COURT FILE NO.: 03/15
DATE: 2016-02-11
CITATION: *Davis v. Fell*, 2016 ONCJ 84

ONTARIO COURT OF JUSTICE

RE: Ryan Davis, Applicant
Alexandra Fell, Respondent

BEFORE: Justice Sheilagh O'Connell

COUNSEL: Rachel Healey, for the Applicant

Anne Marie Horne, for the Respondent

C O S T S E N D O R S E M E N T

Introduction:

[1] The Respondent mother ("the mother") seeks full recovery of her costs of the following court proceedings in this matter:

1) an *ex parte* motion heard January 12, 2015, in the amount of $12, 242.61;

2) a case conference heard April 8, 2015, in the amount of $21, 271.89;

3) a "to be spoken to" hearing/continuation of case conference heard on May 28, 2015, in the amount of $22, 266.73;

4) a motion heard June 24, 2015 in the amount of $30, 647.37; and

5) a motion heard November 6, 2015 in the amount of $43, 691.43.

[2] The global amount of costs claimed is $**130,120.03** for the five court appearances above. All appearances were before me as the case management judge in this proceeding.

[3] Both parties served written submissions and brief of authorities. The mother also served her bill of costs. No offers to settle were served or filed.

The Mother's Position:

[4] The mother seeks full recovery of her costs for all court appearances, which include two motions and three conferences. She submits that she was completely successful on all of the case conferences and motions with regards to the parenting arrangements, visitation schedule and other issues.

[5] The mother also submits that the father has acted in bad faith throughout these proceedings, including commencing an *ex parte motion* which was "malicious and frivolous and completely unnecessary." She further submits that the father's behavior throughout the proceedings has been "volatile, aggressive, threatening and bullying specifically towards the mother" and that he has acted unreasonably throughout.

The Father's Position:

[6] The applicant father ("the father") submits that the costs claimed are excessive, disproportionate to the relatively routine issues dealt with by the court, and unreasonable in light of the amount of legal fees that ought to have been spent in preparing for and speaking to these matters. He further submits that the amounts claimed should be dismissed or significantly discounted on a number of grounds. He denies that he has acted in bad faith and that it is it is his position that the mother has acted unreasonably throughout and not the father.

Brief Background:

[7] The parties were married on June 13, 2005. The parties separated on July 14, 2007. There is one child of the marriage, Tyler Benjamin Davis, born December 13, 2004 (Tyler).

[8] The parties entered into a separation agreement dated May 24, 2008. The agreement provided that the mother shall have sole custody of Tyler and that the father shall have access to Tyler every Wednesday overnight and every other weekend, as well as any other time as the parties may agree.

[9] The agreement also provided that if either parent plans a vacation with Tyler outside of Canada, then the written notarized consent of the other parent is required.

[10] In March of 2010, the father relocated to Los Angeles, California. The parties entered into negotiations to change the provisions of the separation agreement as a result of the father's relocation. The father exercised access to Tyler in both Toronto and Los Angeles as he frequently traveled back and forth between the two locations.

[11] It is not disputed that the parties were no longer following the parenting provisions of the separation agreement given the father`s relocation to California. The parties never formally amended the separation agreement notwithstanding the change in the father`s circumstances.

[12] On January 5, 2015, the father brought an urgent *ex parte* motion and application seeking temporary sole custody of Tyler, an order that Tyler not be removed from the greater Toronto area, and an order seeking police apprehension of the child and enforcement of any order.

[13] The father deposed that the parties had reached an agreement providing him Christmas access to Tyler from December 19, 2014 to December 26, 2014 in Toronto. According to the father, the mother refused to provide this holiday access and had removed Tyler from Canada to Colombia without his consent. He deposed that Tyler's whereabouts in Colombia were unknown and that he had no way of contacting either the mother or the child.

[14] When the motion came before me on January 5, 2015, it was clear that the father had contact with both the mother and her counsel prior to bringing his urgent motion. It appeared that the mother was on vacation in Colombia, returning to Canada on January 6, 2015. The court also learned that counsel for the father had communicated with mother's counsel, who was also on vacation at the time, but would be available to attend on the motion the following week.

