

WARNING

The court hearing this matter directs that the following notice be attached to the file:

This is a case under Part V of the *Child, Youth and Family Services Act, 2017*, (being Schedule 1 to the *Supporting Children, Youth and Families Act, 2017*, S.O. 2017, c. 14), and is subject to subsections 87(7), 87(8) and 87(9) of the Act. These subsections and subsection 142(3) of the Act, which deals with the consequences of failure to comply, read as follows:

87.—(7) Order excluding media representatives or prohibiting publication.— Where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding, the court may make an order,

. . .

- (c) prohibiting the publication of a report of the hearing or a specified part of the hearing.

(8) *Prohibition re identifying child.*— No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged.*— The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

. . .

142.—(3) Offences re publication.— A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

ONTARIO COURT OF JUSTICE

CITATION: *Children’s Aid Society of Toronto v. S.W.*, 2018 ONCJ 772

DATE: November 2, 2018

COURT FILE No.: C91587/16

B E T W E E N :

CHILDREN’S AID SOCIETY OF TORONTO

Applicant

— AND —

S.W.

Respondent Mother

— AND —

S.J.

Respondent Father of T.J. and Q.J.

— AND —

G.W.

Respondent Father of Y.W.

Before Justice Melanie Sager
Written submissions on costs
Decision on Costs released on November 2, 2018

Jodi Kaiman..... counsel for the applicant
Gary Gottlieb..... counsel for the respondent father
S.W.....on her own behalf
G.W.....on his own behalf

Sager J.:

Overview

[1] This is a decision on the issue of costs claimed by the father, S.J. against both the Children’s Aid Society of Toronto (the society) and the mother, S.W. in relation to

the Protection Application issued by the society on August 30, 2016. S.J. claims costs for the preparation and attendance in court on several appearances on this matter including the first appearance, an emergency motion, a care and custody motion and three case conferences¹.

- [2] Costs were reserved following several appearances in court and a time table was ordered for the parties to serve and file their submissions on costs. The society and the father served and filed written submissions but the mother did not.

Background and Events Leading up to the Protection Application

- [3] Following their separation in 2013, S.J. and S.W. were involved in domestic proceedings in this court until August 25, 2015, when the court made a final order on consent granting S.J. and S.W. joint custody of T.J. born [...], 2011 and Q.J. born [...], 2010, and ordered that the children spend alternating weeks in each parent's care. In other words, the parties consented to a court order granting them joint custody and shared parenting of T.J. and Q.J.
- [4] The mother has two other children from a previous relationship, Y.W. born [...], 2004 and Si.W. born [...], 1998.
- [5] The society became involved with the mother and her four children in August 2015. The society's initial protection concerns involved significant conflict between the mother and her two older daughters, Si.W. who was 15 years old and Y.W. who was 11 years old.
- [6] The society commenced a Protection Application a year later on August 3, 2016, after Y.W. ran away from her mother's home and refused to return to her care. G.W., who did not participate in this proceeding, is the father of Y.W. and S.W. At the commencement of the Protection Application, Si.W. was 16 and living with her paternal grandfather and not named in the Application.
- [7] The protection concerns set out in the Protection Application arose out of "significant parent-teen conflict" between the mother and Y.W. when they were residing together², concerns around the mother's mental health and emotional stability and the impact this is having on the two younger, more vulnerable children, T.J. and Q.J.
- [8] Between August 2015 when the society first became involved with the mother and the four children and August 30, 2016 when they commenced the Protection Application, they had no contact with the father of T.J. and Q.J.

Events following the Commencement of the Protection Application

¹ The conferences were held on June 29, 2017, September 20, 2017 and January 23, 2018. The father seeks costs for all appearances whether costs were reserved or not.

² Y.W. had gone to live with her paternal grandfather prior to the commencement of the Protection Application.

