CITATION: *M.J.L. v. C.L.F.*, 2022 ONCJ 354
DATE: August 2, 2022
COURT FILE NO. D41546/21

ONTARIO COURT OF JUSTICE

B E T W E E N:	)	
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M.J.L.	)	**LINDA J. WILSON, for the APPLICANT**
	)	
APPLICANT	)	
	)	
- and -	)	
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	)	
	)	
C.L.F.	)	**ANDREW VANKOUGHNETT, for the**
	)	**RESPONDENT**
RESPONDENT	)	
	)	
	)	**HEARD: In Chambers**

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

Part One – Introduction

[1] On May 24, 2022, the court released its reasons for decision regarding a three-day trial about the parenting and support arrangements for the parties' 4-year-old daughter (the child). See*: M.J.L. v. C.L.F.*, 2022 ONCJ 243.

[2] The parties were given the opportunity to make costs submissions. The respondent (the mother) seeks her costs of $60,000. The applicant (the father) submits that costs to the mother should not exceed $15,000. He also asks that the costs be payable over an extended period of time.

Part Two – General costs principles

[3] The Ontario Court of Appeal in *Mattina v. Mattina,* 2018 ONCA 867 set out that 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 subrule 2 (2) of the *Family Law Rules* (all references to the rules in this decision are to the *Family Law Rules*).

[4] 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. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 S.C.C. 71, paragraph 25.

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

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

[7] 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 court should also examine who was the successful party, based on the positions taken in the litigation. See: *Lazare v. Heitner*, 2018 ONSC 4861.

[8] Subrule 24 (6) sets out that if success in a step in a case is divided, the court may apportion costs as appropriate.

[9] 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. See: *Jackson v. Mayerle*, 2016 ONSC 1556, paragraph 66.

[10] Where there are multiple issues before the court, the court should have regard to the dominant issue at trial in determining success. See: *Firth v. Allerton*, [2013] O.J. No. 3992 (SCJ); *Mondino v. Mondino*, 2014 ONSC 1102.

Part Three – Offers to settle

[11] Both parties made offers to settle.

[12] Subrule 18 (14) sets out the consequences of a party's failure to accept an offer to settle that is as good as or better than the trial result of the person making the offer. It 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.

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

[14] Neither offer to settle met the requirements set out in subrule 18 (14) for the costs consequences in the subrule to apply, as neither offer was more favourable to the other party than the final result.

[15] A major drawback of both offers to settle was that neither offer was severable.

[16] This court has frequently commented on the importance of making severable offers.

[17] In *Lawson v. Lawson*, 2004 O.J. No. 3206 (SCJ), Quinn J., wrote at paragraph 26:

> **26** I would discourage the making of all-or-nothing offers. The severable variety allows for the prospect that some of the outstanding issues might be settled, thereby reducing the length and expense of the motion or trial, as the case may be. All-or-nothing offers sometimes have a heavy-handed air about them and certainly they possess a much lower chance of being accepted than severable offers.

[18] In *Paranavitana v. Nanayakkara,* [2010] O.J. No. 1566 (SCJ), Wildman J. wrote at paragraphs 13 and 14:

> **13** Unfortunately, this offer was not severable. There would have been no disadvantage to the wife in making the custody offer, in particular, severable from the financial and property terms. Severable offers are an underused tool that can confer considerable settlement and cost advantages. Because of the full recovery provisions of Rule 18(14), they can provide much more flexibility to the court to award full recovery for at least a portion of the overall costs, if the party is successful on only some of the issues. Had the custody terms of the wife's offer been severable from the other terms, I would have been prepared to consider ordering full recovery costs on the custody issue from the date of the offer forward. As this was the majority of the trial time, that would have been a significant cost advantage to the wife.
>
> **14** However, as the offer was not severable, the wife would have to do as well or better than **all** the terms of the offer, in order to take advantage of the full recovery cost provisions of Rule 18(14). Since the husband got an additional week of access, as well as an order that spousal support would reduce from $1000 in three years, Ms. Nanayakkara did not do as well as or better than her offer in its totality. Rule 18(14) does not apply but I can take this offer into account in determining costs under Rule 24, along with any other offers that have been made (Rule 18(16)).

[19] The mother's offer to settle is a good example of why severable offers should be made. The mother's offer for ongoing child support was more favourable to the father than the final result. Her offers for primary residence and ongoing parenting time mirrored the result at trial. If she had severed these parts of her offer the costs consequences in subrule 18 (14) would have applied to them. However, she linked these proposals to other terms that were not as favourable to the father at trial. He was granted more holiday parenting time and input into decision-making than was offered. His request for the child to go to public school was ordered. He was given some decision-making responsibilities and the mother was required to consult with him on major decisions affecting the child. Section 7 expenses were not ordered as requested by the mother.