[15] Accordingly, I declined to grant the relief sought and adjourned the motion to January 12, 2015 at 12 noon. I ordered that the father's counsel shall serve all motion materials on counsel for the mother forthwith. I did permit the father to amend his motion if necessary.

[16] Upon the return of the motion on January 12, 2015, both mother and her counsel were present. The mother had returned from her vacation on January 6, 2015. She had no intention of relocating to Colombia with the child. According to the mother, the father had failed to exercise the Christmas access that had been agreed upon between the parties, and that she had made plans to vacation in Colombia during her Christmas holiday time with Tyler, of which the father was very much aware.

[17] It was disclosed that in previous negotiations between counsel, the father had signed a global travel consent permitting the mother to travel outside of Canada with the child so long as she provided a detailed itinerary, including contact information. The father stated that he had revoked this consent; however he failed to disclose this information in his motion without notice.

[18] When the matter came before me, the parties and counsel had some discussions regarding the issues in dispute. Given that both parties wanted to make changes to the separation agreement, they agreed to appoint a mediator to assist in resolving the outstanding parenting issues between them. The matter was adjourned to a case conference on April 8, 2015 to permit the mediation to proceed. However, both parties reserved their right to seek costs of the urgent motion and were granted leave to serve and file written submission and a bill of costs.

[19] No agreement was reached in mediation and the matter proceeded through the case management process. After the first case conference on April 8, 2015, a further to be spoken to date or case conference was scheduled for May 8, 2015. At that conference, the parties agreed to the appointment of the Office of the Children`s Lawyer (OCL). On November 5, 2015, after hearing the OCL`s views and recommendations, the parties entered into comprehensive minutes of settlement regarding the parenting issues. Further hearing dates were then scheduled to address the child support issues.

The Law and Governing Principles:

[20] An award of costs is governed by s. 131 of *the Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 24 of the *Family Law Rules,* O. Reg. 114/99.

[21] Cost awards are exercises of judicial discretion.[1] The general source of judicial discretion to award costs is found under s. 131 of the *Courts of Justice Act*, However, that discretion must be exercised within the framework established by Rule 24 of the *Family Law Rules*.

[22] Rule 24 of the *Family Law Rules,* O. Reg. 114/99, governs the determination of costs in family law proceedings. The sections relevant to the circumstances of this case are as follows:

> "24.(1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.
>
> (4) Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs.
>
> (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.
>
> (6) If success in a step in a case is divided, the court may apportion costs as appropriate.
>
> (7) If a party does not appear at a step in the case, or appears but is not properly prepared to deal with the issues at that step, the court shall award costs against the party unless the court orders otherwise in the interests of justice.
>
> (8) 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.
>
> (10) Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs."

[23] Rule 24 (11) provides a further list of factors that a court must consider when setting the amount of costs:

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[1] See *Fielding v. Fielding*, 2015 ONCA 901; [2015] O.J. No. 6472 (C.A.) at paragraph 67.

> "(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." *O. Reg. 114/99, r. 24 (11).*

[24] Rule 18(14) and 18(16) of the *Family Law Rules*, which address the cost consequences of offers to settle, provide the following:

> "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.
>
> 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." *O. Reg. 114/99, r. 18 (14) and (16).*

[25] Rule 24 created a new framework for determining costs in family law proceedings. The presumptive nature of Rule 24 significantly curtailed the court's discretion regarding costs in family law proceedings and absent compelling circumstances or the exceptions set out in the rule itself, costs are generally awarded to the successful party. The Ontario Court of Appeal in *C.A.M. v. D.M.* (2003) 67 O.R. (3d) 181 held that while the Rules have not completely removed a judge's discretion, the rules nonetheless circumscribed the broad discretion previously granted

to the courts in determining costs. Courts must not only decide liability for costs, but also the amount of those costs.

[26] In *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40, [2009] O.J. No. 1905, 2009 CarswellOnt 2475, at paragraph 8, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

> (1) to partially indemnify successful litigants for the cost of litigation;
> (2) to encourage settlement; and
> (3) to discourage and sanction inappropriate behaviour by litigants.

