2014 ONCJ 579
Ontario Court of Justice

McKenzie v. Johnson

2014 CarswellOnt 15521, 2014 ONCJ 579, 246 A.C.W.S. (3d) 404

Desiree McKenzie, Applicant and Rico Johnson, Respondent

Carole Curtis J.

Judgment: June 9, 2014
Docket: Toronto D 56694/12

Proceedings: additional reasons to *McKenzie v. Johnson* (2014), 2014 ONCJ 84, 2014 CarswellOnt 1979, Carole Curtis J. (Ont. C.J.)

Counsel: Philip Viater, for Applicant
Julie Stanchieri, for Respondent

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.f Factors
XVII.11.f.i Conduct of party

Headnote

Family law --- Costs — In family law proceedings generally — Factors considered — Conduct of party
Parties never lived together but had relationship that produced one child — Mother applied for child support — Central issue in litigation was disclosure of father's income and assets — Mother's motion to strike out father's pleadings for failure to comply with consent disclosure order was granted with regard to financial issues, income was imputed to father, and temporary child support was increased — Father's motion to reinstate pleadings was granted — Parties made submissions regarding costs — Mother was ordered to pay father's costs fixed in amount of $5,000, all inclusive — Father was successful on motion, and was entitled to costs — Father made offer to settle while mother did not — Father's offer to settle did not qualify under R. 18(14) of Rules of Civil Procedure (Ont.), but it was offer to settle under R. 18(16) and it was taken into account in determining costs — Mother did not act in bad faith but she acted unreasonably — Mother should have made offer to settle.

Table of Authorities

Cases considered by *Carole Curtis J.*:

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — referred to

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, 2003

CSC 71, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — referred to

Chiaramonte v. Chiaramonte (2013), 2013 ONCA 641, 36 R.F.L. (7th) 11, 2013 CarswellOnt 14325, 311 O.A.C. 113, 370 D.L.R. (4th) 328 (Ont. C.A.) — referred to

Fong v. Chan (1999), 1999 CarswellOnt 3955, 181 D.L.R. (4th) 614, 128 O.A.C. 2, 46 O.R. (3d) 330 (Ont. C.A.) — referred to

Heuss v. Surkos (2004), 2004 ONCJ 141, 2004 CarswellOnt 3317 (Ont. C.J.) — referred to

Izyuk v. Bilousov (2011), 2011 ONSC 7476, 2011 CarswellOnt 14392, 7 R.F.L. (7th) 358 (Ont. S.C.J.) — referred to

Laing v. Mahmoud (2011), 2011 ONSC 6737, 2011 CarswellOnt 12972 (Ont. S.C.J.) — referred to

Lawson v. Lawson (2008), 2008 CarswellOnt 2819 (Ont. S.C.J.) — referred to

M. (J.V.) v. P. (F.D.) (2011), 2011 ONCJ 616, 2011 CarswellOnt 13510 (Ont. C.J. [In Chambers]) — referred to

Osmar v. Osmar (2000), 8 R.F.L. (5th) 387, [2000] O.T.C. 979, 2000 CarswellOnt 2343 (Ont. S.C.J.) — referred to

Peers v. Poupore (2008), 2008 CarswellOnt 7055, 2008 ONCJ 615, 61 R.F.L. (6th) 453 (Ont. C.J.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — considered

s. 131(1) — considered

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to

R. 2 — considered

R. 2(2) — considered

R. 2(3) — considered

R. 2(4) — considered

R. 14 — considered

R. 18(14) — considered

R. 18(16) — considered

R. 24 — considered

R. 24(1) — considered

R. 24(5) — considered

R. 24(5)(b) — referred to

R. 24(11) — considered

R. 24(11)(b) — referred to

Form 14B — referred to

ADDITIONAL REASONS regarding costs to judgment reported at *McKenzie v. Johnson* (2014), 2014 ONCJ 84, 2014 CarswellOnt 1979 (Ont. C.J.).