[20] The offers to settle were not very helpful in determining success because the offers were "all or nothing".

[21] The court considered both offers pursuant to subrule 18 (16), and in assessing the reasonableness of the parties under sub-clause (iii) of subrule 24 (12) (a).

Part Four – Determination of success

[22] The father acknowledged that the mother was the more successful party based on the positions taken at trial. However, the parties disagreed on the degree of that success.

[23] The mother sought primary residence of the child. The father sought a shared-parenting schedule. The mother was the successful party on this issue.

[24] The mother sought orders for sole decision-making responsibility, dispensation of the father's consent for her to travel and to obtain government documentation for the child and that the child attend a Catholic school in her catchment area. The father sought joint decision-making

responsibility and an order that the child attend a public school in his catchment area. He opposed any order dispensing with his consent. The court ordered:

a) Both parties may make decisions about the child's cultural, religious and spiritual training, as they see fit, when the child is in their care.

b) The child shall attend the public school closest to the mother's home in her catchment area.

c) The mother shall choose the child's service providers, including her doctors. The father shall not take the child to any service provider, including any doctor, without the mother's consent, except in the event of a medical emergency.

d) The mother shall determine what extra-curricular activities the child attends and shall inform the father.

e) The mother shall otherwise have sole decision-making responsibility for the child.

f) The mother shall meaningfully attempt to consult with the father before making any major decision about the child.

g) The mother may obtain or renew all government documentation for the child, including passports, without the father's consent.

[25] Although she wasn't completely successful, the mother was much more successful on these issues than the father.

[26] The court also granted the travel orders sought by the mother which the father had opposed.

[27] The father sought equal parenting time at trial. The mother sought an order that the father's existing weekday parenting time continue over the summer and once school began that it take place on alternate weekends from Friday to a return to school on Mondays. She also proposed that the father have parenting time each Wednesday overnight. The court agreed with the mother's position starting in September 2022 but ordered that the father have additional parenting time for one week in each of June, July and August.

[28] The parties had comparable positions on holiday parenting time at trial.

[29] The mother was much more successful on the parenting time issues than the father.

[30] The mother sought child support retroactive to July 30, 2018, based on an imputed annual income to the father of $45,000. The father asked that no child support be ordered – he took the position that there had been a shared parenting arrangement.

[31] The father, in closing submissions, was content to use an income of $45,000 for the support calculation on a go-forward basis, if support was ordered. He asked the court to use his stated income of $25,000 for 2020 and his 2021 income of $12,967 for the support calculation.

[32] The court made child support orders as follows:

a) Based on an annual imputed income of $35,000, the father shall pay child support to the mother of $304 each month, starting on January 1, 2020.

b) Based on an annual imputed income of $15,000, the father shall pay child support to the mother of $79 each month, starting on June 1, 2021.

c) Based on an annual imputed income of $45,000, the father shall pay child support to the mother of $418 each month, starting on June 1, 2022.

d) The father may pay the arrears created by this order at the rate of $200 each month starting on June 1, 2022. However, if he is more than 30 days late in making any ongoing or arrears payment, the full amount of arrears then owing shall immediately become due and payable.

[33] The court did not order the father to contribute to the child's section 7 expenses. The mother led no evidence on this issue.

[34] There was divided success on the child support order. However, the mother was more successful since the father was not prepared to pay her anything.

Part Five – Amount of costs

[35] Subrule 24 (12) reads as follows:

24 (12) In setting the amount of costs, the court shall consider,

a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:

(i) each party's behaviour,

(ii) the time spent by each party,

(iii) any written offers to settle including offers that do not meet the requirements of rule 18,

iv) 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.

[36] This case was important to the parties. It was not complex or difficult.

[37] Both parties acted unreasonably by serving and filing excessive documentation. Much of it wasn't relevant and was only marked for identification at trial. The parties also inordinately focused on personally attacking the other at trial.

[38] The court found that neither party was a reliable witness and skewed evidence to support their interpretation of events.

[39] The father acted unreasonably by failing to provide complete or timely financial disclosure. This increased the mother's costs. An adverse inference was drawn against him.

[40] The mother acted unreasonably by making unsupported allegations about the father earning hidden income.

[41] The parties both made offers to settle.

[42] The mother submitted a bill of costs of $75,247 for the entire time spent on the case and a second bill of costs for $43,195, being her full recovery costs for the trial step.

[43] Subrule 24 (11) 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.

[44] 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).

[45] In *Laidman v. Pasalic and Laidman*, 2020 ONSC 7068 the court set out that the presumption remains that costs should be determined at each stage, and there are good reasons for this. 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 – often to a different judge – can result in later confusion and controversy about what really happened at the earlier step.