[27] The court's role in assessing costs is not necessarily to reimburse a litigant for every dollar spent on legal fees. As was pointed out in *Boucher et al. v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579, 71 O.R. (3d) 291, 188 O.A.C. 201, 48 C.P.C. (5th) 56, [2004] O.J. No. 2634, 2004 CarswellOnt 2521 (Ont. C.A.), the award of costs must be fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings rather than an exact measure of actual costs to the successful litigant.

[28] Consideration of success is the starting point in determining costs. However, any attempt to determine a "winner" or "loser" in a settlement is, in most cases, complex if not impossible. Cases are resolved in whole or in part for many reasons. See *Sims-Howarth v. Bilcliffe*, 2000 CarswellOnt 299 (S.C.J.), para. 1. Thus, for good reason, judges are reluctant to make an order as to costs when the parties settle the merits to their dispute. Where parties make a settlement as between themselves, the court should be very slow to make an award of costs against one of the parties. Unless there are compelling reasons to do so, costs in the circumstances of the settlement between parties ought not to be awarded by the court. See: *Page v. Desabrais*, supra, para. 28; *Blank v. Micallef*, 2009 CarswellOnt 6790, para. 11; *Gurzi v. Elliot*, 2011 CarswellOnt 2169 (O.C.J.) para. 16.

[29] If the court is able to determine which party is successful based on minutes of settlement, than the divided success approach under Rule 24(6) is appropriate, and a consideration of the parties' reasonable or unreasonable behaviour must be made. See *Davis v. Davis*, 2004 CarswellOnt 2186 (S.C.J.) paras. 3 and 7.

[30] Further, if a successful party has behaved unreasonably "in relation to the issues from the time they arose (Rule 24(5)," then pursuant to Rule 24(4), they may be "deprived of all or part of the [their]costs or ordered to pay all or part of the unsuccessful party's costs." Behaviour under Rule 24(5) is not restricted to behaviour associated with offers to settle. See *Family Law Rules*, Rule 24(4), (5) and 11(b); *Lawson v. Lawson*, 2004 CarswellOnt 3154 (S.C.J.), para. 44.

[31] Rule 24(10) of the *Family Law Rules* also provides that the judge who deals with a step in a case shall decide who, if anyone, is entitled to costs. It is well established that in order to obtain costs for prior steps, there must be an order reserving those costs to the trial judge, or to the motions judge. A trial judge or motions judge is not entitled to make an award for costs covering prior steps such as case conferences and settlement conferences. Those prior steps are

not within the judge's discretion particularly where there was no order as to costs or the issue of costs was not address. See *Family Law Rules*, Rules 24(10); *Islam v. Rahman*, 2007 CarswellOnt 5718 (Ont. C.A.) at paragraph 2; *Jepson v. Cresnjovec*, 2007 CarswellOnt 7255 (O.C.J.) at para. 8; *MacIntosh v. MacIntosh*, 2008 CarswellOnt 655 (S.C.J.) at paras. 22-23 and *Debora v. Debora*, 2005 CarswellOnt 676 (S.C.J.), para 20.

[32] Finally, in deciding the amount of costs to be paid, I must also consider clause 24 (11) (f) which requires the court to consider any other relevant matter, including the ability to pay costs. See *Biant v. Sagoo*, 2001 CANLII 28137, 20 R.F.L. (5th) 284, [2001] O.J. No. 3693. In *C.A.M v. D.P. supra*, Justice Rosenberg for the Ontario Court of Appeal states the following:

> "I am also of the view that the financial situation of the parties can be taken into account in setting the amount of the costs award either under Rule 24 or Rule 18. Thus, while subrule 24(11) enumerates a number of factors that must be taken into account, the person setting the amount of the costs is directed to take into account "any other relevant matter". I agree with Aston J. in Sims-Howarth at para. 4, that the "Family Law Rules demand flexibility in examining the list of factors in subrule 24(11) without any assumptions about categories of costs". In my view, a consideration of particular relevance may be the financial position of the parties, especially of an unsuccessful custodial parent. See Biant at para. 17 and *Brennan v. Brennan*, [2002] O.J. No. 4743 (S.C.J.) at para. 11. In fixing costs the courts cannot ignore the best interests of the child and thus cannot ignore the impact of a costs award against a custodial parent that would seriously affect the interests of the child. [par. 42]