***Carole Curtis J.*:**

Over-view

1 This is the decision regarding costs of the father's motion to re-instate his pleadings in this application. The decision in the motion was released on 20 February 2014 [2014 CarswellOnt 1979 (Ont. C.J.)], and the father's pleadings were ordered to be re-instated.

Background

2 The mother, the applicant, born 3 March 1978, is 36 years old. The father, the respondent, born 4 July 1971, is 42 years old. The parents never lived together, but had a relationship that produced a child, Elias Diego Johnson, born 10 June 2008, now six years old.

Litigation History

3 There have been several years of contested acrimonious litigation about child support and access to Elias, and there have been motions, conferences and several court appearances. The mother's application in May 2012 claimed custody, child support, disclosure, and a restraining order. The father's Answer in December 2012 claimed access. Both parents have been represented by lawyers throughout the litigation, and there has been a great deal of material filed by both sides in this case.

4 The central issue in the litigation has been disclosure of the father's income and assets, in order for the mother to support her claim to impute income to the father for child support purposes. The mother says that the father has a very lavish lifestyle and earns a great deal of money, but is secretive about his business and has always hidden his assets. The mother says that the father owns numerous properties, numerous businesses, and has owned and leased many extraordinarily expensive cars. While together, the father took the mother on many vacations. The father claims that the mother has exaggerated his income and assets.

5 The mother brought a motion to strike the father's pleadings for his failure to comply with a consent disclosure order. On 28 December 2012, among other orders, the court struck the father's pleadings regarding the financial issues, making the following findings (among others):

Endorsement 28 December 2012:

A detailed consent order was made regarding disclosure on 31 August 2012.

Father has failed to comply with many of the specific items, including he has failed to produce his applications for lines of credit and for mortgages.

Father's finances and income and assets appear to be complicated and may be substantial, but without this disclosure, it is difficult for the court to know the details.

Father's pleadings regarding financial issues are struck under Rule 1(8).

If father has not fully complied with consent disclosure order by Thursday 31 Jan. 2013, mother may proceed unopposed

to seek final orders on financial issues. Mother shall file Form 14B up-dating the court after this date. It is not clear whether this hearing would be by Form 14B, affidavit 23C and other evidence, or whether this would require an oral hearing.

Mother shall serve Form 14B with update on father, but if matter proceeds unopposed after that (on financial issues) father is not entitled to notice.

It is very difficult to determine father's income for child support purposes. This may be due to the lack of disclosure.

6 In effect, the father's pleadings on the financial issues were struck, but he was given a further opportunity, until 31 January 2013 to comply with the court order and to produce the material ordered. The mother could not proceed to seek final orders on an unopposed basis until that one month had passed.

7 On 14 January 2013, the father changed lawyers. The father produced and filed a very large amount of material, much of which was produced and filed in January 2013.

8 The mother did not file a Form 14B updating the court on the status of the father's disclosure. The mother did not immediately seek an unopposed hearing after the 31 January 2013 deadline, and had not sought such a hearing at the motion to re-instate, which was argued on 16 December 2013.

9 On 20 February 2013, the father was ordered to pay the mother's costs of the motion to strike his pleadings, on a full recovery basis fixed at $6,525.75 all in (fees + HST, disbursements + HST). The father was found to have behaved unreasonably under R. 24(5), particularly regarding his repeated failure to make full, proper and timely disclosure, despite court orders. The court found that it had been very difficult for the mother and for the court to determine the father's income largely due to his lack of disclosure. The costs order was paid.

10 The lawyers spent a good deal of 2013 negotiating about the disclosure, whether it was complete, and what additional information was required. Where information was not available to the father, he provided an explanation as to why the information could not be obtained and provided details of his efforts to obtain the information. Additional information was requested and produced during this period.

11 The father asked the mother's lawyer to consent to the re-instatement of his pleadings, as early as a letter dated 13 March 2013, and several times after that. The mother refused to do so.

