NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2020-070-000723
[2024] NZFC 4217

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	NICHOLAS ALAN TURNER Applicant
AND	BREANNA FRANCENE TURNER Respondent

Appearances: Applicant appears in Person
J Hosking for the Respondent

Judgment: 9 April 2024

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO INTER PARTES COSTS]

---

[1] On 13 March 2023 I issued a reserved judgment in relation to applications by Mr Turner seeking various orders under the Child Support Act 1991. I found that some of the claims advanced by Mr Turner were statute barred, and that the balance failed as Mr Turner had not satisfied the statutory grounds for making a departure order, or that those grounds (if they had been established) amounted to special circumstances.[1]

[2] In that judgment I foreshadowed the issue of costs as Ms Hosking had foreshadowed that Ms Turner was likely to seek costs against Mr Turner. Accordingly, I made directions for the filing of submissions.

[3] For reasons that are not relevant, but which were beyond my control, the submissions filed by Ms Hosking on or about 2 January 2023 were not referred to me until last month. A recent review of the file by the registry, established that error, and I was only made aware of Ms Hosking's submissions in relation to costs on 18 March 2024. At that time, I was advised by the registry that Mr Turner had failed to file any submissions in relation to the issue of costs, and on 22 March 2024 I issued a reserved judgment in relation to *inter partes* costs, pursuant to which I made an order that Mr Turner was to pay Ms Turner's costs in the sum of $9,454.50.

[4] Having issued that judgment, both Mr Turner and Ms Hosking immediately advised the registry that Mr Turner had in fact filed submissions, those submissions having been filed by him on 8 May 2023. The earlier errors by the registry were therefore further compounded by the registry not providing me with Mr Turner's submissions on opposition to the issue of costs. Consequently, I had to issue a recall of my judgment and I now need to consider the issue of costs afresh. I now issue this cost decision, therefore, having received and considered carefully the submissions by both Ms Hosking and Mr Turner.

Legal Principles

[5] Section 232 of the Child Support Act 1991 provides for the Court to make an order in relation to costs. Section 232 needs to be read in conjunction with r 207 of the Family Court Rules 2002 which states that a decision toward costs is a

---

1 *Turner v Turner* [2023] NZFC 1794.

discretionary decision and can be made with reference to the provisions of the District Court Rules 2014.[2]

[6] Justice Duffy in *Van Selm v Van Selm* undertook a thorough review of the principles applicable for an award of costs in the Family Court.[3] At [41] of her Honour's judgment she recorded:

> I am satisfied, therefore, that the recent cases in [the High Court] dealing with costs awards in the Family Court consistently support costs awards being made in the Family Court in accordance with general costs principles.

[7] A further statement of the relevant principles is set out by Mander J in *Bowden v Bowden*.[4] Notwithstanding the wider applicability of the District Court Rules, guidance is still found in the common law.[5] In *S v I*[6] the High Court endorsed the comments on his Honour Judge Callinicos in *AS v JM* (Costs) where the Judge held:[7]

> While there may be some difference in philosophy as to whether a more civilly orientated approach is taken to costs matters in the Family jurisdiction, there remains a constant thread through the decisions when the Court is considering a party who has been unreasonable. All the decisions make it clear that where a party has acted unreasonably, prolonging the proceedings, or has been the recipient of adverse credibility findings then they cannot expect to escape close attention when the Court exercises its discretion on costs issues.

[8] I have also considered the approach of her Honour Judge Smith in *JJF v AJH*.[8] I adopt her reasoning and the approach set out at [13] to [15] inclusive and [31] of that decision. Like her Honour, in terms of fixing quantum, it is my view that the use of the scale costs contained in the District Court Rules provide for a more transparent and predictable rationale. Justice Duffy held as much in the *Van Selm v Van Selm* decision.