Application of the Governing Law and Legal Principles to this Case:

[33] I do not agree that the mother was completely successful on all of the court appearances in this matter. At least three of the five appearances were conferences. No offers to settle were served for those proceedings. Further, no costs were sought and reserved at the conclusion of those three proceedings.

[34] For the reasons that follow, I disallow the costs claimed for the case conference heard on April 8, 2015, the "to be spoken to"/continuation of the case conference heard on May 28, 2015 and the motion, which was converted into a lengthy settlement conference on November 6, 2015. However, I award partial costs for the *ex parte* motion returnable January 12, 2015 and the motion heard on June 24, 2015.

January 12th Ex Parte Motion:

[35] The father should not have commenced this proceeding on an urgent *ex parte* basis. The mother and her counsel should have been properly served with the father's application. Although both parties sought changes to the parenting provisions of the separation agreement, the father's application should have proceeded through the normal case management process, with the first appearance being a case conference, not an urgent motion made without notice to the mother.

[36] The mother incurred unnecessary expense as a result of the father`s urgent motion. The evidence did not establish that the mother and the child had left the country unbeknownst to the father or that she was intending to relocate to Colombia with Tyler. The father's materials also failed to disclose the blanket travel authorization which permitted the mother to travel with Tyler outside of Canada for vacation purposes. The father states that he revoked this authorization, although this was disputed by the mother.

[37] The evidence established that the parties had a dispute regarding the Christmas holiday schedule. The father did not attend to pick up Tyler on the agreed-upon date for his holiday vacation as a result of work commitments. The mother had already planned her vacation to Colombia with Tyler and was either unwilling or unable to change her plans. It was unreasonable for the father to bring an ex parte motion knowing that both the mother and her lawyer were away on holidays.

[38] Although the parties agreed to adjourn the proceedings to attend mediation, the mother was successful as the court did not grant the father the relief that he sought in his motion, including temporary custody of Tyler. Both parties specifically reserved their costs of the motion and sought leave to serve and file bills of costs and written submissions if necessary.

[39] The mother claims $12,242.61 for the cost of the *ex parte* motion. This included the preparation of the mother's responding court materials, including her affidavit and financial statement, and for the attendance at the motion. At the hearing of the ex parte motion, the mother's counsel advised that she had spent 10 hours in preparing for the motion, and four hours and court for a total of 14 hours, or $8,050.00, based on counsel's hourly rate.

[40] The mother will be awarded $8,000.00 in costs for the preparation and attendance on the *ex parte* motion.

The April 8th Case Conference and the May 28, 2015 "To be Spoken to"/Continuing Case Conference:

[41] The mother claims costs in the total amount of $42, 538.62 for these two case conferences.

[42] The April 8th case conference was scheduled after the parties had agreed to attend mediation following the father's *ex parte* motion on January 12, 2015. Ms. Catherine Paul, a mediator at the Halton courthouse agreed to conduct the mediation and the matter was adjourned pending the mediation. At the mediation, the parties had reached a tentative agreement in principle with respect to the visitation schedule for Tyler, subject to review with counsel.

[43] Following the mediation and after further consideration when speaking with counsel, the mother had some concerns about to the tentative proposal reached in mediation and advised that she did not feel comfortable with the mediation. She sought a further reconsideration of the holiday and access schedule at the case conference on April 8th, 2015.

[44] The parties had significant and productive discussions at the April 8th case conference and a further agreement in principle was reached. The mother's counsel agreed to prepare draft minutes incorporating the agreement and some of the court's recommendations at the case conference. The matter was then adjourned to May 28, 2015 "be spoken to" or a continuation of the case conference, but with the hope of filing minutes of settlement at that time.

