CITATION: *LeBlanc v. LeBlanc*, 2018 ONCJ 499
DATE: July 23, 2018
COURT FILE NO. D20542/18

ONTARIO COURT OF JUSTICE

B E T W E E N:	)	
	)	
BEULAH LEBLANC and MICHAEL LEBLANC	)	**GARY GOTTLIEB, for the APPLICANTS**
APPLICANTS	)	
	)	
- and -	)	
	)	
DANETTE ANNE LEBLANC and EVAN JAMES ROSS	)	**RHEA KAMIN, for the RESPONDENT, DANETTE ANNE LEBLANC**
	)	**JOSEPH SHERIDAN, for the RESPONDENT, EVAN JAMES ROSS**
RESPONDENTS	)	
	)	
	)	
	)	**HEARD: IN CHAMBERS**

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

[1] On June 21, 2018, the court gave oral reasons for decision arising out of motions concerning the parenting arrangements for the subject 14-month-old child (the child).

[2] The court granted temporary custody of the child to the applicants (the maternal grandparents). It ordered that the respondents (the parents) could have access to the child for 2 hours on Monday, Wednesday and Friday after the respondent father finishes work. The parents were also granted access on alternate Saturdays and Sundays from 10:00 a.m. until 6 p.m. All access was ordered to be supervised – on weekdays and Sundays by the maternal grandparents, or their designates, and on Saturdays by the paternal grandparents. The court permitted the maternal grandparents to take the child on a three week vacation to the Canadian East Coast this summer. Lastly, the court ordered that the maternal grandparents not video or record the parents' time with the child.

[3] The maternal grandparents were given the right to make written costs submissions. They seek their costs of $30,932.17. The parents ask that no costs be ordered, or in the alternative that costs be fixed at no greater than $5,628.05 (the mother's own legal costs).

[4] The Ontario Court of Appeal in *Serra v. Serra*, [2009] O.J. No. 1905 (Ont. C.A.), stated that modern costs rules are designed to foster three fundamental purposes, namely: to partially indemnify successful litigants for the cost of litigation, to encourage settlement and to discourage and sanction inappropriate behaviour by litigants bearing in mind that the awards should reflect what the court views is a fair and reasonable amount that should be paid by the unsuccessful party.

[5] Subrule 24(1) of the *Family Law Rules* (all references to rules in this endorsement are 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. 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).

[6] Subrule 18 (14) 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.

[7] Even if subrule 18 (14) does not apply, the court may take into account any written offer to settle, the date it was made and its terms when exercising its discretion over costs (subrule 18(16)).

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

[9] Close is not good enough to attract the costs consequences of 18 (14). The offer must be as good or more favourable than the motion result. See: *Gurley v. Gurley*, 2013 ONCJ 482 CanLII.

[10] The parties made offers to settle the motions. The offers were fairly close. None of the offers met the requisite criteria for sub-rule 18 (14) to apply, although the maternal grandparents came very close.

[11] The court ordered that the maternal grandparents not video or record the parents' time with the child. This was in response to such video evidence recorded by the maternal grandparents on their nanny-cam that was excluded on the motions. The court provided more flexibility with weekday access than offered in the maternal grandparents' offer to settle, as it was to take place after the father finished work, as opposed to specified hours proposed by the maternal grandparents (when the father might be working). Finally, terms were put in the decision to provide for video access for the parents while the maternal grandparents are out east this summer.

[12] The main difference in the offers to settle had to do with summer access. The parents were only prepared to offer two one-week vacation periods to the maternal grandparents. This would have scuttled their east coast vacation plans. The parents also asked for additional Sunday access each week that was not ordered.

[13] On the motions the parents took a much more aggressive position. They sought to have the child placed in the temporary care of the father and in the alternative, sought unsupervised overnight access. This position was not realistic. The maternal grandparents opposed the paternal grandparents supervising any of the parents' visits. The court ordered that they could supervise the Saturday visits. Otherwise, the maternal grandparents' position on the motions was similar to their offer to settle.

[14] The maternal grandparents were the successful parties on the motions. The presumption that they are entitled to costs was not rebutted.

[15] In making this decision, the court considered the factors set out in subrule 24 (12), which 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.

[16] The parents submit that the maternal grandparents acted unreasonably by failing to include relevant evidence on their without notice motion that started this case. The court does not agree. While it is important for parties bringing such motions to make full, fair and candid disclosure[1], the standard is not perfection. The court recognizes that such motions are often rushed given the exigencies of the situation and that the evidence is unlikely to be as comprehensive as when the parties have had more time to gather and organize it.

[17] The motions took longer to argue because the maternal grandparents attempted to introduce the nanny-cam evidence and the parents objected. The parents were successful in having this evidence excluded.

[18] The court reviewed the time spent by each party on the motions. It was helpful to receive bills of costs from the parents. The mother's counsel spent 30 hours on the motions – the father's counsel 26 hours, plus additional time by a law clerk. The court finds that the time claimed by the maternal grandparents (55 hours) is excessive and disproportionate. This was an important motion for the parties, but it was not complex or difficult.

[19] The court considered both *Boucher et al. v. Public Accountants Council for the Province of Ontario,* [2004] O.J. No. 2634 (Ont. C.A.) and *Delellis v. Delellis and Delellis,* [2005] O.J. No. 4345. Both these cases point out that when assessing costs it is "not simply a mechanical exercise." In *Delellis,* Aston J. wrote at paragraph 9:

> However, recent cases under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended have begun to de-emphasize the traditional reliance upon "hours spent times hourly rates" when fixing costs....Costs must be proportional to the amount in issue and the outcome. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant.