[9] The relevant principles of the DCR 2014 are those referenced in r 207(2) (a) to (k) inclusive of the FCR 2002. Rule 14.2 of the DCR 2014 sets out the general

---

2 Family Court Rules 2002, r 207(2).
3 *Van Selm v Van Selm* [2015] NZHC 641.
4 *Bowden v Bowden* [2017] NZHC 1841 at [13].
5 *R v S* [*Guardianship*] [2004] NZFLR 207; (2003) 22 FRNZ 1017.
6 *S v I* (2009) 28 FRNZ 13 (HC).
7 *AS v JM* [2004] NZFLR 57 at [17].
8 *JJF v AJH*, FC Christchurch, FAM-2008-009-3326, 13 January 2011.

principles which must apply to the determination of costs; of relevance to this case are the following:

> **14.2 Principles applying to determination of costs**
>
> (1) The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs:
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

[10] Rule 14.6 of the DCR is also relevant given that Ms Turner seeks increased costs or indemnity costs. Rule 14.6 states as follows:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules (*increased costs*); or
>
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (*indemnity costs*).

[11] The basic principle that costs should follow the event was confirmed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd*[9] and in *Glaister v Amalgamated Dairies Ltd*.[10]

[12] As set out above the cost regime contained in the rules empower the Court to order increased costs. Relevant to this proceeding, increased costs may be ordered if the Court considers that a party opposing costs contributed unnecessarily to the time and expense of the proceeding, or towards a step in the proceeding by failing, without reasonable justification, to accept an offer of settlement to settle, or to otherwise dispose of the proceedings.[11] In *Holdfast NZ Ltd v Selleys Pty Ltd* the Court of Appeal provided guidance on the correct approach to an award of increased costs.[12] Those steps are as follows:

(a) The Court must firstly categorise the proceeding (DCR 14.3).

(b) The Court then needs to work out a reasonable time for each step in the proceeding (DCR 14.5).

(c) As part of the step 2 exercise, a party can claim extra time for a particular step (DCR 14.6(3)(a)).

(d) The applicant for costs should then step back and look at the costs award that he or she is entitled to, and can then argue for additional costs under DCR 14.6(3)(b), noting that any increase on scale costs above 50 per cent is unlikely.

The Submissions of Mr Turner

[13] Mr Turner opposes costs being awarded. He reminds me that at [9] of my March 2023 decision I noted:

---

9 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109.
10 *Glaister v Amalgamated Dairies Ltd* (2004) 16 PRNZ 1074 (CA).
11 Rule 14.6(3)(b)(v) of the DCR.
12 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

> I do note that Ms Hosking has foreshadowed an intention to apply for costs against Mr Turner should Ms Turner's defence be successful. Morally, I suggest it is repugnant for Ms Turner to seek costs against Mr Turner when she has clearly received an overpayment of child support all those years ago. That is an issue for Ms Turner to discuss with Ms Hosking.

[14] The circumstances in which Mr Turner overpaid Ms Turner are set out at [6] and [7] of my March 2023 reserved judgment. However, for the reasons set out at [8] I found that the Court had no ability to make an order that Ms Turner refund to Mr Turner the amount he had overpaid in child support to Ms Turner. I suggested to Ms Turner that he might have a recourse by way of a civil remedy in either the District Court or the Disputes Tribunal.

[15] The remainder of Mr Turner's submissions, in opposition to costs, are principally an attempt by him to relitigate or dispute my March 2023 decision, and the conclusions that I had reached. His submissions, having considered them carefully, have been unhelpful to me in considering the issue of costs.

Ms Hosking's Submissions

[16] Ms Hosking sets out scale costs on a 2B basis totalling $6,303. I agree with Ms Hosking's assessment that 2B is an appropriate band, and her reference to the various steps set out in the District Court Rules. I accept the steps are not directly analogous to Family Court proceedings, but they do provide the Court and counsel with a guide.

[17] Ms Turner further seeks indemnity costs or, in the alternative, uplift costs. Ms Hosking, in relation to indemnity costs points to the conduct of Mr Turner. Judge Cook made clear directions on 26 August 2022, and it is clear from the cross-examination that occurred that Mr Turner breached those directions. In relation to the service directions, he did not provide evidence of any attempts to contact Ms Turner by email or using her phone number (notwithstanding that it had never been changed by her).[13] Those misrepresentations about service led to me making adverse comments against Ms Turner, proceedings which in my March 2023 judgment I resiled from on.

