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R.A.K. v. M.Z., 2024 ONCJ 2

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DATE: January 2, 2024
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ONTARIO COURT OF JUSTICE

2024 ONCJ 2 (CanLII)

B E T W E E N:	)	
	)	
R.A.K.		**VIKTORIYA TERENTYEVA, for the APPLICANT**
	)	
	)	
APPLICANT	)	
	)	
- and –		
M.Z.		**ELENA MAZINANI and ASH MAZINANI, for the RESPONDENT**
	)	
	)	
RESPONDENT	)	
	)	
		HEARD: In Chambers
	)	
	)	

JUSTICE S.B. SHERR

COSTS ENDORSEMENT

Part One – Introduction

[1] On October 26, 2023, the court released its reasons for decision after a four-day trial regarding parenting and support arrangements for the parties' 12-year-old daughter (the child) and the applicant's (the mother's) claim for spousal support against the respondent (the father). See: *R.A.K. v. M.Z.,* 2023 ONCJ 476.

[2] The court ordered that the child have her primary residence with the mother and that the mother have decision-making responsibility for her. It made an order for structured parenting time for the father. The mother was granted incidents of parenting, including the ability to obtain government documentation for the child and to travel with the child outside of Canada without the father's consent. An order was made that neither parent could remove the child from Canada without the prior written consent of the other party or by court order. The father was ordered to pay child support to the mother of $461 each month, starting on November 1, 2023, increasing to $556 each month, starting on January 1, 2024. Child support arrears were fixed at $2,400. The court ordered the father to pay the mother spousal support of $300 each month for five years.

[3] The parties were given the opportunity to make costs submissions. The mother seeks her costs of $27,323. The father submits that no costs should be ordered.

Part Two – General costs principles

[4] The Ontario Court of Appeal in *Mattina v. Mattina*, 2018 ONCA 867 set out that modern costs rules are designed to foster four fundamental purposes:

(1) to partially indemnify successful litigants;

(2) to encourage settlement;

(3) to discourage and sanction inappropriate behaviour by litigants and;

(4) to ensure that cases are dealt with justly under subrule 2 (2) of the *Family Law Rules* (all references to the rules in this decision are to the *Family Law Rules*).

[5] 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 S.C.C. 71, paragraph 25.

[6] Costs awards are discretionary. Two important principles in exercising this discretion are reasonableness and proportionality. See: *Beaver v. Hill*, 2018 ONCA 840.

[7] An award of costs is subject to the factors listed in subrule 24 (12), subrule 24 (4) pertaining to unreasonable conduct of a successful party, subrule 24 (8) pertaining to bad faith, subrule 18 (14) pertaining to offers to settle and the reasonableness of the costs sought by the successful party. See: *Berta v. Berta*, 2015 ONCA 918, at paragraph 94.

Part Three – Subrule 18 (14)

[8] Subrule 18 (14) sets out the consequences of a party's failure to accept an offer to settle that is as good as or better than the trial result of the person making the offer. It reads as follows:

COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER

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> 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.

[9] Neither party made an offer to settle that attracted the costs consequences set out in subrule 18 (14).

[10] The offers made by both parties were not served at least 7 days before the trial date, as required by subrule 18 (14). The mother served her offer 5 days before the trial. The father served his offer 2 days before the trial.

[11] Neither offer was severable and neither offer was more favourable to the other party than the final result.

[12] The offers mirrored the positions taken by the parties at the trial.

[13] 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)) or, in assessing the reasonableness of a party under sub-clause (iii) of subrule 24 (12) (a).

Part Four – Success

4.1 Legal considerations

[14] Subrule 24(1) 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).

[15] To determine whether a party has been successful, the court should examine who was the successful party, based on the positions taken in the litigation. See: *Lazare v. Heitner*, 2018 ONSC 4861. This assessment includes the positions taken in the pleadings, and the specific relief sought at the hearing, if different. See: *Kyriacou v. Zikos*, 2022 ONSC 401. The court may also take into account how the order compares to any settlement offers that were made. See: *Lawson v. Lawson* [2008] O.J. No. 1978 (SCJ); *Todor v. Todor*, 2021 ONSC 3463; *G.E. v. J.E.*, 2023 ONSC 1743; *Kyriacou v. Zikos, supra*.

[16] Subrule 24 (6) sets out that if success in a step in a case is divided, the court may apportion costs as appropriate.

[17] Divided success does not equate with equal success. It requires a comparative analysis. Most family cases have multiple issues. They are not equally important, time-consuming or expensive to determine. See: *Jackson v. Mayerle*, 2016 ONSC 1556, paragraph 66.