[1] See: *Sangster v. Sangster*, [2003] O.J. No. 69 (Ont. C.A); *Alexander v. Cherry*, 2007 ABCA 128.

[20] The hourly rate claimed by the maternal grandparents for their counsel was reasonable, based on his seniority and skill.

[21] The court considered that the offers to settle were fairly close. The parents should have been more flexible about the summer access.

[22] The expenses claimed by the maternal grandparents are reasonable.

[23] When the maternal grandparents brought their motion without notice:

a) The mother was living in their home and the father was visiting daily.

b) They proposed to continue this arrangement.

c) They sought the order because they had a legitimate concern that the parents might try and remove the child from their care.

[24] The landscape soon changed. The parents married after the without notice order was made.[2] The father had rented his own apartment. The maternal grandparents decided (while the parents were on their honeymoon) that the mother should no longer live with them.

[25] The maternal grandparents were entitled to make this decision, but it significantly reduced the parents' time with the child. It also further ruptured their relationship with the parents and escalated the litigation.

[26] The court considered the parents' ability to pay the costs order (see: *MacDonald v. Magel* (2003), 67 O.R. (3d) 181 (Ont. C.A.). The mother has a non-verbal learning disability and earns nominal income. The father earns $47,500 per annum. The parents have a limited ability to pay costs. However, a party's limited financial circumstances will not be used as a shield against *any* liability for costs but will only be taken into account regarding the quantum of costs. See: *Snih v. Snih*, 2007 CanLII 20774 (Ont. SCJ).

[27] The court adopts the comments of Justice Heather McGee in *Mohr v. Sweeney*, 2016 ONSC 3338 (CanLII), 2016, where she writes, "those who can least afford to litigate should be most motivated to seriously pursue settlement, and avoid unnecessary proceedings."

[28] The parents could have and should have resolved these motions.

[29] However, the court is also concerned that the excessive amount of costs claimed by the maternal grandparents is an attempt to dissuade the parents from pursuing this case. This concern is exacerbated given the mother's vulnerabilities that the maternal grandparents set out in their evidence. Costs should not be used as a tool to intimidate parties from pursuing legitimate

[2]The marriage had been planned prior to the motion and the maternal grandparents generously paid for the parents' honeymoon in Niagara Falls.

positions.

[30] In their costs submissions the maternal grandparents referred to settlement recommendations made by the settlement conference judge. The parents responded with their own version of what the judge suggested.[3] It is inappropriate in costs submissions to refer to statements made at a settlement conference.[4]

[31] In paragraphs 41 to 43 of *Entwistle v. MacArthur*, 2007 CarswellOnt 3149 (SCJ), Justice Alex Pazaratz reviewed the law on this point as follows:

> **[41]** In *Savoie v. Richard* (2004), 135 A.C.W.S. (3d) 580, 135 A.C.W.S. (3d) 857, 18 O.F.L.R. 158, [2005] W.D.F.L. 418, 2004 CanLII 47793 (ON SC), 2004 CanLII 47793, [2004] O.J. No. 5140, 2004 CarswellOnt 5309 (Ont. Fam. Ct.), Justice Perkins note in paragraph [4]:
>
> > **[4]** The mother's costs submission contains some irrelevant and improper material. . . . It is also improper to report another judge's opinion on the merits of the case expressed in the course of a case conference or settlement conference. See subrule 17(23) respecting statements at a settlement conference.
>
> **[42]** In *Sloss v Forget* (2005), 137 A.C.W.S. (3d) 762, 2005 CanLII 4843 (ON SC), 2005 CanLII 4843, [2005] O.J. No. 747, 2005 CarswellOnt 732 (Ont. Fam. Ct.), there was divided success and both parties applied for costs. Both parties had made offers to settle. For reasons not fully explained, those offers could not be considered under subrule 18(14) and had to be viewed under subrule 24(5). Justice Maria T. Linhares De Sousa stated at paragraph [8]:
>
> > **[8]** I add one last comment. I found it disturbing the way both counsel took the liberty to share with this court in their written submissions on costs their various recollections of the discussions that went on in the settlement conference as well as the recommendations and opinions of the presiding judge at the settlement conference. My reading of r. 17(23) . . . indicates to me that discussions that go on in the course of a settlement conference should be kept confidential except in "an agreement reached at a settlement conference" or "an order". I would hope that both counsel will remember this rule in the future.
>
> **[43]** In *Guy v. Tulloch* (2004), 131 A.C.W.S. (3d) 456, [2004] W.D.F.L. 385, 2004 CanLII 15397 (ON SC), 2004 CanLII 15397, [2004] O.J. No. 2198, [2004] O.T.C. 454, 2004 CarswellOnt 2154 (Ont. Fam. Ct.), at the costs phase, counsel sought to inform the court of some of the recommendations made by the settlement conference judge. Justice V. Jennifer Mackinnon stated at paragraph [8]:
>
> > **[8]** . . . In my view, *Family Law Rule* 17(23) is clear authority against my being told of the settlement conference recommendations, even on the issue of costs. . . .

[32] The parents are living together. The court will order that they be jointly and severally liable for the costs that will be ordered.

[33] Taking into account all of these considerations, an order shall go that the parents shall pay the maternal grandparents' costs fixed in the amount of $6,000, inclusive of fees, disbursements and HST. The parents are jointly and severally liable for these costs. The parents

[3] These submissions had no impact on this costs order.
[4] See subrule 17 (23).

may pay these costs at the rate of $250 each month, starting on August 1, 2018. However, if they are more than 30 days late in making any payments, the entire amount of costs then owing, shall immediately become due and payable.

Released: July 23, 2018
Justice S.B. Sherr