The Parents' Claims and their Positions at the Motion

12 In September 2013, the father brought a motion to re-instate his pleadings on the financial issues, and for other relief. The father's position was that he had produced all or almost all of the material covered in the disclosure order, that his pleadings on the financial issues should be re-instated, and that the financial issues should be allowed to proceed for a determination on the merits on a contested basis. The mother's position was that the father was still not in full compliance with the disclosure order, was not in compliance with the child support order, that this motion should be dismissed, and the financial issues resolved on the basis of an unopposed hearing.

Analysis

13 In a written endorsement released on 20 February 2014, the court re-instated the father's pleadings and made these findings:

a) After the order of 28 December 2012 striking his pleadings, the efforts made by the father to comply with the disclosure order were more than just token attempts at compliance. The father's financial situation was more complex than that of the average family law litigant. This is not to suggest that the father's disclosure has been perfect;

b) It was time for a determination of these issues on the merits, with as much relevant information as is available for the trial judge. Justice would be best served, and the primary objective would now best be met, in this case, by allowing the

father to participate at trial. The extent of the father's disclosure may well lead a trial judge to conclude that his income or assets exceed the figures disclosed. That determination is best left to the trial judge, based on all the evidence, including such further evidence as the father may provide to substantiate his position. *Chiaramonte v. Chiaramonte*, 2013 CarswellOnt 14325, 2013 ONCA 641, [2013] W.D.F.L. 5609, 36 R.F.L. (7th) 11, 235 A.C.W.S. (3d) 439 (Ont. C.A.), para. 37, 38; and,

c) The mother claims that the father's pleadings should also not be re-instated as he was not in full compliance with the child support order. The court took this into account. In all of the circumstances, it is consistent with the directive in Rule 2 for the father's pleadings on the financial matters to be re-instated, notwithstanding this non-compliance by the father, and for the matter to be heard on the merits at a trial, as soon as possible.

The Parties' Claims re Costs

14 The father claims costs of the motion under Rules 14 and 24 of the Family Law Rules, O. Reg. 114/99, as amended, and s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, on the basis that he was successful on the motion. He claims $21,664.48 all in (fees + disbursements) on a full recovery basis.

15 The mother says the father is not entitled to costs, that he was not successful on the motion, and she claims her costs of the motion of $7,500 all in, on a partial recovery basis.

The Costs Analysis

The Law of Costs

Entitlement

16 The courts have a broad discretion to award costs. The general discretion of the courts regarding costs is contained in the *Courts of Justice Act*, s. 131(1), which sets out three specific principles:

a) the costs of a case are in the discretion of the court;

b) the court may determine by whom costs shall be paid; and,

c) the court may determine to what extent the costs shall be paid.

17 Modern costs rules are designed to foster three fundamental purposes: *Fong v. Chan* (1999), 46 O.R. (3d) 330, 181 D.L.R. (4th) 614 (Ont. C.A.), 1999 CanLII 2052, 1999 CarswellOnt 3955 (Ont. C.A.), para. 24:

(a) to indemnify successful litigants for the cost of litigation;

(b) to encourage settlement; and

(c) to discourage and sanction inappropriate behaviour by litigants.

18 This claim for costs deals only with the motion to re-instate the father's pleadings, although there were other issues claimed. Pursuant to Rule 24(1) of the Family Law Rules, the father is presumed to be entitled to costs because he was successful at the motion.

The Evolution of Costs as an Instrument of Social Policy

19 The traditional purpose of an award of costs was to indemnify the successful party in respect of the expenses sustained. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. The principle of indemnification, while paramount, is not the only

consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexatious litigation, and to discourage unnecessary steps. This change in the common law was an incremental one when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.), paras, 21-24.

20 The traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser, rather than leaving each party's expenses where they fall, they act as a disincentive to those who might be tempted to harass others with meritless claims. In addition, because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, *supra*, para. 26.

21 Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer. Costs can also 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*, *supra*, para. 25.