[45] There was no "winner" or "loser" at the April 8th case conference. Both parties made concessions in the agreement in principle that was reached. Further, the mother did not reserve her costs of the April 8, 2015 case conference, nor were costs addressed at that hearing. Finally, no offer to settle was served by the mother prior to the April 8th case conference.

[46] Regarding the May 28th case conference, the mother and her counsel attended with the draft minutes of settlement following the April 8th case conference. The father did not agree with the draft minutes and sought a number of changes, after further consideration.

[47] Although the father may have behaved unreasonably in rejecting the draft final minutes of settlement presented by mother's counsel at that hearing date, the parties continued to have further settlement discussions and agreed, for the first time, to appoint counsel from the Office of the Children's Lawyer to represent Tyler. The parties were not able to resolve summer holidays or the consent to travel issue and a motion was scheduled for June 24th on those issues.

[48] Again, there was no winner or loser at this hearing. It was very apparent that there was a significant dispute between the parties regarding Tyler's views and preferences about the length of time that he would like to be in California with his father over the summer holidays. Initially, the mother was reluctant to consider the appointment of the Office of the Children's Lawyer at that conference. The father was of the view that Tyler would like to spend four consecutive weeks with him and the mother was of the view that Tyler did not feel comfortable being away for more than two weeks at a time. After considerable discussion, the mother, to her credit, agreed the appointment of the Children's Lawyer for Tyler, something which the father had been seeking.

[49] As with the April 8th case conference, the mother did not seek costs of the May conference date, nor were costs reserved by her.

[50] It is well established that in order to obtain costs for prior steps, there must be an order reserving those costs to the trial judge, or to the motions judge. A trial judge or motions judge is not entitled to make an award for costs covering prior steps such as case conferences and settlement conferences. Those prior steps are not within the judge's discretion particularly where there was no order as to costs or the issue of costs was not addressed. See *Family Law Rules*, Rules 24(10); *Islam v. Rahman*, 2007 CarswellOnt 5718 (Ont. C.A.) at paragraph 2; *Jepson v. Cresnjovec*, 2007 CarswellOnt 7255 (O.C.J.) at para. 8; *MacIntosh v. MacIntosh*, 2008 CarswellOnt 655 (S.C.J.) at paras. 22-23 and *Debora v. Debora*, 2005 CarswellOnt 676 (S.C.J.), para 20.

[51] With respect to these two steps (the April 8th and May 28th appearances), the mother is now seeking costs for steps where she did not seek costs previously and no costs were ordered or

reserved. The costs claimed for the April 8th and the May 28th conferences are therefore disallowed.

The June 24th Motion:

[52] The mother claims costs of $30, 647. 37 for this motion. The mother brought this motion after the May 8th conference to address the 2015 summer holidays, her request to travel to Colombia with Tyler, and the parenting schedule going forward pending the appointment and report of the Office of the Children's Lawyer. These three issues needed to be addressed after the parties were unable to reach an agreement at the case conference.

[53] The mother served and filed her motion materials on June 16th, 2015. In her motion materials, the mother also sought child support, a retroactive child support claim, appointment of an income valuator for the father, and costs of the motion. The motion materials were lengthy. The father did not file responding materials even though he was vigorously opposed to the mother`s request for relief, however, he stated that due to the volume of materials, he did not have time to respond.

[54] At the return of the motion on June 24, 2015, the court made it clear that it was only prepared to hear the pressing issues with respect to summer holidays, the mother's request to travel to Colombia, and the schedule going forward pending the OCL investigation. The court had clearly advised the parties at the May hearing date that only one hour had been scheduled for the pressing summer and travel issues. The court was not able to accommodate further argument on the balance of the issues on that day, which was a very busy case management and motions day.

[55] At the argument of the motion, the mother sought an order that the father`s summer holidays with Tyler be the first two weeks of July, given her concerns regarding Tyler's views and preferences, which had not yet been canvassed independently by the Office of the Children's Lawyer. She further sought a stable and consistent schedule for Tyler as he moved into his new school year. Finally she sought an order permitting her to travel with Tyler to Colombia in August for a family holiday and wedding party. The mother's fiancé is Colombian, although he lives and works in Canada and is a permanent resident of Canada.

