CITATION**:** Angle v. Angle, 2024 ONSC 1758
COURT FILE NO.: FC-22-130
DATE: 2024/03/25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kristofer Brendan Beau Angle, Applicant

AND:

Jenna Pauline Angle, Respondent

BEFORE: The Honourable Mr. Justice A. Pazaratz

COUNSEL: Counsel for the Applicant, Self-Represented

Counsel for the Respondent, Nadine Waldman

HEARD: March 25, 2024

COSTS ENDORSEMENT

1 I have reviewed written costs submissions filed by the parties.

2 Re-capping what happened, briefly:

a. This is a high conflict file dominated by parenting and relocation issues in relation to a four-year-old boy.
b. After much delay, on November 10, 2023 the parties scheduled a 10-day trial for the sittings of March 11, 2024.
c. The Applicant father's lawyer then brought a motion to be removed from the record. On January 3, 2024 this court reluctantly granted that request, on the basis that the solicitor-client relationship had irretrievably broken down.
d. The father then brought a motion seeking an adjournment of the March 2024 trial, because he needed time to retain and instruct new counsel for this complicated file.
e. Both parties filed extensive materials and the adjournment motion was strenuously argued.
f. The father's first choice was to adjourn the trial to October or November 2024. His second choice was the two-week sittings of July 1, 2024.
g. The Respondent mother's first choice was to dismiss the adjournment request and leave the trial on the March 2024 sittings. Her second choice was to adjourn the trial no later than the July 1, 2024 sittings – and preferably to the June 10, 2024 sittings.

h. Neither party got their first choice. The trial was adjourned to the June 10, 2024 sittings.
i. The mother asked that the return date be peremptory on the father. The father opposed this. The mother was successful on this issue.
j. The mother asked that a previously determined date for the listing of the matrimonial home should be further delayed, as a result of the delayed trial. The father opposed this. The mother was successful on this issue.
k. The mother asked that the father be prohibited from bringing any further motions. The father was successful in resisting this request.

3 The mother seeks her costs forthwith on a full indemnity basis in the amount of $6,251.68, inclusive of HST, of which $5,251.68 relates to the mother's costs for the motion and $1,000.00 represents costs thrown away for trial preparation.

4 The father submits he was as successful as the mother. He says he incurred comparable legal fees hiring an agent to represent him at the motion. Ultimately, he submits there was divided success and no costs should be payable.

5 Costs rules are intended 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 pursuant subrule 2(2) of the *Family Law Rules* ("the Rules") *Mattina v. Mattina* 2018 ONCA 867 (Ont CA); *Serra v. Serra* 2009 ONCA 395 (Ont CA).

6 Costs awards are discretionary. In exercising that discretion, the court should be mindful of two touchstone considerations: reasonableness and proportionality. *Beaver v. Hill* 2018 ONCA 840 (ON CA).

7 Rules 18 and 24 govern the determination of costs in family law proceedings.

8 Consideration of success is the starting point. Rule 24(1) creates a presumption of costs in favour of the successful party. *Sims-Howarth v. Bilcliffe* 2000 CanLII 22584 (SCJ).

9 Rule 24(6) provides that where success in a step in a case is divided, the court may exercise its discretion to order and apportion costs as appropriate.

a. Divided success is not synonymous with equal success.
b. Most family cases have multiple issues. They are not usually equally important, time-consuming or expensive to determine. *Jackson v. Mayerle* 2016 ONSC 1556 (SCJ); *G.T.C. v. S.M.G.* 2020 ONCJ 580 (OCJ); *Kasmieh v. Hannora*, 2023 ONSC 303 (SCJ)
c. The Rule 24(6) analysis involves more than simply adding up the number of issues and running a mathematical tally of which party won more of them. *Thompson v. Drummond* 2018 ONSC 4762 (SCJ); *G.T.C. v. S.M.G.* 2020 ONCJ 580 (OCJ); *.Dejong v. Dejong*, 2022 ONSC 252 (SCJ); *Vasilodimitrakis v. Homme* 2020 ONSC 4414 (Div Ct)