Costs and Ability to Pay

22 Ability to pay may be relevant to the issue of the quantum or scale of costs, but not to another party's entitlement to costs: *Izyuk v. Bilousov*, 2011 CarswellOnt 14392, 2011 ONSC 7476 (Ont. S.C.J.), (2011), 210 A.C.W.S. (3d) 143, [2012] W.D.F.L. 1822, [2012] W.D.F.L. 1819, [2012] W.D.F.L. 1818, 7 R.F.L. (7th) 358 (Ont. S.C.J.), para. 51.

Offers to Settle

23 The evidence as to whether either party had a valid offer to settle open at the time the motion to re-instate the father's pleadings was unclear and confusing. The mother did not make an offer to settle the motion.

24 The father made an Offer to Settle the pleadings issue on 27 June 2013, proposing that his pleadings be re-instated, and including other proposals (he would pay $5,000 towards child support arrears within 14 days, there would be one day of questioning of each side, the parties would exchange Requests for Information on a timetable). The offer had a timed expiration as a "no costs" offer until 19 July 2013. Both this offer, and a subsequent letter regarding the offer dated 12 November 2013, appear to state that the offer is open until one minute after the start of the motion. But both the offer and the letter refer to specific dates for the motion to be argued, and the motion was not argued on either of those dates. This extension (if it was intended to be an extension) is unfortunately unclear. Lawyers are advised to use a clause that says clearly that the offer is open until five minutes after the start of the argument of the motion, and to not refer to a motion date.

25 Offers to settle are a significant part of the costs landscape in family law in Ontario. They are important to the possible resolution of cases. In addition, they are important to determining costs.

26 Parties and their lawyers have a positive obligation to behave in ways which enable the court to move cases forward to resolution (Rule 2). Rule 2(4) imposes a duty on parties and their lawyers to promote the primary objective of the rules to deal with cases justly (Rule 2(2)). This includes taking appropriate steps to save time and expense (Rule 2(3)). Offers to settle play an important role in saving time and expense by promoting settlements, focusing parties and often narrowing issues in dispute: *Laing v. Mahmoud*, 2011 ONSC 6737, [2011] O.J. No. 5134, 2011 CarswellOnt 12972 (Ont. S.C.J.), para. 7.

27 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: *Lawson v. Lawson*, 2008 CarswellOnt 2819, [2008] W.D.F.L. 3600, 167 A.C.W.S. (3d) 723, [2008] O.J. No. 1978 (Ont. S.C.J.). The position each party took at the motion should also be examined.

28 The costs consequences of offers to settle are set out in Rule 18 (14) 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.

29 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 to the offer to settle, when exercising its discretion over costs (Rule 18(16)).

> **COSTS — DISCRETION OF COURT**
>
> 18 (16). When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.

30 Rule 18 (16) invites consideration of any and all offers to settle: *Osmar v. Osmar*, 2000 CarswellOnt 2343, 8 R.F.L. (5th) 387, [2000] W.D.F.L. 660, [2000] O.J. No. 2504, [2000] O.T.C. 979 (Ont. S.C.J.), para. 7.

31 In deciding whether a party has acted reasonably or unreasonably in a case, the court shall examine the reasonableness of any offer the party made (Rule 24(5)(b)): *M. (J.V.) v. P. (F.D.)*, 2011 CarswellOnt 13510, 2011 ONCJ 616, 209 A.C.W.S. (3d) 873, [2012] W.D.F.L. 2168 (Ont. C.J. [In Chambers]).

32 Offers to settle are important and can be the yardstick by which to measure success. They are significant in determining both liability for costs and quantum: *Osmar v. Osmar*, *supra*, para. 7.

33 The father's Offer to Settle made 27 June 2013 and extended 12 November 2013 would have qualified under Rule 18 (14) if the offers had been clear that they were open for acceptance until one minute after the start of the motion. They were not. However, the father's Offers to Settle are Offers to Settle under Rule 18 (16), and the court should take them into account in determining eligibility for costs.