[46] In *Berge v. Soerensen*, 2020 ONCJ 265 Justice Roselyn Zisman set out the following circumstances where costs of a prior step should be awarded:

a) Costs have been reserved to the trial judge.

b) When, considering subsequent events, the trial judge is better situated to determine the costs of the prior step than the judge presiding over the step or,

c) In exceptional circumstances.

[47] Here, costs were not reserved at prior steps in the case to the trial judge. There is no indication in the endorsement record that costs were even sought at prior steps in the case. The court is not better able to determine the costs for the previous steps than was the case management judge. There are no exceptional circumstances that warrant ordering costs for the prior steps in the case.

[48] This does not preclude the court from awarding costs accrued from activity not specifically related to a step in the case. 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. The court will award costs for this activity which includes the drafting of the Answer/Claim, financial statements and seeking financial disclosure.

[49] 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. See: *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.

[50] The father did not produce his own bill of costs. The court draws an adverse inference against him for failing to do this. The court repeats its comments recently made at paragraph 38 in *S.W.-S. v. R.S.*, 2022 ONCJ 11, as follows:

> [38] Further, the father did not submit documentation showing his own fees and expenses to the court for comparison. An adverse inference is drawn against him for failing to do this. Providing this documentation is required pursuant to subrule 24 (12.2). This subrule reads as follows:
>
> > (12.2) A party who opposes a claim for costs respecting fees or expenses shall provide documentation showing the party's own fees and expenses to the court and to the other party.

[51] However, the rules do not require the court to allow the successful party to demand a blank cheque for their costs. See: *Slongo v. Slongo* 2015 ONSC 3327 (SCJ). The court retains a residual discretion to make costs awards which are proportional, fair and reasonable in all the circumstances. See: *Jackson v. Mayerle,* 2016 ONSC 1556.

[52] In determining the appropriate quantum, the court should consider the amount that the unsuccessful party could reasonably have expected to pay in the event of lack of success in the litigation. See: *Arthur v. Arthur,* 2019 ONSC 938.

[53] Excessive time was spent by the mother producing irrelevant evidence and documentation.

[54] The rates claimed for the mother's counsel are reasonable.

[55] The disbursements claimed by the mother for photocopying were excessive as much of the documentation copied was unnecessary.

[56] The court should also take into consideration the ability of a party to pay costs. See: *MacDonald v. Magel* (2003), 67 O.R. (3d) 181 (Ont. C.A.). The father is of modest means.

[57] The ability to pay will be less of a mitigating factor when the impecunious party has acted unreasonably, or where their claim was illogical or without merit. See: *Gobin v. Gobin*, 2009 ONCJ 278; *D.D. and F.D. v. H.G.*, 2020 ONSC 1919. Those who can least afford to litigate should be most motivated to seriously pursue settlement and avoid unnecessary proceedings. See: *Mohr v. Sweeney*, 2016 ONSC 3338; *Balsmeier v. Balsmeier*, 2016 ONSC 3485.

[58] The court finds that it is reasonable and proportionate for the father to pay the mother's costs in the amount of $24,000, inclusive of fees, disbursements and HST. The father should have reasonably expected to pay this amount of costs if the mother was successful at trial.

[59] The court will address any hardship to the father by permitting him to pay costs over four years, in the amount of $500 each month.

Part Six – Enforcement by the Family Responsibility Office

[60] The mother seeks an order that all of her costs be payable as support and enforced as an incident of support by the Director of the Family Responsibility Office (the Director) pursuant to clause 1 (1) (g) of the *Family Responsibility and Support Arrears Enforcement Act.*

[61] The court has discretion to allocate what portion of the costs are attributable to support, particularly when there are multiple issues being litigated. See: *Sordi v. Sordi*, 2011 ONCA 665.

[62] A flexible approach has been endorsed when the court is determining what proportion of costs should be allocated to the support issues. See: *Shelley v. Shelley*, 2019 ONSC 2830.

[63] The mother's request that 100% of her costs be enforced as an incident of support by the Director is unreasonable. The majority of the trial was spent on the parenting issues.

[64] The court will order that costs of $9,000 shall be enforced as an incident of support.

Part Seven – Conclusion

[65] A final order shall go on the following terms:

a) The father shall pay the mother's costs fixed at $24,000, inclusive of fees, disbursements and HST.

b) The father may pay the arrears at the rate of $500 each month, starting on September 1, 2022. However, if he is more than 30 days late in making any child support or costs payment, then the entire amount then owing shall immediately become due and payable.

c) Costs in the amount of $9,000 shall be payable as support and enforced as an incident of support by the Director of the Family Responsibility Office pursuant to clause 1 (1) (g) of the *Family Responsibility and Support Arrears Enforcement Act*.

[66] The mother's counsel should take out this order and the May 24, 2022 order.

Released: August 2, 2022

Justice S.B. Sherr