- [9] The society commenced the Protection Application at 311 Jarvis Street Toronto, Ontario on August 30, 2016 and the matter first came before the court on September 7, 2016. On that date Justice Sheilagh O’Connell made a temporary without prejudice order placing T.J. and Q.J. in the care of their parents and in accordance with the parenting schedule set out in their custody order of August 25, 2015. The file was transferred to this court as it had made the custody order in 2015.
- [10] The father brought a motion on November 9, 2016, seeking a temporary order placing the children in his sole care subject to the society’s supervision. The society did not support the order being requested by the father. The motion was adjourned at the mother’s request to allow her to retain and instruct counsel and, after hearing argument, the children were placed in the father’s care on a temporary without prejudice basis and the mother was granted generous access including overnight. Costs of the appearance were reserved.
- [11] Following the November 9, 2016 court appearance, the society identified new concerns regarding the mother and reassessed their position. On January 7, 2017, prior to the return of the care and custody motion, the society brought an urgent motion to vary the mother’s access to be supervised by the society. At this point the society supported the children being in the father’s full time care.
- [12] On February 9, 2017, the care and custody motion was adjourned again at the mother’s request as she had only retained counsel that day. Costs of the appearance were reserved.
- [13] On March 15, 2017, a temporary with prejudice order was made placing the children in the father’s care subject to the society’s supervision. The mother was granted unsupervised day access three times a week. Costs of the appearance were reserved.
- [14] On June 23, 2017, the father brought a motion to address the mother’s access over the summer months and the possibility of a parenting capacity or mental health assessment of the mother was discussed. Costs of the appearance were reserved.
- [15] On September 19, 2017, the parties agreed to a mental health assessment of the mother and scheduled a summary judgment motion for December 7, 2017.
- [16] On January 23, 2018, after the parties and court learned that the mother had left Ontario, the mother’s access was varied and the summary judgment motion was moved to February 21, 2018.
- [17] After the mother left Ontario with no notice and failed to cooperate with the court ordered mental health assessment, the society amended its Application to request a custody order in favour of the father.

- [18] There were no further appearances before me after January 23, 2018. Requests to alter the timetable for the serving and filing of costs submissions came before me in writing and endorsements were released.³
- [19] According to the father's submissions he seeks costs for all aspects of the litigation up to January 23, 2018.

The Father's Position

- [20] The father is seeking costs against the society and the mother totalling \$51,052.66. Of that amount he attributes \$5860.97 solely to the mother and \$23,998.50 solely to the society. The father seeks an order for the balance, \$21,193.19, to be paid by both the society and the mother.
- [21] The father argues that the court can order costs for steps in the case whether costs were reserved or not. While costs were reserved on November 9, 2016, February 9, 2017, March 15, 2017 and June 28, 2017, they were not reserved following appearances on January 9, 2017, September 19, 2017 and January 23, 2018.
- [22] It is not disputed that the society did not involve the father or even inform him of their investigation of the child protection concerns until shortly after the Protection Application was issued on August 30, 2016, a full year after the society began investigating concerns in the mother's home. This undisputed fact forms the basis for the costs order being sought by the father.
- [23] The father argues that had the society involved him from the outset in August 2015, the children would have been removed from their mother's care and placed in the father's full time care prior to the commencement of the Protection Application. Had this happened, the father argues he would not have had to retain counsel and incur significant legal fees.
- [24] The father argues that the society did not take protective actions when it came to his children whereas Si.W. and Y.W. were better protected by the society who supported their placement with their paternal grandfather and aunt prior to commencing the Protection Application.
- [25] The father also argues that the society's handling or mishandling of the case after it commenced the Protection Application resulted in his having increased and/or unnecessary legal fees.
- [26] The father also seeks costs against the mother claiming that she ignored court orders, caused unnecessary delays, advanced unreasonable positions and was unsuccessful in the proceeding.

³ On March 8, 2017, Justice Jones made a finding that the children were in need of protection pursuant to sections 37(2)(b) & (g) of the *Child and Family Services Act* and granted the father custody of T.J. and Q.J.

The Society's Position

- [27] The society argues that after receiving a call from Y.W. on August 17, 2015, the society became involved with the mother and her two older children. While the initial investigation involved all four children, services provided by the society focused on the conflict between the mother and her two older daughters. The society reported that based on their observations of the mother with T.J. and Q.J. there were no protection concerns during the period of service between August 2015 and April 2016. As a result, the society argues that there was nothing substantial to report to the father.
- [28] The society acknowledges receiving two referrals from service providers working with T.J. between April 22, 2016 and June 14, 2016, regarding behavioural issues. The society followed up with the mother regarding these referrals and concluded that the mother was acting appropriately and following up with service providers to address T.J.'s issues⁴. The society did not contact the father to interview him and involve him in the process of addressing T.J.'s behavioural issues.
- [29] The society further argues that as tensions escalated between the mother and Y.W., the society did not observe any concerns regarding T.J. and Q.J. when seen in the mother's home.
- [30] The society ultimately sought a supervision order placing T.J. and Q.J. in the care of their parents subject to the society's supervision out of concern for the mother's inability to manage her children and conflictual relationships as well as her lack of consistent cooperation with the society.
- [31] The society "acknowledged that it would have been preferable" for it to have "contacted" the father between April and August 2016 and keep him apprised of its involvement regarding his children but that doing so would not have changed the recommendation or outcome for the children on or before commencement of protection proceedings.
- [32] The society disagrees with the father's assessment of their management of the litigation arguing that they were constantly reassessing their position and took the appropriate action when, for example, the mother's behaviour became more erratic and when she left the province. The society also brought a motion for a mental health assessment of the mother at the father's request.
- [33] The society's position is that the father is not entitled to costs payable by the society and his claim should be dismissed.