[56] The father attempted to introduce Internet articles about Colombia in opposition to the mother's motion, including a travel advisory from the U.S. government regarding travel to Colombia by American citizens. At this point the father was self-represented, so the court granted him some leeway. The father argued that Colombia was the fifth most dangerous place in the world and it had the world's highest murder rate. It was his position that the mother was putting his son in grave danger by travelling to Colombia with him.

[57] The mother filed two independent affidavits regarding the safety of visitors to Colombia as well as her own affidavit with a detailed plan and itinerary. In addition, the materials filed by the father from the U.S. government also indicated that tens of thousands of Americans safely travel to Colombia each year.

[58] After hearing submissions and reviewing all of the evidence, the court granted the mother the relief that she sought with respect to summer holidays, the access schedule going forward pending the OCL investigation and permission travel to Colombia with Tyler in August.

[59] There is no doubt that the mother was successful on this motion. The mother acted reasonably throughout. She is therefore presumed entitled to the costs of this motion.

[60] However, the mother is not entitled to full recovery of her costs. First, the mother included several heads of relief for support and retroactive support in her motion, which was never intended to be addressed at the scheduled motion date and for which short notice was provided to the father. The court adjourned that part of the motion to another date.

[61] Second, more importantly, for reasons unknown to the court, the mother did not serve an offer to settle prior to the hearing of this motion, in accordance with Rule 18 of the *Family Law Rules*. She is therefore not entitled to the claim full recovery of costs in accordance with Rule 18(14) of *Rules*. The failure to serve an offer to settle prior generally deprives a party of full recovery of their legal costs from the date that the offer was served.

[62] The failure to serve an offer to settle is an important factor that I should take into consideration in assessing costs, particularly given the requirements of Rule 18 of the *Family Law Rules* and the overall objectives and Rule 24(5) of the *Family Law Rules*, which provides that the failure to make an offer to settle is a factor that the court must consider in determining whether a party acted reasonably.

[63] Justice Stanley Sherr states the following in *J.V.M. v. F.D.P.* [2011] O.J. No. 5441, and I adopt this reasoning in assessing the costs in these proceedings:

> "…The failure to make an offer to settle much earlier by either party is unreasonable behaviour. Subrule 2(4) imposes a duty on parties and their lawyers to promote the primary objective of the rules to deal with cases justly (subrule 2(2)). This includes taking appropriate steps to save time and expense (subrule 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. See *Laing v. Mahmoud*, 2011 ONSC 6737, [2011] O.J. No. 5134, 2011 CarswellOnt 12972 (Ont. Fam. Ct.). The failure to serve an offer to settle will be an adverse factor when assessing costs."

[64] The mother also submits that the father acted in bad faith. Rule 24 (8) provides 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. The mother submits that the father concealed information relevant to the very issue before the court and intended to inflict emotional and financial harm to the mother by commencing his application in prolonging the litigation.

[65] Although I find that the father's position on the motion was unreasonable, I do not find that his behaviour amounted to bad faith, as the mother submits. There is a difference between unreasonable behaviour and bad faith. "Bad faith" is not defined under subrule 24(8) of the *Family Law Rules*. The case law is clear that bad faith is something significantly more than unreasonable litigation behaviour. In one of the leading cases, *C.S. v. M.S.*, [2007] O.J. No. 2164, Justice Craig Perkins explained that bad faith means the following:

> "In order to come within the meaning of bad faith in sub rule 24(8), behaviour must be shown to be carried out with intent to inflict financial or emotional harm on the other party or other persons affected by the behaviour, to conceal information relevant to the issues, or to deceive the other party or the court. A misguided but genuine intent to achieve the ostensible goal of the activity, without proof of intent to inflict harm, to conceal relevant information or to deceive, saves the activity from being found to be in bad faith. The requisite intent to harm, conceal or deceive does not have to be the person's sole or primary intent, but rather only a significant part of the person's intent."

