

CITATION: *Palmer v. Campbell*, 2017 ONCJ 412

DATE: June 20, 2017

COURT FILE NO. D90654/16

ONTARIO COURT OF JUSTICE

B E T W E E N:

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CARLINE ADASSA PALMER

) **GARY GOTTLIEB, for the**
) **APPLICANT**

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APPLICANT

)
)

- and -

)
)

DAMION NECHI CAMPBELL

MATTHEW SCHLEIFER, agent for
MAURICE J. MATTIS, for the
RESPONDENT

RESPONDENT)

JULIA VERA, for the OFFICE OF THE
CHILDREN’S LAWYER, for the child

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)

) **HEARD: JUNE 16, 2017**

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

[1] On June 16, 2017 the court delivered oral reasons for judgment after hearing a one-day trial about the father’s access to the parties’ 13-year-old child (the child), incidents of custody and child support.

[2] The parties agreed during the trial to an order that the father will have access to the child in accordance with the child's wishes.

[3] The mother was granted the ability to travel with the child outside of Canada without the father's consent.

[4] The court imputed annual income of \$20,000 to the father. He was ordered to pay the *Child Support Guidelines* (the guidelines) table amount of child support of \$160 each month retroactive to April 1, 2015.

[5] Lastly, the father was ordered to pay \$2,700 towards retroactive special expenses of the child pursuant to section 7 of the guidelines. The parties were ordered to pay ongoing section 7 expenses equally.

[6] The mother seeks costs of \$20,000. The father asks that no costs be paid. Counsel for the child did not make costs submissions.

[7] The Ontario Court of Appeal in *Serra v. Serra*, [2009] O.J. 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.

[8] 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).

[9] 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.

[10] 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)).

[11] 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).

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

[13] The mother made an offer to settle dated May 23, 2017. The court finds that overall, it meets the criteria to attract the costs consequences set out in subrule 18 (14). The court made the orders for access and travel proposed by the mother. The issue of obtaining the child's passport became moot when the father finally signed the passport application during the trial.

[14] The mother sought to impute the father's annual income at \$23,712, which would have resulted in a monthly table support payment of \$190. The court order only imputed income of \$20,000 to the father and a monthly payment of \$160. However, the court made the order retroactive to April 1, 2015, whereas the mother was willing to accept just ongoing child support in her offer. The mother was substantially successful on her claim for retroactive section 7 expenses, although the court discounted her claim for tax benefits she will receive. Analyzed as a whole, the final order was more favourable to the mother than her offer.

[15] The father made an offer to settle dated June 2, 2017. He proposed specific, graduated access to the child. He proposed paying child support of \$100 each month and 50% of section 7 expenses, but only on an ongoing basis. He sought an order that the mother obtain his consent to travel outside of Ontario.

[16] The father was unsuccessful on each issue.

[17] The father did not rebut the presumption that the mother is entitled to costs.

[18] In making this decision, the court considered the factors set out in subrule 24 (11), which reads as follows:

- 24 (11) A person setting the amount of costs shall consider,
- (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.

[19] The case was important for the parties. It was not complex or difficult.

[20] The mother acted reasonably.

[21] The father did not act reasonably. The court found that he had withdrawn from the child's life for over 7 years. The child does not want to see him at this time but is willing to consider future contact. The father did not seek access until served with this support application. He insisted on a specific access schedule, despite the child's strong views and preferences to the contrary, expressed through his counsel. He made unsubstantiated allegations that the mother had influenced the child not to see him. The father's claim lacked merit, yet he took the case to trial, causing unnecessary stress for the mother and the child.

[22] It came to everyone's surprise when near the end of his cross-examination the father conceded that the mother's access request was reasonable and he was prepared to agree to it.

[23] The father also took an unreasonable position on the mother's right to travel with the child, given his lack of involvement with the child's life.