Behaviour of the Parties

34 One of the purposes of costs is to change behaviour.

35 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, 132 A.C.W.S. (3d) 1112 (Ont. C.J.), and *Peers v. Poupore*, 2008 ONCJ 615 (Ont. C.J.) (CanLII), para. 62.

36 Parties to litigation must understand that court proceedings are expensive, time-consuming and stressful for all concerned. They are not designed to give individual litigants a forum for carrying on in whatever manner they may choose, oblivious to the impact of that conduct on the other side and, perhaps most importantly for the purposes of this case,

oblivious to the mounting costs of the litigation: *Heuss v. Surkos*, *supra*, para. 20.

37 Matrimonial litigation is an occasion for sober consideration and thoughtfulness rather than intemperate behaviour: *Heuss v. Surkos*, *supra*, para. 20.

38 Rule 24 (5) provides criteria for determining the reasonableness of a party's behaviour in a case (a factor in Rule 24 (11)(b)). 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.

39 A finding of bad faith is not a condition precedent to full recovery of costs by the other side under the Family Law Rules: *Osmar v. Osmar*, *supra*, para. 11.

40 The mother did not act in bad faith, but she did act unreasonably. She should have made an offer to settle the motion. Her behaviour on the issue of re-instating the pleadings fits squarely within the provisions of Rule 24(5). She could have and should have consented to an order re-instating the father's pleadings.

Quantum of Costs

41 The father claimed costs as follows:

	Partial recovery	**Full recovery**
Fees + HST	$17,145.72	$21,432.15
Disbursements + HST	$232.33	$232.33
Total	*$17,378.05*	*$21,664.48*

42 The mother claimed costs of $7,500 all in, on a partial recovery basis.

43 Determining the amount of costs is not simply a mechanical exercise. Costs must be proportional to the amount in issue and the outcome: *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

44 The over-riding principle is reasonableness. 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: *Boucher v. Public Accountants Council (Ontario)*, *supra*.

45 The factors to consider in determining the amount of costs in family law matters are (Rule 24(11)):

> 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.

46 In determining the amount of costs on this motion, the court took into account these factors set out in R. 24 (11), as follows:

a) *The importance, complexity or difficulty of the issues*: although the motion was important to the parents, it was neither complicated not difficult;

b) *The reasonableness or unreasonableness of each party's behaviour in the case*: A finding of unreasonableness is not necessary to the making of a costs order. The mother did not make an offer to settle on this issue. She insisted that the motion to re-instate be brought, and then once brought, insisted that it be argued. The mother's behaviour on this issue was unreasonable, unnecessary and inappropriate, in all the circumstances;

c) *The lawyer's rates;* the rates claimed for the father's lawyers were reasonable. It was hard to know if the rates claimed for the law clerks who worked on the motion were reasonable, as no information was provided about their levels of experience;

d) *The time properly spent on the case:* The mother's lawyer, although claiming costs of the motion, and although specifically asked by the court to do so, did not provide any summary of the time spent on the motion. This is regrettable, as it would have been helpful to the court to compare the time spent by both sides of the motion.

A summary of the time spent by the father's lawyer on this motion was provided. Two lawyers and two law clerks worked on this matter. There were no totals provided of the time spent by each worker, or the total time spent. The court should not have to guess at these amounts, and should not have to add up the totals to determine the issues on the costs claim. The majority of the lawyer work (about 70%) was done by a more junior lawyer, and at a lower hourly rate. It appears that there was 43.8 hours of lawyers time spent, and 24.4 hours of law clerk time spent. Those totals are high and disproportionate for this motion, given that it was not difficult or complex.

e) *Expenses properly paid or payable*; the disbursements claimed by the father (total $232.33) were modest.

Order

47 The mother shall pay the father's costs of the motion. The motion should not have had to be brought. The mother should have consented to re-instate the father's pleadings in all of the circumstances.

48 A fair and reasonable costs order, and one that is proportionate to the issues involved, in all of these circumstances, is $5,000 all in (fees + HST, disbursements + HST).

Order accordingly.

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