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[18] Where there are multiple issues before the court, the court should have regard to the dominant issue at trial in determining success. See: *Firth v. Allerton*, [2013] O.J. No. 3992 (SCJ); *Mondino v. Mondino*, 2014 ONSC 1102.

4.2 Analysis

[19] The mother was completely successful regarding the parenting issues, based on the positions taken by the parties at trial.

[20] There was divided success on the financial issues. However overall, the mother was more successful on these issues than the father.

[21] The mother asked to impute the father's annual income at $67,000 for support purposes. The father suggested using a minimum wage income if he was required to pay any support. The court imputed an annual income of $50,000 to the father to the end of 2023, and $60,000 starting on January 1, 2024. The mother was more successful on this issue.

[22] The mother sought a start date of November 1, 2018 for support. The father asked that only ongoing support be paid. The court used June 6, 2022 as the start date for support. This resulted in a modest amount of support arrears owing. There was divided success on this issue.

[23] The mother sought spousal support of $700 each month for 5 years. The father asked that no spousal support be payable. The court ordered that the father pay the mother $300 each month for 5 years. There was divided success, but the mother obtained a spousal support order and was more successful on this issue than the father.

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

Part Five – The amount of costs

5.1 Legal considerations

[25] Subrule 24 (12) sets out factors for the court to consider in determining the reasonableness and proportionality of a costs claim. It 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.

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[26] Subrule 24 (4) states that despite subrule 24 (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.

[27] Subrule 24 (5) provides some criteria for determining the reasonableness of a party's behaviour in a case. It reads as follows:

> DECISION ON REASONABLENESS
>
> 24 (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.

[28] The reasonableness of the parties' positions, arguments and conduct are relevant to the issue of costs. An important function of costs is to uphold the integrity of our justice system. Costs are one way of ensuring the resources of the justice system are not unduly drained by clearly unreasonable claims and ill-advised litigation strategy. See: *Weber v. Weber*, 2020 ONSC 6855.

[29] Conduct which unduly complicates or unduly lengthens and increases the cost of a proceeding constitutes unreasonable conduct under subrule 24 (4). See: *Goldstein v. Walsh*, 2019 ONSC 3174 (SCJ); *Hutchinson v. Peever*, 2021 ONSC 4587 (SCJ); *Jackson v. Mayerle*, 2016 ONSC 1556 (SCJ).

[30] In considering the reasonableness of the parties' conduct, the judge deciding costs should also address their mind to whether they have complied with court orders and the Rules during the proceeding. Rules 1(8)(a) and 1(8.1) provide that if a person fails to obey an order in a case or a related case or with the Rules, the court may deal with the failure by making an order for costs. See: *M.A.B. v. M.G.C.*, 2023 ONSC 3748.

[31] Subrule 24 (8) of the rules states 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.

[32] Subrule 24 (8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. See: *Cozzi v. Smith*, 2015 ONSC 3626; *Scipione v. Del Sordo*, 2015 CarswellOnt 14971 (Ont. SCJ).

[33] There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. See: *S.(C.) v. S. (M.)* (2007), 38 R.F.L. (6th) 315 (Ont. SCJ).

[34] Bad faith is not synonymous with bad judgment or negligence; rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation. See: *Scipione*, *supra*.

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[35] A bad faith finding on some specific issue does not necessarily have a spill-over effect to other issues. See: *Hunt v. Hunt* [2001] O.J. No. 5111 (SCJ); *Kardaras v. Kardaras*, 2008 ONCJ 616.

[36] In determining the appropriate quantum, the court should consider the amount that the unsuccessful party could reasonably have expected to pay in the event of lack of success in the litigation. See: *Arthur v. Arthur*, 2019 ONSC 938.

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5.2 Analysis and costs order in favour of the mother

[37] This case was important to the parties. It was not complex or difficult.

[38] Being unsuccessful does not equate necessarily to being unreasonable. See: *Wauthier v. McAuliff*, 2019 ONSC 5302; *W.H.C. v. W.C.M.C.*, 2021 ONCJ 363. The court does not find that the father took unreasonable positions, even though he was not successful.

[39] Both parties made comprehensive offers to settle. Although they were delivered late, the court does not find that they acted unreasonably in this respect.

[40] Counsel for the parties acted reasonably by focusing the process for the trial.

[41] The mother caused some additional minor expense for the father, as either she or her counsel were late for three of the four days of the trial.

[42] The father engaged in serious unreasonable behaviour. At paragraph 84 of the trial decision, the court wrote that the father was manipulative and controlling and had shown little regard for court orders.

