CITATION: Sherman v. Byrne, 2016 ONSC 3130
COURT FILE NO.: FS-11-369289
DATE: 20160512

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PAULA JOANNE SHERMAN, Applicant

AND:

DAVID ANDREW BYRNE, Respondent

BEFORE: Glustein J.

COUNSEL: *Gary Gottlieb*, for the Applicant

David Byrne, self-represented

COSTS ENDORSEMENT

[1] Without any evidence being called at trial, the parties reached a settlement of parenting issues (custody and access) as well as financial issues (child and spousal support, section 7 expenses, and ancillary matters).

[2] On May 9, 2016, at the first day of trial, both parties brought preliminary motions. The self-represented respondent, David Byrne ("Byrne") sought an adjournment. The applicant, Paula Sherman ("Sherman") sought to strike the answer of Byrne, or in the alternative, proceed with an uncontested trial without Byrne being able to lead evidence, and in the further alternative, an order adjourning the trial. I did not grant either motion, although I did order Byrne to comply with his production obligations and provide his documents and a witness list (with a summary of the expected testimony) by the next morning, May 10, 2016.

[3] At the outset of the hearing on May 10, 2016, Byrne advised the court that he was withdrawing his claim for shared custody and for equal access. He requested that the existing order of Stevenson J. be maintained, with an order for compliance, clarification, and "make-up" access if his access was not available over a period of approximately 20 "special days" (comprised of seven Jewish holidays including the full eight days of Passover, as well as other school closure days).

[4] Over the course of the morning on May 10, 2016, prior to Sherman leading evidence, the parties (in court and in negotiations outside the courtroom) resolved the parenting issues as a result of thorough discussions between Sherman and her counsel, and Byrne. The parties agreed that they would return to court the next morning to have the court endorse an order that reflected the terms reached during the morning.

[5] Over the course of the afternoon on May 10, 2016, with the assistance of Justice J. Wilson, the parties resolved the financial issues. Justice Wilson endorsed the consent final order on the financial issues.

[6] On May 11, 2016, the parties returned to court to have the parenting order approved and endorsed by the court. After the court made that endorsement, counsel for Sherman sought costs related to the parenting issues, based on (i) a term in the consent financial order that "There will be no costs for the issues noted in this consent", and (ii) counsel's trial submission on May 10, 2016 (before the settlement conference with Justice Wilson) that he would make submissions as to costs.

[7] Sherman seeks $78,034.98 in costs on a full indemnity basis, with an additional $10,665.29 for disbursements (all amounts inclusive of taxes).

[8] Sherman relies on Rule 18 of the *Family Law Rules*, but Rule 18(14) only permits "costs to the date the offer was served and full recovery of costs from that date". Consequently, even if it could be said that Sherman obtained a result as favourable or more favourable than her last offer, the full indemnity costs sought would not be appropriate.

[9] Counsel relies principally on Sherman's offer to settle dated May 5, 2016, which sets out an access proposal with the level of detail similar to that agreed to by the parties. However, that offer is outside the deadline of seven days before the trial under Rule 18(14). In any event, as I discuss below, Byrne negotiated terms of the parenting order in the consent order at trial which were more favourable than the May 5, 2016 offer.

[10] Unlike the May 5, 2016 offer to settle, the other offers to settle addressed access issues that arose on motions. In any event, just as Byrne obtained some parenting relief in the consent order at trial which was more favourable than the May 5, 2016 offer, the same can be said for the earlier offers to settle.

[11] With respect to financial issues, those were resolved with the assistance of Justice Wilson, with Sherman accepting some terms (including abandoning an arrears claim of almost $9,500) that were less favourable than the proposals in the May 5, 2016 offer.

[12] The starting point for costs in a family law proceeding is the presumption under Rule 24(1) that costs follow the event (*C.A.M. v. D.M.* (2003), 67 OR (3d) 181 (CA)). However, under Rule 24(6), if success in a case is divided, the court can apportion costs as appropriate.

[13] In the present case, success was divided on the parenting issues, and as such I order no costs. The parties acted reasonably at trial and in their careful and thorough negotiations to reach a settlement on parenting (as well as financial) issues. It was reasonable for Byrne not to accept the May 5, 2016 offer, as he was able to obtain some better terms on access, including important "make-up" dates for the many "special days" of access sought by Sherman, as well as the important benefit of not ending weekend access at 4 pm on a Sunday, but rather having his daughter with him for a third overnight and returning her to school on Monday.

[14] The above issues were not insignificant with respect to access. Byrne opposed parenting terms sought by Sherman on which he obtained success through the negotiations. In no way can it be said that he was unreasonable on parenting issues.

[15] I agree with the principle set out by Chiappetta J. in *Anderson v. McWatt*, 2015 ONSC 7328 ("*Anderson*"), relied upon by Sherman, that a self-represented party cannot expect a "shield" from costs in family law litigation (*Anderson*, at para. 38). If a party is unsuccessful, costs may well be ordered, even when settled at the outset of trial, particularly when, as in *Anderson*, the self-represented party engages in "bad faith and unreasonable conduct" or "intentional efforts to mislead this court and deny his family law obligations" (*Anderson*, at para. 38), chooses "not to disclose … true ownership [of properties]" and "to serve over 4000 pages of documents he represented he would be relying upon at trial but later chose not to" (*Anderson*, at para. 36), and "acted unreasonably and in bad faith" requiring the applicant "to self-fund a long and expensive pursuit of the truth only to receive what she was legally entitled to receive from the Respondent 15 years earlier" (*Anderson*, at para. 4).

[16] However, unlike the self-represented party in *Anderson*, Byrne did not act unreasonably during his conduct of the trial, at least in relation to parenting issues. While Sherman raises the issue of Byrne's failure to obtain a pension valuation, produce a sworn financial statement, or deliver updated notices of assessment on a timely basis, all of those complaints relate to the financial issues, for which the parties agreed no costs would be sought, under the consent order reached through the settlement conference with Justice Wilson.

[17] Further, I do not find that Byrne was unreasonably litigious or acted improperly in response to Sherman's motions prior to trial. I note that Byrne often consented to all or part of orders made, and responded to all issues of access and custody with proper regard for the litigation process. Again, while some courts found that Byrne may have been unaware of his obligations to produce some financial documents, or failed to do so in certain circumstances, any such conduct cannot be "bootstrapped" onto a claim for costs related to parenting when the costs related to financial issues were resolved in the Wilson J. settlement conference.

[18] At its essence, the parties in the present case resolved all financial issues on a without costs basis. As to parenting, they negotiated terms at the outset of trial which each believed were in the best interests of their child. The parties chose not to act in a self-interested manner but rather focused on their child.

[19] Some of those parenting terms gave more access to Byrne, while other terms expanded or clarified access for Sherman. Parties should be encouraged to settle issues between themselves, and in the present case both parties should be commended for their efforts. However, to order costs against Byrne would constitute a form of "pre-judging", *i.e.* deciding whether Sherman or Byrne would have been successful on the multitude of issues which would have been raised at trial, rather than focusing on whether Byrne obtained success through the negotiation process.

[20] While Byrne only acknowledged that he was withdrawing his claim for shared custody and equal access at the outset of trial, there is no basis to find that he unreasonably failed to

accept Sherman's May 5, 2016 offer, and the terms of the consent parenting order demonstrate otherwise. In effect, there was divided success on the parenting issues, with a reasonable result

obtained through settlement discussions. For those reasons, I order no costs in relation to the parenting issues.

GLUSTEIN J.

Date: 20160512