthday and Christmas, four hours supervised in S.M.'s community during the weeks of Easter and Thanksgiving. It also included that if S.M. resides outside of Canada the contact would be virtual and unsupervised. It also included that any contact by M.M. and I.L. was at the sole discretion of K.M.

[21] The respondents provided a number of other documents which do not amount offers to settle under the *Rules* including the following:

1. Offers to settle from both the applicants and the respondents from settlement conference briefs from October 2021. Subrule 17(23) of the *Family Law Rules* is clear that no brief, evidence or statement made at a settlement conference is to be disclosed unless in an agreement reached at a settlement conference or an order. There is no exception for the offers to settle in a settlement conference brief to be disclosed in submissions for costs. *Entwistle v. MacArthur*, 2007 CanLII 17375, 157 (SCJ - Ont. Fam. Ct.); *G.H.F. v. M.D.E*., 2019 ONCJ 766 (CanLII); *Farooq v. Majeed*, 2011 ONCJ 827.

2. Documents entitled “settlement talk” which appear directed to the court and appear to be for the purposes of the settlement conference. They were unsigned and undated.

3. Terms of a settlement proposal from March 2023, which the respondents concede was not served on to the applicants.

[22] As such, the only offers for consideration include the offer of the applicants dated February 14, 2023 and the offer of the respondents dated January 26, 2023.

[23] The onus of proving that the offer is as or more favourable than the trial result is on the person making the offer. *Neilipovitz v. Neilipovitz,* [2014] O.J. No. 3842 (SCJ).

[24] Close is not good enough to attract the costs consequences of 18 (14). The offer must be as good as or more favourable than the trial result. However, even if the offer does not attract the costs consequences set out in Rule 18 (14), it may be considered under Rule 18 (16). *Gurley v. Gurley*, 2013 ONCJ 482 CanLII.

[25] The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order. *Wilson v Kovalev*, 2016 ONSC 163.

[26] Based on the positions taken by the parties in their pleadings, at trial, and in their offers to settle, the applicants were clearly the successful parties. Overall, when the offer of the applicants and order are reviewed in their entirety they have achieved an order as favourable as their offer. The final order generally mirrors what was proposed in the offer. The applicants were granted in person and unsupervised regular contact with S.M. The period of reintegration ordered was also significantly shorter than proposed in the applicant’s offer.

[27] The next issue is to consider if there was divided success. Rule 24 (6) states that if success in the case is divided, the court may apportion costs as appropriate. Divided success does not equate with equal success. It requires a comparative analysis. Most family cases have multiple issues. They are not equally important, time-consuming or expensive to determine. *Jackson v. Mayerle*, 2016 ONSC 1556, paragraph 66.

[28] The respondent's position at trial was that the application be dismissed and their offer includes limited and supervised in person contact in the community for Z.L. only, and that any future contact by M.M. and I.L. be at the sole discretion of K.M.

[29] The respondents have continued to submit that they were successful in achieving that K.M. have sole decision-making authority, and that he was "successful in his fight to remain the father". Apart from the authority to determine the applicants' contact, the issue of decision-making authority and primary residence were never before the court. None of the parties sought orders related decision-making and primary residence, and the applicants only sought an order for contact. On this issue the applicants were entirely successful and met or surpassed their offer to settle. This was not a case of divided success.

[30] Costs awards are discretionary. Two important principles in exercising discretion are reasonableness and proportionality. *Beaver v. Hill*, 2018 ONCA 840.

[31] An award of costs is subject to: the factors listed in Rule 24(12), Rule 24(4) pertaining to unreasonable conduct of a successful party, Rule 24(8) pertaining to bad faith, Rule 18(14) pertaining to offers to settle, and the reasonableness of the costs sought by the successful party. *Berta v. Berta*, 2015 ONCA 918 (CanLII) at para. 94.

[32] In making this decision the court has considered the factors set out in Rule 24 (12) of the rules which reads as follows:

> 24 (12) In setting the amount of costs, the court shall consider,
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> > a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
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> > (i) each party's behaviour,
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> > (ii) the time spent by each party,
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> > (iii) any written offers to settle including offers that do not meet the requirements of rule 18,

(vi) any legal fees, including the number of lawyers and their rates,

(v) any expert witness fees, including the number of experts and their rates,

(vi) any other expenses properly paid or payable; and

(b) any other relevant matter.