[43] Twice, the father breached orders of Justice Carole Curtis. On October 5, 2022, she ordered him to return the child to Canada by October 19, 2022. The father did not return the child until April 6, 2023. Then, from August 25, 2023, until October 6, 2023, the father overheld the child from the mother. At trial, the court found that these breaches were not justified. It is also important that courts send a strong message that such conduct also will have serious costs consequences.

[44] The rates claimed by the applicant's counsel are reasonable ($300 per hour, for a 2018 call to the bar).

[45] The court finds that the time claimed by the applicant in her bill of costs was reasonable and proportionate. She only included her costs for the trial step.

[46] Subrule 24 (12.2) provides that a party who opposes a claim for costs respecting fees or expenses shall provide documentation showing the party's own fees and expenses to the court and to the other party. An adverse inference may be drawn against the party who fails to provide such documentation. See: *S.W.-S. v. R.S.*, 2022 ONCJ 11; *M.H.S. v. M.R.*, 2022 ONCJ 28; *Kasmieh v. Hannora*, 2023 ONSC 1643; *Morsillo v. Quartarone*, 2022 ONCJ 591.

[47] The father did not submit his own bill of costs with his costs submissions. An adverse inference is drawn against him. While he submitted that the mother should not receive costs due to divided success and her unreasonable behaviour, he did not contest the time or rates claimed by her.

[48] The court should also take into consideration the ability of a party to pay costs. See: *MacDonald v. Magel* (2003), 67 O.R. (3d) 181 (Ont. C.A.). Difficult financial circumstances are a factor but not are always a reason to deprive a successful party of costs or to reduce the amount of costs. See: *Beaulieu v. Diotte*, 2020 ONSC 6787. Ability to pay will be less of a mitigating factor when the impecunious party has acted unreasonably, or where their claim was illogical or without merit. See: *Gobin v. Gobin*, 2009 ONCJ 278; D.D. and *F.D. v. H.G.*, 2020 ONSC 1919.

[49] Those who can least afford to litigate should be most motivated to seriously pursue settlement and avoid unnecessary proceedings. See: *Mohr v. Sweeney*, 2016 ONSC 3338; *Balsmeier v Balsmeier*, 2016 ONSC 3485.

[50] The father should have reasonably expected to pay the costs that will be ordered.

[51] The court also finds that the father can afford to pay the costs that will be ordered. It will take his financial circumstances into account by permitting him to pay the costs in 4 equal instalments – 6 months apart.

[52] The father shall be ordered to pay the mother's costs of $20,000, inclusive of fees, disbursements and HST.

5.3 The mother's bad faith

[53] The court wrote the following at subparagraph 83 (g) of its trial decision.

> The mother clearly altered one text message she had relied upon at trial, leaving out comments that reflected negatively on her. When challenged by the father, she continued to insist that the version she had presented to the court was on her phone. When asked to pass up her phone, she eventually conceded that the full text provided by the father was accurate.

[54] With rapid developments in technology, it is becoming easier to alter electronic documents. Actions, such as the mother's here, compromise the integrity of court proceedings. It is imperative that courts send a strong message that such conduct will have serious consequences when discovered.

[55] The court finds that the mother's actions in altering the text message crossed the threshold from unreasonable behaviour to bad faith.

[56] The father submits that the mother's conduct disentitles her to costs. The court disagrees, in these circumstances, because:

a) The father engaged in serious unreasonable behaviour and was unsuccessful. He does not get a pass from paying costs because of the mother's conduct.

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b) The full version of the altered text, while embarrassing to the mother, would have had no impact on the court's decision. It was the mother's conduct in altering the text that gave the court pause.

c) The mother's actions did not add significant cost to the trial.

d) The remedy for the mother's conduct should be proportional, while sending the message that it is unacceptable.

[57] Subrule 24 (8) sets out 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.

[58] The court finds that the mother should pay the father costs in the amount of $5,000 as a result of her bad faith. The costs are payable immediately.

Part Six – Conclusion

[59] A final order shall go as follows:

a) The father shall pay the mother's costs fixed at $20,000, inclusive of fees, disbursements and HST.

b) The father may pay the costs ordered to the mother as follows:

i) $5,000 forthwith

ii) $5,000 by June 30, 2024.

iii) $5,000 by December 31, 2024.

iv) $5,000 by June 30, 2025.

c) If the father defaults on any costs payment by more than 14 days, the full amount of costs then owing shall immediately become due and payable.

d) The mother shall pay the father's costs, arising from her bad faith, fixed at $5,000, inclusive of fees, disbursements and HST. The costs are payable forthwith.

e) The father's first costs payment shall be offset against the costs owed to him by the mother. He shall make his next costs payment on June 30, 2024. The mother's costs obligation to the father is met with the set-off of his first costs payment to her.

Released: January 2, 2024

Justice Stanley B. Sherr

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