d. The determination of whether success was truly "divided" requires a contextual analysis that takes into consideration the importance of the issues that were litigated and the amount of time and expense that were devoted to the issues that required adjudication. *Jackson v. Mayerle* 2016 ONSC 1556 (SCJ); *Slongo v. Slongo* 2015 ONSC 3327(SCJ); *Lippert v. Rodney; Norton and Norton*, 2017 ONSC 5406 (SCJ); *Dosu v. Dosu*, 2022 ONSC 6205 (SCJ).
e. Where there are multiple issues, the court should consider the dominant issue(s) at trial in determining success. *Firth v. Allerton* [2013] O.J. No. 3992 (SCJ); *Mondino v. Mondino* 2014 ONSC 1102 (SCJ); *Rebujio v. Rosario*, 2022 ONCJ 452 (OCJ); *N.M. v. S.M.*, 2023 ONCJ 23 (OCJ); *Kerr v. Moussa*, 2023 ONCJ 82 (OCJ); *F.K.T. v. A.A.H.*, 2023 ONCJ 185 (OCJ).
f. Where the court determines that success was divided, costs may be awarded to the party who was more successful on an overall global basis, or on the primary issue – subject to any further adjustments regarding comparative success on secondary issues, and any other factors relating to the litigation history of the case. *Gomez-Pound v. Pound*, [2009] O.J. No. 4161 (OCJ); *Boland v. Boland*, 2012 ONCJ 239 (OCJ); *Arthur v. Arthur*, 2019 ONSC 938 (SCJ); *Dejong v. Dejong*, 2022 ONSC 252 (SCJ).

10 *Comparative* success can be assessed by asking some basic questions:

a. How many issues were there?
b. How did the issues compare in terms of importance, complexity and time expended?
c. Was either party predominantly successful on more of the issues?
d. Was either party more responsible for unnecessary legal costs being incurred?

Jackson v. Mayerle 2016 ONSC 1556 (SCJ)

11 In this case I find that there was divided success:

a. In the hierarchy of issues, the father was successful on the threshold issue of whether the March 2024 trial date should be adjourned. This was the most time-consuming aspect of the motion. If the trial wasn't adjourned, none of the other issues would come into play.
b. The mother was successful in resisting the father's first choice that the trial be adjourned to October or November 2024.
c. A summer 2024 trial date was both parties' "second choice". There's not much difference between an adjourning to the June or July 2024 sittings. Indeed, at one point it appeared the July sittings were the only summer option in terms of judicial availability. The selection of the June 10, 2024 sittings was at least in part as a result of my effort to squeeze the trial into an earlier sitting, to increase the likelihood that a final decision would be made prior to the commencement of the school year in September (related to the relocation issue).
d. The mother was successful making the new trial date peremptory on the father.

e. She was also successful obtaining a delay with respect to the sale of the matrimonial home. The father correctly notes that the mother didn't bring a cross-motion on this topic. She raised it as a condition of any possible adjournment of the trial. Either way, it was argued, and the mother's position prevailed.
f. The father was successful resisting the mother's request for a prohibition against the father bringing further motions.
g. None of those residual issues required extensive attention in the written materials, or much time to argue.

12 The mother's claim for full indemnity costs is based in part on her submission that she filed an offer to settle dated January 22, 2024 which triggers Rule 18.