[33] Rule 24(5) provides criteria for determining the reasonableness of a party's behaviour in a case (a factor in clause 24(12)(a) (1) above). It reads as follows:

DECISION ON REASONABLENESS

(5) In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,

(a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;

(b) the reasonableness of any offer the party made; and

(c) any offer the party withdrew or failed to accept.

[34] Counsel for the applicants provided a Bill of Costs in the amount of $138,090.52. The bill of costs from the applicants original counsel of record was also provided which totals approximately $21,000. The hourly rate of trial counsel for the applicants is reasonable given her years of experience as was the time she spent on this matter. However, while there was significant documentary evidence the amounts claimed for junior counsel and clerical assistance was excessive given the issues and evidence.

[35] The respondents provided a Bill of Costs from their counsel in the amount of $83,343. They also provided Bills from their former counsel totaling $5479.10.

[36] A useful benchmark for determining whether costs claimed are fair, reasonable and proportionate is to consider the amount that the unsuccessful party paid for their own legal fees and disbursements in the same matter. *Smith Estate v. Rotstein*, 2011 ONCA 491 (Ont CA); *Durbin v. Medina*, 2012 ONSC 640 (SCJ); *Scipione v. Del Sordo*, 2015 ONSC 5982 (SCJ); *Zhang v. Guo*, 2019 ONSC 5767 (Div Ct); *Laidman v. Pasalic and Laidman*, 2020 ONSC 7068.

[37] The costs determination must reflect proportionality to the issues argued. There should be a correlation between legal fees incurred (for which disbursement is sought) and the importance or monetary value of the issues at stake. The Rules do not require the court to allow the successful party to demand a blank check for their costs. *O'Brien v. O'Brien*, 2017 ONSC 2017.

[38] I have also considered the cases of *Boucher et al. v. Public Accountants Counsel for the Province of Ontario* [2004] O.J. No. 2624 (O.C.A.) and *Delellis v. Delellis and Delellis* [2005] O.J.4345. Both these cases point out that when assessing costs it is "not simply a mechanical exercise." In *Delellis*, Ashton J. wrote at paragraph nine:

> "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".

[39] The applicants submit that the respondents' approach to this matter was not only unreasonable but supports a finding of bad faith. Subrule 24(8) of the Rules states that if a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

[40] Subrule 24 (8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. *Cozzi v. Smith,* 2015 ONSC 3626; *Scipione v. Del Sordo*, 2015 CarswellOnt 14971 (Ont. SCJ). There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. *S.(C.) v. S. (M.)* (2007), 38 R.F.L. (6th) 315 (Ont. SCJ). Bad faith is not synonymous with bad judgment or negligence; rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation. *Scipione, supra*.

[41] As noted in the Reasons for Judgement the respondents have not approached this matter reasonably. They limited and terminated contact between the child and the maternal family based on serious and ultimately unfounded allegations. Despite this, however, I am not prepared to make a finding of bad faith.

[42] While the respondent's position throughout this matter, particularly in light of the investigations by the CAS, police, and the OCL, was ill advised and not supported by the evidence, I am not satisfied that it rose to the level which supports a finding that it was done dishonestly or with intentional duplicity.

[43] The applicants also seek recovery of significant costs incurred for prior steps in this matter.

[44] With respect to the issue of costs for prior steps in the case, the court in *Lewis v. Silva*, 2019 ONCJ 795 (pars. 25-28) noted the following:

> **[25]** Prior to July 1, 2018, pursuant to subrule 24 (10), costs for any step in the proceeding were required to be determined at the time or expressly reserved. In *Islam v. Rahman,* 2007 ONCA 622 (CanLII), the Ontario Court of Appeal set out that the trial judge should not deal with requests for costs that were addressed or should have been addressed at prior steps in the case. However, this did not preclude courts from awarding costs accrued from activity not specifically related to the step. Activity not requiring judicial intervention is often better dealt with at the end of the case and not by the motions judge. See: *Houston v. Houston*, 2012 ONSC 233 (CanLII); *Walts v. Walts*, 2014 ONSC 98 (CanLII). This activity includes time spent for meetings with the client and reviewing and preparing pleadings and financial statements. See: *Czirjak v. Iskandar*, 2010 ONSC 3778 (CanLII).
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> **[26]** Subrule 24 (11) came into force on July 1, 2018 and now provides that the failure of the court to order costs in relation to a step in a case does not prevent it from awarding costs in relation to the step at a later stage in the case.
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> **[27]** However, courts continue to be cautious about awarding costs at the trial stage where costs were not awarded at earlier steps in a case. See: *Baezner v. Brunnenmeir,* 2018 ONCJ 956 (CanLII); *Nabwangu v. Williams*, 2019 ONCJ 171 (CanLII).
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> **[28]** In *Saunders v. Vargas*, 2018 ONSJ 4531, Justice Robert Charney set out the challenges faced by a trial judge in determining costs incurred at previous steps in a case, writing at paragraphs 23 and 24:
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> > [23] While the amendment to Rule 24(11) confirms that the court is not precluded from awarding costs at a later stage in the case, this should not be seen as an open invitation to counsel to ask a judge to review the conduct of the opposing party at previous conferences or hearings before a different judge. There is a risk that cases will no longer be about the issues that brought the parties to court in the first place, but turn into conflicts about what happened in previous court appearances and conferences. Trying to reconstruct the conduct of previous hearings and conferences that took place before a different judge is not an efficient use of judicial resources.