[66] As Justice Perkins further explains in *C.S. v. M.S.*, [2007] O.J. No. 2164, *supra*, bad faith must be more than "simply bad judgment or negligence" and "implies the conscious doing of wrong because of dishonest purpose or moral ubiquity" [paragraph 19 of the same decision]. A party who seeks to find bad faith must meet a high burden.

[67] I do not find that the father intended to inflict financial or emotional harm on the mother when he took the position that it was too dangerous for his son Tyler to travel to Colombia, or when he sought four weeks of summer holiday time with him in California, as opposed to the two weeks proposed by the mother. Although I found that the father's fear of Tyler traveling to Colombia was unreasonable and perhaps irrational he appeared to be genuinely concerned about his son traveling to Colombia. His opposition to the mother's request was not rooted in bad faith. Further, there was no evidence before me that the father had concealed information relevant to the very issue before the court, as stated in the mother's cost submissions. The court was unable to determine what information was ostensibly concealed, and this was not explained in the submissions before the court.

[68] In considering what costs should be awarded to the mother for the June 24th motion, I examined Ms. Horne's bill of costs. Ms. Horne's hourly rate is $575.00 per hour, which although high is not unreasonable for a lawyer of her experience and expertise. She has been the family law practitioner for 27 years. Ms. Horne has also claimed the costs of two law clerks whose hourly rate is $225. Ms. Horne billed 44.5 hours for the preparation and attendance on the motion and the two law clerks billed 2.9 hours. On a partial recovery basis (sixty-five percent of the total amount), the amount is $19,920.79.

[69] In reviewing the bill of costs, filed, in my view, the amount of time claimed by Ms. Horne to prepare and attend on this motion was excessive. Given that the issues were canvassed extensively of both the April 8 and may 28th case conferences it was not clear why so much time

was needed to prepare for the June 24 motion. The issues were not so complex or difficult to attract such significant costs.

[70] However, I also consider the father's conduct with respect to the motion. The father`s position at the motion was unreasonable.

[71] The father put the mother to the expense of bringing the motion, notwithstanding the very thorough canvassing of these issues at the case conference before me, and the recommendations made. The father also did not file any responding materials, despite his vigorous opposition to the relief that the mother was seeking.

[72] In considering all of the above factors, I would award $8,000.00 to the mother in legal costs for the June 24th motion.

The November 6, 2015 motion:

[73] The mother claims costs in the amount of $43,691.43 for the hearing on November 6, 2015. The mother characterizes this hearing date as a motion. Respectfully, I disagree. Although the balance of the relief claimed by the mother on the June 24th motion was adjourned to this date, there was no motion argued on that day. Tyler`s OCL counsel attended on that day to provide his feedback and recommendations with respect to the custody and access issues. The parties agreed to hold the matter down to have further discussions in the hope of reaching a comprehensive settlement regarding the parenting issues.

[74] The parties worked very hard throughout the day and checked in periodically with the court to seek guidance on certain issues that they could not resolve. At the end of a long day, the parties reached comprehensive minutes of settlement regarding summer holidays, March break, Thanksgiving, including both American and Canadian Thanksgiving, and a regular access schedule for Tyler. Detailed minutes of settlement were drafted. With the assistance of the Office of the Children's Lawyer, the parties were able to reach a settlement on the parenting issues and entered into a final and temporary consent order in accordance with the minutes of settlement filed.

[75] Here, as in the court appearances on April 8th and May 28th, there was no clear winner or loser. The parties and counsel had converted the November 6th appearance date into a lengthy settlement conference. Both parties made significant compromises.

[76] Again, no offer to settle was served by the mother prior to the November 6th hearing date. Further, a review of the mother's bill of costs for November 6, 2015 make it clear that no further motion or affidavit materials were prepared in advance of this date. The majority of the time billed for the November 6th appearance appears to be for correspondence, emails, telephone calls, conference calls, communications regarding the OCL intake form, the OCL investigation, issues with respect to Tyler, parenting issues, conversations and correspondence between the mother's counsel and her client, and her client's father.