a. Rule 18 sets out cost consequences where a party fails to accept an offer which the other party then meets or exceeds at trial. In that case, the successful party is entitled to costs until the offer was served, and "full recovery" of costs from that date.
b. Rule 18(4) sets out that an offer shall be signed personally by the party making it and also by the party's lawyer, if any. The technical requirements of Rule 18(14) must be met to attract the costs consequences that subrule. *Ajiboye v. Ajiboye* 2019 ONCJ 894 (OCJ); *Fearon v Ellsworth* 2020 ONCJ 583 (OCJ); *Mussa v. Imam* 2021 ONCJ 92 (OCJ); *Weber v. Weber* 2020 ONSC 6855 (SCJ); *M.A. v. M.E.*, 2021 ONCJ 619 (OCJ).
c. The party seeking elevated costs pursuant to Rule 18(14) has the onus of proving that the order obtained at the motion or trial is *as favourable as or more favourable* than the terms set out in the offer to settle (or the relevant section(s) in a severable offer). *Neilipovitz v. Neilipovitz* [2014] O.J. No. 3842 (SCJ); F.B. v. C.H. 2021 ONCJ 333 (OCJ); *Saroli v. Grette*, 2022 ONSC 3560 (SCJ); *Fenton v. Charles* 2023 ONCJ 74 (OCJ)
d. Offers need not be *exactly* the same as the order obtained. What is required is a general assessment of the overall comparability of the offer as contrasted with the order. *Wilson v. Kovalev*, 2016 ONSC 163 (SCJ); *Leclerc v. Grace* 2020 ONSC 6722 (SCJ); *Peladeau v Charlebois* 2020 ONSC 6596 (SCJ). The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. *Jackson v. Mayerle* 2016 ONSC 1556 (SCJ); *Chomos v. Hamilton* 2016 ONSC 6232 (SCJ).
e. When comparing an offer to the eventual result, the court may consider financial equivalency. For example, a payor's offer of lump sum spousal support may trigger Rule 18 consequences where the net benefit to the recipient would have exceeded the time limited periodic support which was ordered at trial. *Lennox v. Kaye*, 2022 ONSC 4061 (SCJ).
f. But "close" is not good enough to attract the costs consequences of Rule 18(14). The offer must be as good or more favourable than the order obtained. *Thomas v. Saunchez*, 2022 ONCJ 532 (OCJ); *Gurley v. Gurley*, 2013 ONCJ 482 (OCJ); *Grujicic and Grujicic v. Trovao* 2023 ONSC 1518 (SCJ).

g. The Rule 18 costs consequences are not automatic. Rather, Rule 18 creates a rebuttable presumption that does not displace judicial discretion to determine whether the cost consequences are appropriate. *Arthur v. Arthur*, 2019 ONSC 938 (SCJ); *Grujicic and Grujicic v. Trovao* 2023 ONSC 1518 (SCJ).
h. Even where a Rule 18(14) offer triggers "full recovery" costs, the court still has the discretion not to order full recovery costs. *C.A.M. v. D.M.*, 2003 CanLII 18880 (ON CA). *N.M.L. v. A.T.C.*, 2022 ONCJ 250 (OCJ). The successful party is still not entitled to a "blank cheque". The principles of reasonableness and proportionality still prevail in determining an amount, even where there is complete success. *Goryn v. Neisner*, 2015 ONCJ 318 (OCJ); *Jackson v. Mayerle* 2016 ONSC 1556 (SCJ); *Belair v. Bourgon*, 2019 ONSC 2170; *Slongo v. Slongo*, 2015 ONSC 3327(SCJ); *Tintinalli v. Tutolo*, 2022 ONSC 6276 (SCJ).

13 The mother's offer was brief and set out the following:

> I. The Trial shall be adjourned to the first available date after March 11, 2024 for a two-week trial on the following conditions:
>
> a. There will be no further motions;
> b. There will be no amendments to pleadings; and
> c. The sale of the matrimonial home will be postponed until after the trial decision is released.
>
> 2. If this Offer to Settle is accepted, the Applicant will pay the Respondent $950 in costs within 5 days.
>
> 3. This Offer to Settle is open for acceptance until the start of the Motion unless earlier withdrawn in writing.