Mother's Position

⁴ It is difficult to understand how the society was satisfied with the manner in which the mother was addressing these concerns as the society's evidence is that the mother was not cooperating with the society at that time and would not facilitate a visit with workers in her home.

- [34] Although given the opportunity to serve and file cost submissions, the mother did not do so.

The Law

- [35] Costs orders are governed by Rule 24 of the *Family Law Rules* (the Rules). Under subrule 24(1) there is a presumption that the successful party is entitled to costs. Subrule 24(2) provides that this presumption “does not apply in a child protection case or to a party that is a government agency.” Subrule 24(3) provides that “the court has discretion to award costs to or against a party that is a government agency, whether it is successful or unsuccessful.”

- [36] The Ontario Divisional Court in *Children’s Aid Society of Ottawa v. S.(D.)*, (2003) O.J. 945, explained that,

“The rationale for making child protection cases an exception to the presumptive entitlement to costs stems from the fact that a children's aid society has a statutory obligation to initiate and pursue proceedings if there is reason to believe a child is in need of protection and it should not be dissuaded from the pursuit of its statutory mandate by costs considerations. Parents, on the other hand, are generally insulated from claims for costs in such proceedings because when faced with state intervention in the care and upbringing of their children, they have a right to force the state to prove its case and should not be penalized in costs.”

The father’s claim against the society

- [37] In *Children’s Aid Society of Hamilton v. K.L.*, (2014) 2014 ONSC 3679 (CanLII), O.J. 2860, Justice Deborah Chappel conducted a thorough review of the case law dealing with costs claims against child protection agencies, and set out the following general principles.

1. Child protection agencies do not enjoy immunity from a costs award.
2. However, the starting point in analyzing a claim for costs against a child protection agency is that child welfare professionals should not be penalized for carrying out their statutory obligation to protect children.
3. The approach to costs as against child welfare agencies must balance the importance of encouraging child protection professionals to err on the side of protecting children and the need to ensure that those professionals exercise good faith, due diligence and reason in carrying out their statutory mandate.
4. The high threshold of "bad faith" is not the standard by which to determine a claim for costs against a child protection agency.
5. Costs will generally only be awarded against a Children's Aid Society in circumstances where the public at large would perceive that the Society has acted in a patently unfair and indefensible manner.

6. A Society should not be sanctioned through costs for an error in judgment, or in cases where the nature of the case makes it very difficult to weigh and balance the evidence and predict the legal outcome.

7. Important factors to consider in deciding whether costs against a Society are appropriate include the following:

i. Has the Society conducted a thorough investigation of the issues in question?

ii. Has the Society remained open minded about possible versions of relevant events?

iii. Has the Society reassessed its position as more information became available?

iv. Has the Society been respectful of the rights and dignity of the children and parents involved in the case?

v. In cases involving procedural impropriety on the part of a Society, the level of protection from costs may be lower if the irregularity is not clearly attributable to the Society's efforts to diligently carry out its statutory mandate of protecting children.

[38] In *Hastings Children's Aid Society v. L.(J.)*, 2012 ONCJ 362, Justice Elaine Deluzio wrote, "The essential test for the appropriateness of an award of costs against a Society is whether the Society should be perceived by the ordinary persons as having acted fairly."

[39] Costs against the society in a child protection proceeding can arise out of misconduct in relation to the substantive issues before the court or procedural missteps by the society. This distinction has been acknowledged in several cases. See: *Children's Aid Society of Algoma v. M.(R.) Children's Aid Society of Hamilton-Wentworth v. A.F.*, [2001] O.J. No. 119 (Sup. Ct.) (society brought an untimely "irresponsible" motion to remove a parent's counsel) and *Children's Aid Society of Hamilton-Wentworth v. R.(S.)*(2003), 2003 CanLII 2004 (ON SC), 39 R.F.L. (5th) 252, leave to appeal refused 2003 CarswellOnt 2952 (Div. Ct.); *Children's Aid Society of London and Middlesex v. T.S.-V.*, 2013 ONSC 4517

[40] What is clear from the case law is that a society that acted reasonably and diligently in the steps it took to protect a child, may still be exposed to costs for procedural misconduct or irregularities.