---

13 Minute of Judge Cook, 26 August 2022 at [7](d).

[18] Further as Ms Hosking submits Mr Turner failed to entirely articulate his claims under s 105(2) as had been directed. At the hearing before me it became apparent that the object of Mr Turner's application was to obtain an order that Ms Turner refund him the sum of $31,148.95. Prior to that the claim was not articulated in any way by him in a way which was easily understandable.

[19] Further, on 7 December 2021 Mr Turner gave me at an earlier hearing the impression that:

(a) Since 2016 he had been the primary caregiver of the party's child; and

(b) He had been having difficulties getting information from IRD.

[20] What became apparent in the hearing before me was that neither of those propositions were correct when viewed against the IRD records provided by Ms Turner. Those records included assertions that Mr Turner had himself made to the IRD about the care arrangements at the time. Ms Hosking's submission is that this is exactly the type of conduct that falls within the r 14.6(4)(a) and (b) of the DCR 2014. It is Ms Hosking's submission if I do not accept that indemnity costs should be paid, I should be considering uplift costs of 50 per cent. The basis of that submission is Mr Turner's failure to comply with Judge Cook's directions and his application being without merit from the outset.

Discussion

[21] I accept, as Ms Hosking has set out, in terms of the rules there are aspects of the litigation stance advanced by Mr Turner, his unmeritorious arguments, his failure to comply with directions, and the filing of irrelevant evidence which directly impact upon the issue of costs. While I note, as Mr Turner has highlighted, the view I expressed that it would be morally repugnant for Ms Turner to seek costs against Mr Turner, I need to determine the issue of costs on a principled and legal basis, and not on a "moral" basis. Furthermore, my "morally repugnant" comments were in relation to the sole issue of overpayment, and in the context of Mr Turner advancing an argument in relation to that narrow issue which, for the reasons I have set out, was

entirely unsustainable; there was simply no jurisdiction for the Family Court to order Ms Turner to repay Mr Turner the amount of the overpaid child support. That aspect of his application was therefore devoid of merit, and necessitated Ms Turner having to defend his unmeritorious application. As set out in my reserved judgment, Mr Turner may well have civil remedies available to rebalance the situation.

[22] But in relation to the balance of the claims and arguments advanced by Mr Turner, they were wholly unsuccessful for the reasons set out in my reserved judgment. Ms Turner was put to the expense of having to defend those unsuccessful applications.

Conclusion

[23] For the reasons set out in my reserved judgment Mr Turner's arguments were entirely without merit. Ms Turner has been put to the expense of defending what transpired to be confusing, at times contradictory, and unmeritorious applications. Furthermore, as Ms Hosking submits the remedy sought by Mr Turner was one that he was time barred from pursuing and without jurisdiction. Additionally, his assertion in the evidence before me as to the actual care arrangements were in direct contradiction to other evidence filed and decisions made by the review officers.

[24] One of the factors I need to consider is an ability to pay. That is, can Mr Turner pay a cost award. It is clear from the evidence I have heard that both parties' financial situations are not ones in which they are flush with resources. Notwithstanding that a cost award needs to be made to reflect the fact that Ms Turner has had to defend an unwarranted and unmeritorious application. Simply because I am not satisfied as to Mr Turner's ability to meet indemnity costs, I am not prepared to award indemnity costs. I will however award uplift costs and the sum of 50 per cent is sought by Ms Hosking.

[25] Accordingly, I make an order that Mr Turner is to pay Ms Turner's costs on a 2B basis of $6,303 uplifted by 50 per cent, namely, $3,151.50 being a total cost award of $9,454.50.

[26] Ms Hosking also raises the issue of a cost contribution order. I am not satisfied that either party has the resources from which to pay a cost contribution order, and I decline to order a cost contribution order against either party.

[27] In short, having considered the submissions filed by Mr Turner, they have not persuaded me to take a different approach to that set out in my 22 March 2024 recalled reserved judgment. As I have noted, his submissions were really an attempt to relitigate and argue issues that I had already determined.

[28] I invite Ms Hosking to file an order for sealing reflective of the cost order I made against Mr Turner.

S J Coyle
Family Court Judge

Signed this 9th day of April 2024 at am / pm