14 For the following reasons, I find that the mother's offer does not trigger Rule 18(14) consequences:

a. The terms of the offer were not severable. This means that the offer must match or exceed the result on all issues, and the mother cannot establish that this was the result.
b. The offer to adjourn "to the first available date after March 11, 2024" does not specifically address the *actual* replacement date. It leaves it open to further debate as to what constitutes "the first available date", which is exactly what happened at the hearing.
c. The mother's "package deal" offer included the requirement that there be no further motions and no amendments to pleadings. As stated, she was not successful imposing these restrictions.
d. The mother was not successful in postponing the sale of the matrimonial home "until after the trial decision is released." My order stated that the property is to be listed for sale by June 3, 2024 which is *before* the trial would commence.

e. Finally, the built-in $950.00 costs component negates any possibility of a Rule 18(14) full-indemnity result. An offer to settle which includes as a non-severable term a predetermination of a costs obligation perverts the Rule 18(14) analysis – because costs can only be addressed *after* the substantive determination has been made. Rule 18(14) contemplates full indemnity for costs where *all* of the terms of an offer have been obtained or exceeded in the trial judgment. A party cannot claim credit for accurately predicting a costs determination which a judge has not yet made. An offer which includes costs obligations not yet determined by the court, cannot satisfy the strict requirements of this subsection. *Chomos v. Hamilton* 2016 ONSC 6232 (SCJ); *Henderson v. Winsa* 2019 ONSC 27 (SCJ); *Raaflaub v. Gondosch* 2020 ONSC 3113 (SCJ); *Neves v. Pinto* 2020 ONSC 5193 (SCJ); *F.K. v. A.K. and CAS of Hamilton* 2020 ONSC 4927 (SCJ); *Rogers v. Rogers* 2020 ONSC 2610 (SCJ); *Hall v. Hall* 2019 ONSC 4198 (SCJ); *Shelley v. Shelley* 2019 ONSC 608 (SCJ); *Van Boekel v. Van Boekel* 2020 ONSC 7586 (SCJ); *Abrahiumkhill v. Khaled*, 2022 ONCJ 324 (OCJ); *Vasilodimitrakis v. Homme* 2020 ONSC 4414 (Div Ct); *Hockis v. Smirnova*, 2023 ONSC 4025 (SCJ).

15 Rule 24(5) provides criteria for determining the reasonableness of a party's behaviour in a case. Rule 24(5)(a) requires that the court shall examine the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle. While the mother's offer did not match or exceed the ultimate result, *at least she made an offer*. The father did not.

16 As stated, a relatively small component of the mother's costs claim ($1,000.00) relates to costs thrown away preparing for a trial which on January 29, 2024 ended up being adjourned from March to June 2024.

17 The phrase "costs thrown away" refers to a party's costs for trial preparation which has been wasted and will have to be re-done, where the opposing party is responsible for adjournment of the trial or hearing. *Caldwell v Caldwell* (2015), 70 R.F.L. (7th) 397 (SCJ); *Pittiglio v. Pittiglio,* 2015 ONSC 3603 (SCJ); *Middleton v. Jaggee Transport Ltd.,* 2014 ONSC 3041 (SCJ); *Ierullo v. Ierullo* 2023 ONSC 74 (SCJ)

a. Often there is an element of "fault". For example, where one of the parties or their counsel neglect to call a witness or a last-minute amendment is required to correct an oversight, the court may grant an adjournment on conditions, including the payment of costs thrown away.
b. But fault is not a pre-requisite. Costs thrown away may still be awarded against the party requesting an adjournment, notwithstanding lack of fault of their part. Being responsible for an adjournment carries costs consequences, irrespective of whether the party can be faulted for the situation. *Goddard v. Day*, 2000 ABQB 799 (AB QB).
c. Costs thrown away are generally payable on a full recovery basis because the purpose is to indemnify a party for the wasted time for trial preparation arising from the adjournment. *Caldwell*; *Pittiglio*; *Milone v. Delorme,* 2010 ONSC 4162 (SCJ); *Ierullo v. Ierullo* 2023 ONSC 74 (SCJ).

d. The court must determine what costs have actually been wasted. The extent of the duplication of work or preparation will depend on many factors including the length of the delay, and the magnitude of the change or complication which resulted in the adjournment being granted. The issue is: how much of the preparation will have to be re-done? *Caldwell*, *Ierullo*; *Straume v. Battarbee Estate,* 2001 CarswellOnt 6225.
e. An award of costs thrown away can be revisited at the end of the trial to determine if further costs should be awarded: *Straume*; *Caldwell*; *Middleton*; *Ierullo*.