[41] I find that the society conducted itself in a manner that the ordinary person would perceive to be patently unfair or indefensible by not making contact with the father for over a year from the date they became involved in the lives of his children T.J. and Q.J. The following events took place before the commencement of the Protection Application that should have led to the society informing the father of their involvement with T.J. and Q.J.:

- a) On August 29, 2015, the police called the society after a mobile crisis unit attended at the mother's home on August 20th, 2015. The mobile crisis worker advised the society that she was worried that the mother was not coping well and that there appeared to be constant conflict between the mother and Y.W., who was crying and begging them not to leave her with her mother. The mobile crisis worker reported that the mother presented as overwhelmed.
- b) In the summer of 2015, the society believed the mother was using the society and the police as a way of managing the situation in her home.
- c) On November 11, 2015 the police called the society to advise that the mother claimed the police were harassing her and described the mother as ranting and not making sense to the police.
- d) On November 18, 2015, a Family Services Worker was assigned to the family.
- e) The mother did not allow the society to conduct a home visit between February 4, 2016 and June 15, 2016; they were only permitted telephone calls with her.
- f) On April 22, 2016, the society received a referral from T.J.'s doctor with concerns regarding sexualized behaviour.
- g) On June 11, 2016, after Y.W. runs away police were called to the mother's home and reported to the society the home to be "very messy and to smell of urine and animal feces".
- h) On June 11, 2016, the society reported that Y.W. was concerned about her younger siblings.
- i) On June 14, 2016, a society worker met with Y.W. at school who told the worker that her mother was cutting her off from T.J. and Q.J. by telling them she would hurt them. She reported that they appeared scared of her when she bumped into them at school.
- j) On July 6, 2016, Y.W. told the worker that she was worried about her sisters and that her mother had told them that she was dangerous and not to spend time with her. The society reported that Y.W. was clearly worried about her sisters' wellbeing.

[42] The society commenced a Protection Application on August 30, 2016 without having made any previous contact with the father. The society knew or ought to have known that the father of T.J. and Q.J. had a court order granting him joint custody and shared parenting of the children. He ought to have been notified by the society of their involvement in the children's lives immediately.

[43] If not right out the outset, there were several instances when a diligent worker should have come to the conclusion that it was time to contact and involve T.J. and

Q.J.'s father. The multiple police referrals as well as the referrals from T.J.'s doctor and school should have immediately prompted contact with the father. Also extremely puzzling is the worker's failure to contact the father during the four month period the mother would not facilitate a home visit between February and June 2016.

- [44] The society did not attempt to provide an explanation, as there is no reasonable explanation for their conduct. It is quite shocking that the society did not involve the father from the outset but to fail to contact him after not one but two referrals by T.J.'s doctor and school is indefensible. I cannot begin to understand how the society saw fit to make enquiries as to their wellbeing with T.J. and Q.J.'s schools, doctor and daycare but sought no input from their father.
- [45] By not interviewing the father at the outset of their involvement the society failed to fulfill its mandate and statutory obligation to fully investigate all protection concerns and Plans of Care prior to initiating an Application. This was a serious violation of their professional and statutory obligations. It is also a serious breach of the public's expectation of the manner in which children's aid societies conduct themselves.
- [46] The society's failure to inform the father of their involvement with his children was not a mere error in judgment. An error in judgment would have occurred if the father was contacted by the society a couple of weeks after it became involved; not a year later and after the Protection Application was issued.
- [47] I find that an ordinary person could reach no conclusion other than the society acted unfairly and unreasonably by not engaging the father in the 12 months they were involved with the mother and T.J. and Q.J. prior to commencing a Protection Application.
- [48] I find that the society's misconduct is not a procedural irregularity but rather amounts to misconduct in relation to the substantive issues before the court and warrants a costs order in the father's favour.

