CITATION: Caughlin v. Caughlin, 2024 ONSC 1697
COURT FILE NO.: FC-18-152-0000
DATE: 20240321

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Renata Lee Templeton Caughlin, Applicant

AND:

Kenneth Blair Caughlin, Respondent

BEFORE: The Honourable Madam Justice R. S. Jain

COUNSEL: Applicant was Self-Represented

Jeffrey Rouse, Agent for the Respondent

HEARD: In writing

RULING ON COSTS

[1] On December 20, 2023, I released my decision on a trial held in regard to the issues of retroactive and ongoing child and spousal support, and equalization of the parties' businesses.

[2] The parties were invited to provide me with written submissions if they were unable to agree on the issue of costs. Having now received submissions from both parties, this is my decision on costs.

[3] The applicant seeks costs of the trial and *all* her legal fees incurred during the six years of litigation on a full recovery basis. Although she was self represented at the trial, she had retained lawyers throughout the litigation. The applicant seeks an order that the respondent pay her costs in the amount of $70,798.24.

[4] The respondent seeks an order that there be no order as to costs, or, in the alternative, that the applicant pay him costs in the amount of $2,310, or, in the alternative, if the court is of the view that a costs order is warranted against the respondent, such costs should represent a partial recovery of the applicant's costs to prepare for trial in the amount of $11,151.42.

[5] As set out in my decision, the applicant was *partially* successful in her requests for arrears and ongoing spousal support, and for an equalization of the businesses.

[6] In my view, success of this trial was mixed. Neither party is *presumptively* entitled to costs. Despite this, costs may be payable if one or both parties delivered an offer to settle to the other side and believes that their offer to settle beats my Order (*i.e.* had the offer to settle

been accepted, the other party would have been better off). Costs may also be payable if either party is found to have behaved unreasonably or in bad faith.

[7] As set out in *Mattina v. Mattina*, 2018 ONCA 867, modern costs rules are designed to foster four fundamental purposes:

a. To partially indemnify successful litigants;

b. To encourage settlement;

c. To discourage and sanction inappropriate behaviour by litigants; and

d. To ensure that cases are dealt with justly under r. 2(2) of the *Family Law Rules*.

[8] Rule 24(1) creates a presumption of costs in favour of the successful party.

[9] Rule 18(14) provides that a party who makes an offer to settle is entitled to costs to the date the offer was served and full recovery costs from that date if all the conditions set out in the Rule are met. Even if the conditions set out in the rule are met, the court retains the discretion not to order full recovery costs.

[10] Both parties have provided Offers to Settle which were made to each other prior to the hearing of the trial and which remained open to acceptance up to the start of the hearing.

[11] Upon review of these Offers, in my view, neither party obtained an order as favourable as or more favourable than the terms contained in their Offers to Settle. Accordingly, costs are not recoverable by either party pursuant to r. 18(14).

[12] Both parties submit the other has been unreasonable in their positions and conduct. The applicant goes further to alleging bad faith on the part of the respondent (which the respondent denies). As a result of those submissions, the applicant suggests the respondent should pay her costs on a full recovery basis immediately.

[13] Rule 24(8) 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. This rule requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. 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.[1] 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.

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[1] See: *S. (C.) v. S. (M.) (2007)*, 38 R.F.L. (th) 315 (Ont. SCJ).

[14] As I noted in my decision, the parties were engaged in a high level of conflict for many years after their separation. I stated the following at paragraph 6:

> Both parties used an inordinate amount of time during the trial giving evidence regarding how terrible the other party behaved during the marriage and after the separation. Most of this evidence was irrelevant to the substantive issues before the court. However, it did highlight for me how the high level of conflict and distrust between these parties coupled with the lack of disclosure, were large contributors to the reasons why this matter did not resolve prior to trial.

[15] During the trial both parties made serious allegations of abuse against each other. I did not make any findings regarding these allegations. However, there were two things that stick out in my mind that highlighted the unreasonable behaviour of the respondent. Firstly, during the respondent's testimony, he made a point of making collateral attacks on the applicant's character. He commented on their sex life when they were together, the applicant's looks, and his views of her mental health (most of which I found was irrelevant, unnecessary, harsh and unkind). I found he lacked insight into his own contributions to the couple's eventual separation; and the risk of harm to their son by exposing/involving him in the high level of conflict (which has likely been emotionally damaging to the child). Secondly, the respondent altered email evidence during the trial. This was not brought to the court's attention until he was caught during cross-examination.[2]

[16] Family law litigants are responsible for and accountable for the positions they take in the litigation.[3] Sometimes in family law matters, the behaviour of both the parties may seem to be unreasonable at different times. They could be acting out of emotion or fear, or in reaction to or out of a lack of trust and information. These emotions and fears can cloud the determination of fault for the alleged unreasonable or bad faith conduct.

[17] In my view, the continued conflict was the primary focus of the parties' trial and their costs submissions. Given the results, I am not satisfied with the evidence of either party to make a finding of bad faith. However, I am satisfied with the applicant's evidence to make a finding that the respondent acted unreasonably in the trial, so as to make any costs award payable immediately.

[18] The applicant is seeking a significant amount of costs on all the various steps in this case for the entirety of the litigation. Although the trial judge has jurisdiction under r. 24(11) to determine costs of earlier steps in the proceeding, there are limits to the courts discretion to

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[2] During the respondent's evidence in chief, he submitted and relied upon a version of an email from the SMCYFS wherein he isolated the allegations that were verified *only* against the applicant. The applicant confronted him on this during cross examination and the respondent admitted that he had cropped out four other findings and verifications of other allegations against *both* the applicant and the respondent. Exhibit 16 is a complete copy of the email from the SMCYFS dated November 26, 2018 that shows all the verifications of their investigation.

[3] See: *Heuss v. Surkos*, 2004 CarswellOnt 3317, 2004 ONCJ 141.

do so. The court should award costs for previous steps in circumstances when costs have been reserved to the trial judge; or when in certain circumstances the trial judge is better situated to determine the cost of the prior step than the judge that presided over that step; or, in exceptional circumstances[4]. In any event, the onus rests on the litigant pursuing those costs to prove why they should be awarded those costs.

[19] I am not satisfied with the evidence of the applicant that she has shown that the trial judge was better situated to determine the costs of all prior steps. I agree with the respondent's submission that the court ought to "consider costs associated with the Accountant Sue Bragg that totals $5,088.96 and the Legal Accounts of Burrion Hudani Doris LLP that total $11,807.13" for the total of $16,896.09. I further agree with the applicant's submission claiming costs for her own trial preparation time, time spent in trial and disbursements, totalling $2,916.15. Although she was self represented, she undoubtably suffered loss of income and incurred expenses for the trial. All of these expenses added together total $19,812.24 and are the only ones that relate to the trial or trial preparation.

[20] The amount of costs must be proportionate to the importance and complexity of the issues. This trial was necessary because as evidenced by the six years of litigation, the parties were never going to resolve this matter on their own. The issues of the trial were important and complex. I do find that it is appropriate to award fair and reasonable costs to the applicant, given her greater success on the major issues, and to make an appropriate adjustment to account for the divided success on the less dominate issues[5].

[21] For these reasons, Order to go that the respondent shall immediately pay to the applicant costs in the amount of $17,500 inclusive of H.S.T. and disbursements.

R. S. Jain J.

Date: March 21, 2024

[4] See *Lewis v. Silva*, 2019 ONCJ 795 and *Cameron v. Cameron*, 2018 ONSC 6823.
[5] See *Firth v. Allerton*, 2013 ONSC 5434.