18 In *Caldwell v Caldwell* (2015), 70 R.F.L. (7th) 397 (SCJ) Quinlan J. summarized the law of "costs thrown away":

> [8] The phrase "costs thrown away" refers to a party's costs for trial preparation which have been wasted and will have to be re-done as a result of the adjournment of the trial: *Pittiglio v. Pittiglio,* 2015 ONSC 3603 at para. 7; *Middleton v. Jaggee Transport Ltd.,* 2014 ONSC 3041, at para. 5.
> [9] There are three general categories of cases in "costs thrown away" decisions:
> (i) the first category deals with fault where, for example, one of the parties or their counsel neglect to call a witness or a last-minute amendment is required. The court will grant the adjournment on conditions, including the payment of costs thrown away;
> (ii) the second category is where the trial is adjourned because of the court's scheduling problems. No costs are awarded in this circumstance as no party bears responsibility for the adjournment; and
> (iii) the third category deals with adjournments sought by one of the parties as a result of no fault on their part. Costs thrown away are still awarded against the party applying for the adjournment, notwithstanding lack of fault: *Goddard v. Day,* 2000 ABQB 799.
> [10] The court noted in *Goddard*, at para. 20:
> The third category . . . is really one of responsibility for the adjournment as opposed to fault or lack of fault . . . situations where someone is responsible for an adjournment, but cannot be faulted for that responsibility . . . [B]eing responsible for an adjournment . . . carries with it a costs consequence.
> [11] Costs thrown away are generally payable on a full recovery basis: *Pittiglio*, at para. 5; *Milone v. Delorme,* 2010 ONSC 4162, 2010 CarswellOnt 5535, at para. 12; *Straume v. Battarbee Estate,* 2001 CarswellOnt 6225, at paras. 2-3; *Middleton*, at para. 5. This is because the purpose of such an award of costs is to "indemnify a party for the wasted time for trial preparation arising from the adjournment": *Pittiglio*, at para. 6; *Legacy Leather International Inc. v. Ward,* 2007 CanLII 2357 (ONSC), at para. 9. Such an award is not to punish the party seeking the adjournment, but to indemnify the other party for the wasted time for trial preparation arising from the adjournment: *Incandescent Revolution Manufacturing Co. v. Gerling Global General Insurance Co.,* 1989 CanLII 3385

> (AB QB), at para. 12; *Pittiglio*, at para. 6, citing *Kalkanis v. Kalkanis*, 2014 ONSC 205, at para. 3.
> [12] The court must determine what costs have actually been wasted. This is not an easy task: some witnesses will require little further preparation while some will require much: *Straume*, at para. 4. It has been described as an "intuitive", rather than a scientific, process: *Pittiglio*, at para. 17.
> [13] An award of costs thrown away can be revisited at the end of the trial to determine if further costs should be awarded: *Straume*, at para. 37; *Middleton*, at para. 23; *Laudon v. Roberts & Sullivan*, 2007 CanLII 10906 (On SC), at para. 20.

19 Each entry on the Bill of Costs submitted by the mother's counsel refers to work in relation to the "Trial Adjournment Motion". No particulars have been provided with respect to the calculation of the "$1,000.00 costs thrown away" being claimed. The mother's written costs submissions do not address the fundamental question*: "How much of work done was wasted because it will have to be re-done?"*

20 I am not prepared to order costs thrown away. This is without prejudice to the mother's ability to raise the issue in any costs determination at trial.

21 I have also considered the financial circumstances of the parties, and the importance and complexity of the issues.

22 On balance, I find that this was a situation of divided success. There shall be no order as to costs.

Justice Alex Pazaratz

Date: March 25, 2024