Quantum of costs

- [49] The assessment of costs is not a mechanical exercise. It's not just a question of adding up lawyer's docket: *Boucher et al v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), 2004 CanLII 14579; 71 O.R. (3d) 291 (Ont. C.A.); *Dingwall v. Wolfe*, 2010 ONSC 1044 (CanLII), 2010 ONSC 1044 (SCJ).
- [50] The overall objective of a costs order 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: *Selznick v Selznick*, 2013 ONCA 35 (CanLII), 2013 ONCA 35 (Ont. C.A.); *Delellis v. Delellis*, 2005 CanLII 36447 (ON SC), 2005 CarswellOnt 4956 (SCJ); *Serra v. Serra* 2009 ONCA

395 *Murray v. Murray*, (2005) 2005 CanLII 46626 (ON CA), 2005 CanLII 46626 (Ont. C.A.); *Guertin v Guertin*, 2015 ONSC 5498 (CanLII), 2015 ONSC 5498 (SCJ).

- [51] The father argues that he incurred costs that could have been avoided if the society had involved him earlier and placed the children in his care. The society argues that their recommendations or the steps they took would not have been any different had they involved the father earlier. While I do not necessarily agree with the society's position on this issue, I cannot conclude that had the society contacted the father and his family at the outset of their involvement, it was inevitable that the children would have been placed in his full time care prior to the commencement of a Protection Application or even shortly thereafter.
- [52] When the society first became involved they were attempting to work with the mother to obtain appropriate services for her and her older children. They spoke with T.J.'s and Q.J.'s school, daycare and doctor and no concerns were noted. When Y.J. ran away from her mother's home and refused to return, the society took the most appropriate and least intrusive approach by seeking supervision orders; Y.W. with her paternal grandfather and aunt; and, T.J. and Q.J. in the joint care of their father and mother in accordance with the final order from the domestic proceedings.
- [53] I also agree with the society that they continued to reassess their position and took the appropriate and protective steps throughout the litigation. I find that the steps the society took in the course of the litigation were reasonable in light of all of the evidence and circumstances and, that an ordinary person would not conclude otherwise.
- [54] In light of the finding that the society's misconduct did not necessarily result in increased costs to the father, what amount of costs should be ordered against the society in the father's favour?
- [55] In *Kunuwanimano Child and Family Services, North Eastern Ontario Family and Children's Services v. S.L.*, 2018 ONCJ 119 (CanLII) substantiated, Justice John Kukurin, writes about the consideration of accountability when determining the issue of costs. At paragraph 42, Justice Kukurin writes,

“There is one other consideration in awarding costs against a society that has also been touched upon by some jurists. This is the principle of accountability. Where is the accountability if the litigants know there are no down sides with respect to costs? This was best stated by Agro J. [*Children's Aid Society of Brant v. D.M.C.*, 1997 CanLII 9575 (ON CJ)]

“Costs are neither reward nor punishment. In my view, it is not fairness that is the issue in the exercise of discretion under *section 131 of the Courts of Justice Act*. Rather it is the accountability for the manner in which any litigant presents its case and expedites a reasonable resolution, whether by settlement or at trial. In the case of a children's aid society, this accountability is for the manner in which it

investigates its case and presents it to the court measured against the background of the statutory requirements of the *Child and Family Services Act*. In the absence of an award for costs, there is no such accountability.”

- [56] In *Serra v. Serra*, 2009 ONCA 395 (CanLII), paragraph 8, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:
- a. To partially indemnify successful litigants for the cost of litigation.
 - b. To encourage settlement; and,
 - c. **To discourage and sanction inappropriate behaviour by litigants** [the emphasis is mine].
- [57] In *E.H. v. O.K.*, 2018 ONCJ 578 (CanLII), Justice Stanley Sherr wrote, “Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), 2003 S.C.C. 71, paragraph 25.”
- [58] While costs orders should not have the effect of deterring societies from carrying out their duties to protect children, costs orders can and should have the effect of ensuring that children’s aid societies are held to the appropriate standards and act professionally in carrying out their duties in accordance with the legislation as well as their own policies and procedures. The standards the societies are expected to follow were created to ensure fairness and to instill confidence and trust in the families they assist and the greater public. A lapse in meeting these standards could result in a costs order as a means of holding the society accountable as each and every breach of its duties has the effect of eroding the public’s trust in the society to protect children and youth while treating the parents and caregivers fairly. We cannot afford repeated breaches by the society that erode the trust and confidence of the public, as the work they do is invaluable to the children and youth they protect and repeated breaches will no doubt overshadow this work.
- [59] This costs order is designed not to deter the society from carrying out their duties but rather to deter it from doing so in a manner that brings the society and the administration of justice into disrepute.
- [60] The challenge before the court is to determine the appropriate quantum of the costs order taking into consideration the finding that the children would not necessarily have been placed in the father’s care at an earlier date had the society involved him sooner. The court must also consider that it finds no fault with the society’s litigation conduct.