[77] The attendance at court on November 6, 2015 was a lengthy attendance, but that was because the parties and counsel worked all day long in drafting minutes of settlement in accordance with the recommendations of the Office of the Children's Lawyer.

[78] The judicial case management component to the *Family Law Rules* was specifically designed to encourage resolution. There are multiple and ongoing opportunities for the parties to resolve their issues with the assistance of a judge. In each of the case conference, settlement conference and other appearances, the purpose is to explore "the chances of settling the case". This is what happened here.

[79] As stated before, where parties reach a settlement between themselves, the court should be very slow to make an award of costs against one of the parties. Unless there are compelling reasons to do so, costs in the circumstances of the settlement between parties ought not to be awarded by the court. See: *Page v. Desabrais*, supra, para. 28; *Blank v. Micallef*, 2009 CarswellOnt 6790, para. 11; *Gurzi v. Elliot*, 2011 CarswellOnt 2169 (O.C.J.) para. 16.

[80] Here, there are no compelling reasons to order costs to the mother for the November 6th hearing date.

Conclusion:

[81] Finally, in considering what an appropriate cost award should be for the mother, the court must consider the principle that costs should be proportional to the complexity of the issues in the case and the value of the legal work necessary to represent a client in family law proceedings. The issues in this matter were not so complex that they required the many hours of preparation by a lawyer of Ms. Horne's expertise, nor did the issues appear to require the amount of resources incurred.

[82] The court agrees with the submissions made by counsel for the father that the cost of each appearance appeared to rise significantly for reasons that are unclear to the court. There was little change to the facts of this case or the issues facing the party that would justify such a disproportionate increase in costs at each step in the proceeding. Further, the case was managed by a single judge. The court was very familiar with the facts and issues in this matter, as well as the other dynamics driving the litigation. It was not necessary to repeat or duplicate work at each step in the proceeding.

[83] Having said that, there is no question that this is a "high conflict" case. This contributed to the delay in resolving a number of the issues in this case. In my view, a significant amount of the conflict was generated by the unreasonable and sometimes aggressive behaviour of the father as well as the parties' inability to communicate with each other.

[84] However, I do not find that the father`s conduct amounted to bad faith, as defined by the case law discussed earlier in this ruling. At times, the father was unreasonable and difficult, but his conduct was not motivated by a desire to inflict harm on the mother. The father appears to believe that he is being denied a relationship with his son. The father did not appear to understand that the difficulty he encounters in spending time with Tyler on a regular and

consistent basis is largely because of his own decision to move to California, thereby making the logistics of arranging access much more difficult, particularly when the parties do not communicate with each other.

[85] Notwithstanding the above, the father`s unreasonable conduct in these proceedings does not explain the extraordinary high legal fees incurred by the mother in this matter.

[86] The Ontario Court of Appeal has made it clear that in determining costs, the overall objective is to fix an amount of costs that is fair and reasonable. As the Court stated in *Davies v. the Corporation of the Municipality of the City of Clarington*, [2009] O.J. No. 4236; 2009 ONCA 722; 100 O.R. (3d) 66 at paragraph 52:

> "As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher,* this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice". [paragraph 52]

[87] This was not a trial. In my view, the amount of costs sought by the mother for the five discrete appearances in this matter (three conferences and two motions) is not reasonable and excessively disproportionate to the issues in question, the nature of the proceedings, the conduct of the parties, the results achieved, the success of either party, any offers to settle made (or not made), and all of the other factors considered above.

Order:

[88] Accordingly, the court makes the following order:

1. The mother is granted partial recovery of her legal costs for the success she achieved on the June 24th motion in the amount of $8,000.00. She is also granted partial recovery of her legal costs for the success that she achieved on the January 12 *ex parte motion* brought by the father, in the amount is $8,000.00.

2. The mother is therefore awarded total costs of $16,000.00, inclusive of GST and disbursements.

3. The father shall pay the costs of $16,000.00 no later than 30 days from the date of this Court Order, or to be paid at a rate of $450.00 per month, commencing March 15, 2016.

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Justice Sheilagh O'Connell

DATE: February 11, 2016