[24] Income was imputed to the father, who claimed that he has been unable to earn income for two years. The court found he has made minimal effort to look for work and that he is deliberately unemployed. The father has not paid child support for at least 7 years. This is unreasonable behaviour.

[25] Costs were also incurred because the father was not prepared to proceed on the prior two court appearances. On May 19, 2017, the father was not prepared for the case conference and sought an adjournment. This was opposed by the mother. The case was adjourned on terms that the trial of the issues be expedited. Costs of the appearance were reserved. The mother is entitled to her costs for this appearance.

[26] The case was set for trial on June 8, 2017. Counsel for the father (not trial counsel) sought an adjournment due to a conflicting case and personal reasons. The mother opposed the adjournment. The court reluctantly (as the mother was ready to proceed and an entire court sitting day was wasted) granted the adjournment of the trial peremptory on the father. Costs of this appearance were reserved. The mother is entitled for her costs for this appearance.

[27] The rates of counsel for the mother are reasonable for senior counsel (\$500 per hour). The rates charged for the law clerk of the mother (\$200 per hour) are too high. However, only 1.5 hours was claimed for her work.

[28] The father submitted that the mother should only be entitled to claim an hourly rate at legal aid rates. However, the case law is well settled that the receipt of legal aid is not a factor in determining costs. See: *Ramcharitar v. Ramcharitar* (2002), 62 O.R. (3d) 107 (S.C.J.) at para. 25 and *Alvarez v. Smith*, [2008] O.J. No. 941 at para. 17- 19; *Children's Aid Society of the Regional Municipality of Waterloo v. C.T.*, 2017 ONSC 3188.

[29] A review of the mother's bill of costs shows that considerable time claimed was attributable to prior steps in the case. Subrule 24 (10) sets out that costs are to be determined in a summary manner after each step in the case by the presiding judge. A "step" in the case is one of the discrete stages recognized by the rules such as a case conference, settlement conference and the like. See: *Husein v. Chatoor*, [2005] O.J. No. 5715 (OCJ). The trial judge should not deal with requests for costs that were addressed or should have been addressed at these prior steps in the case. See: *Islam v. Rahman*, 2007 ONCA 622.

[30] However, a party is entitled to claim time spent for meetings with the client and reviewing and preparing pleadings and financial statements as this is time not attributable to any one step in the case. See: *Czirjak v. Iskandar*, 2010 ONSC 3778 (CanLII). Costs accrued from activity not specifically related to the step (not requiring judicial intervention) should be dealt with at the end and not by the motions judge. See: *Houston v. Houston*, 2012 ONSC 233; *Walts v. Walts*, 2014 ONSC 98.

[31] 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.

[32] The court considered that it was dealing with relatively low amounts of child support. If this was the only issue, the costs claimed would not be proportional to the amounts in dispute. However, the access issue was of significant importance to the mother and the child and the time spent by counsel on this issue was certainly proportional and necessary.

[33] The court considered the father's ability to pay the costs order (see: *MacDonald v. Magel* (2003), 67 O.R. (3d) 181 (Ont. C.A.). He is of modest means and is presently on Ontario Works. 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, particularly when they have acted unreasonably and are the author of their own misfortune. See: *Snih v. Snih*, 2007 CanLII 20774 (Ont. SCJ pars. 7-13). In the case of *Takis v. Takis*, [2003] O.J. No. 4059 (S.C.J.) the court found that the respondent's lack of income and assets, though a relevant consideration, could not be used as a shield in unnecessary litigation.

[34] The court considered that the cavalier and unreasonable positions of the father should be sanctioned by costs.

[35] Taking into account all of these considerations, an order shall go that the father shall pay the mother's costs fixed in the amount of \$10,000, inclusive of fees, disbursements and HST.

[36] The court finds that 50% of these costs are attributable to the support issues and should be collected as an incident of support by the Family Responsibility Office.

Released: June 20, 2017

Justice S.B. Sherr