- [61] The father retained counsel immediately upon being served with the Protection Application and maintained the retainer throughout the proceeding. It is understandable that the father would continue to retain counsel throughout this proceeding even when the society supported the children being placed in his primary care given how he had been so severely mistreated by the society. No one would blame the father for not trusting the society to act appropriately after it failed to notify him for over a year of the society's involvement in his children's lives.
- [62] Therefore, I am prepared to take the father's lack of trust in the society into consideration when fixing costs against the society for their transgression as this lack of trust was due entirely to the society's conduct and contributed to the costs the father incurred to maintain counsel throughout this proceeding.
- [63] The quantum of the costs order must be proportionate to the society's transgression and reflect the fact that the misconduct was not in relation to a mere procedural issue but rather was in relation to a substantive issue before the court. I find that a costs order of \$10,000.00 meets these principles.
- [64] Therefore, costs shall be payable by the society to the father fixed at \$10,000.00 inclusive of disbursements and H.S.T.

Costs against the mother

- [65] As stated above, parents are generally not subjected to costs orders in child protection proceedings. Justice Murray provides a summary of the relevant case law in paragraphs 22-25 of *Children's Aid Society of Toronto v. S.T.*, 2018 ONCJ 573 (CanLII) as follows:

[22] Courts have found that parents should not be ordered to pay a Society's costs unless they exhibit extreme unreasonable conduct.

Unless unreasonable conduct is so excessive as to warrant condemnation, thereby putting the case into the category of one of those "rare" cases warranting a cost consequence, I find that the parent's right to oppose a child protection proceeding should not be lightly interfered with, even in cases where, with the benefit of hindsight the manner and the nature of the defence presented by parents may be considered to have been excessive and unreasonable. *Kenora-Patricia Child & Family Services v. (M.A.)*, [2007] W.D.F.L. 1732.

[23] Applying that standard to claims by one parent against another in a protection case, courts have only awarded costs where there is a history of highly unreasonable behavior, often behaviour that harms the children involved by heightening and extending conflict between the parents [See *Children's Aid Society, Region of Halton, v. J.S. and D.S.*, 2014 ONCJ 38 (CanLII)]. Often such cases involve a parent who has repeatedly disobeyed court orders and misled the court, and who is found to be acting in bad faith. [See *Children's Aid Society of Ottawa v. P. (M.)*, 2014 ONSC 6567 (CanLII); *Children's Aid Society of Simcoe County v. C.S., M.S. and D.C.*, (2006)2006 CanLII 6688 (ON SC), O.J 871 (Sup. Ct.); *Children's Aid Society of Ottawa v. K.*, (2005) O.J. (2573 (Sup. Ct.))]

[24] When extreme behavior of this type is not involved, courts exercise their discretion to refuse to award costs claimed by a successful parent against the other parent in a protection case. For example, in Children’s Aid Society of Niagara Region v. L.J.R. and K.B.R., (2005) 2005 CanLII 37973 (ON SC), O.J. 4455 (Sup. Ct.), Justice Scime declined to award costs claimed by a mother against a father who was unsuccessful in opposing a Society application placing the children with the mother under supervision. The mother had supported the Society’s application. Justice Scime noted that the father “was not an ordinary litigant protecting financial or property interest. He was faced with state intervention in the care and upbringing of his children and had the right to compel the society to prove its case.”

[25] Even highly unreasonable behavior by a parent may not result in an award of costs if the genesis of that behavior is mental illness, and not just stubborn rigidity. In Children’s Aid Society of Ottawa v. L. (D.), 2014 ONSC 6469 (CanLII), Justice Timothy Ray heard a claim for costs by a grandmother who was granted a 57.1 custody order against the father. Justice Ray found that the father had unduly prolonged the trial and had acted very unreasonably. He stated “Were it not for (*the father’s*) mental issues which I believe guided his unreasonable behavior, I would have ordered that he pay (*the grandmother’s*) costs.”

[66] Given the very serious concerns about the mother’s mental health issues throughout this proceeding, I am not prepared to order the mother to pay the father’s costs due to the likelihood that her poor mental health interfered with her judgment and impaired her decision making throughout this proceeding.

Order to go as follows:

[67] The society shall pay the father’s costs of the protection proceeding fixed at \$10,000.00 payable forthwith.

[68] The father’s claim for costs against the mother is dismissed.

Released: November 2, 2018

Signed: Justice Melanie Sager