> [24] While there may be circumstances in which the significance and unreasonableness of some actions may only become clear after the trial or settlement, the judge who deals with a step in the case generally remains best placed to decide and assess costs in relation to that step. In my view, it is incumbent on a party that requests the court to award costs in relation to an earlier step heard by a different judge, to explain why the later judge is in a better position than the judge who actually dealt with the particular step to assess the significance or unreasonableness of any steps taken.

[45] In *Cameron v. Cameron*, 2018 ONSC 6823 (CanLII), Justice Marvin Kurz interpreted the changes to the costs rules regarding prior steps in a case as creating a rebuttable presumption against ordering costs for these steps if they were not addressed or reserved by the judge hearing the step. Justice Kurz concluded that a judge hearing a trial should only grant the costs of a previous step in one of the following circumstances:

> a. when they have been reserved to the trial judge; or
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> b. when, in light of subsequent events, the trial judge is better situated to determine the costs of the prior step than the judge presiding over that step. In that case, the process of determining costs will involve a broad consideration of the prior step within the context of the case as a whole; or
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> c. in exceptional circumstances.

[46] There are other good reasons for the presumption that costs should be determined at each stage. Parties should have an ongoing awareness of the cost consequences of litigation decisions they make. Reserving costs may impede final resolution by needlessly inflating and complicating the list of future issues still to be dealt with. A judge who has just completed a step in a case will usually be in the best position to evaluate all of the relevant Rule 18 and 24 considerations. Reserving costs to a future event can result in later confusion and controversy about what really happened at the earlier step. *Laidman v. Pasalic and Laidman*, 2020 ONSC 7068.

[47] I am not prepared to order recovery of costs for prior steps in this proceeding. The applicants have not rebutted the presumption that costs should have been addressed at each step. The court is not in a position to evaluate each of the approximately 15 pretrial court appearances which spanned over 2 ½ years to determine if either party's conduct warrants a consideration of costs. None of the prior endorsements reserved costs to the trial court and there are no other exceptional circumstances in this matter.

[48] Further, the trial was estimated and scheduled for 3-4 days but ultimately required 9 days to complete. The parties' evidence in chief was entered through affidavits and the trial estimate was reasonable in the circumstances. This matter ought not to have required 9 days to complete. All the parties share the responsibility for this, and despite repeated directions from the court, each took longer than reasonably required to present their evidence and conduct cross examinations.

[49] The singular issue in this matter related to what, if any, court ordered contact the applicants should have with S.M. The issue was clearly important to all parties in the context of this family and the breadth of the allegations and evidence made it relatively complex.

[50] Costs need to be proportional to the issues and amounts in question and the outcome of the case. Amounts actually incurred by the successful litigant may therefore not be determinative. *Hackett v. Leung*, [2005] O.J. No. 4888 (Ont. S.C.J.).

[51] Overall, it is appropriate to award costs to the applicants based on their success at trial which met or exceeded their offer to settle. However, even if the terms of subrule 18(14) are followed, the court still has the discretion not to order full recovery costs. *C.A.M v. D.M.* [2003] (OCA).

[52] Costs are also appropriate based on the respondents' unreasonable behaviour. Family law litigants are responsible for and accountable for the positions they take in the litigation: *Heuss v. Surkos*, 2004 CarswellOnt 3317, 2004 ONCJ 141.

[53] Having considered all these issues partial recovery for the applicants is appropriate. On the basis of the foregoing, I find that a fair and reasonable quantum in the particular circumstances of this case to be $40,000 (inclusive), payable by the respondents to the applicants forthwith.

Released: October 5, 2023

Signed: "Justice S. E. J. Paull"