

CITATION: Ross v. Holmes, 2022 ONSC 5601
COURT FILE NO.: FC-15-2492
DATE: 2022/10/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Darryl Ross, Applicant

AND:

Cynthia Holmes, Respondent

BEFORE: Somji J.

COUNSEL: Allison Lendor, for the Applicant

Alison Boyce, for the Respondent

HEARD: In Writing

COSTS ENDORSEMENT

[1] The Applicant father seeks costs in the amount of \$11,550 following a motion brought by the Respondent mother on parenting, child support, and disclosure. The father argues he was the successful party on the primary issue of his parenting time, and thereby presumptively entitled to costs. The father incurred costs of \$11,251 for the March 31, 2022, motion hearing and \$8,000 for the December 20, 2021, hearing.

[2] The Respondent mother argues that there was divided success and each party should bear their own costs, or in the alternative, that she should obtain costs for the father's unreasonable conduct. The mother was successful on the issues of decision-making responsibility, arrears and ongoing child support, and disclosure. Furthermore, it would be unfair to award the father costs for the December 20, 2021, proceeding given it was adjourned upon his request. The mother incurred costs of \$5,982 for the motion hearing of March 2022, and \$3,661 for the December 2021 proceeding.

[3] The issue to be decided is whether the father is successful party and presumptively entitled to a costs award. If so, what constitutes a reasonable costs award?

[4] All references to rules are the *Family Law Rules*, O. Reg. 114/99 unless otherwise stated.

Issue 1: Is the mother the successful party and is she entitled to a costs award?

[5] 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, as per r. 2(2) that cases are dealt with justly: *Mattina*, at para. 10.

[6] The court has the discretion to determine to whom costs should be awarded and in what amount: Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[7] Rule 24 sets out the legal framework for cost orders in family cases: *Mattina v. Mattina*, 2018 ONCA 867, at para 9.

[8] The starting point is that the successful party is presumptively entitled to costs: r. 24(1). However, in awarding costs judges must also consider the following:

- written offers to settle: rr. 18(14) and 24(12)(a)(iii);
- any unreasonable conduct on the part of a successful party: r. 24(4); and
- if a party has acted in bad faith: r. 24(8).

Success

[9] Courts have granted costs to a party that was substantially successful and this does not necessarily require success on all issues: *Zhang v Guao*, 2019 ONSC 5767; *Blackwood v Nichols*, 2022 ONCJ 357 at para 9. *Boland v Boland* 2012 ONCJ 239; see also *Baryla v Baryla*, 2019 BCCA 192.

[10] However, I find this case is one of divided success. As stated in my decision, the father is the successful party on the issue of parenting time and the mother is successful party on the issue of arrears and ongoing child support: *Ross v Holmes*, 2022 ONSC 3769 at para 121. Furthermore, there was divided success on the remaining issues, the mother being successful on s. 7 expenses, disclosure, and whether OCL ought to be appointed with the father being successful on maintaining joint decision-making and obtaining a police enforcement clause.

[11] The father's parenting was certainly the predominant issue in the hearing and the issue of most importance for the father. However, the father's unwillingness to abide by court orders to produce medical and financial disclosure was a significant issue for the mother because these records have played and continue to play a key role in determining her position on parenting given her concerns for the children's safety. While I found the father's failure to provide full medical disclosure was not sufficient grounds to limit his parenting time and grant the mother sole discretion to determine his parenting, and hence, his substantial success on this issue, I find the father's conduct in relation to disclosure is an issue that should be given significant weight in assessing the father's entitlement to any costs in this case.

[12] The mother has been requesting disclosure since 2017 to assist her in better understanding the father's medical and financial circumstances. Orders were made in 2017, 2018, and 2021, requiring the father's production of certain records. In my decision, I ordered the father to seek records from the relevant third parties by July 10, 2022, and provide the mother the requested disclosure by July 30, 2022, or in the alternative, an accounting of the status of these requests from the third parties so that alas, progress can be made on this issue. Counsel for the mother advises no disclosure was produced as of July 30, 2022, and no evidence has been provided as to what steps were taken to obtain the disclosure requested.

[13] Moreover, the mother was surprised to learn in the cost submissions that the father had received a severance from his employer which had not been previously disclosed and could have informed the child support issues. I find the father's conduct with respect to disclosure, while not determinative of his parenting time, has nonetheless been unreasonable in the context of this litigation: 24(4) *FLR*.

[14] In addition, the December 20, 2021, motion hearing was adjourned because the father retained counsel at the last minute, did not inform opposing counsel of his adjournment request until December 10, 2021, and only filed responding materials on December 15, 2021, after the filing deadline. I agree with counsel for the mother that these proceedings resulted in costs thrown away for the mother.

[15] Justice Summers also ordered the father to provide the mother with the medical and financial disclosure requested or an accounting of the third-party disclosure requests. The father

failed to do so by the March 31, 2022, motion hearing date or to meaningfully address his position on the outstanding disclosure requests in his arguments: *Ross v Holmes* at para 96.

[16] Therefore, notwithstanding the father's success on the issue of his parenting time, I find that the father's delay in retaining counsel, filing an answer, and providing disclosure requested since 2017, much of which remains outstanding to this date, constitutes inappropriate behaviour on the part of a litigant that should not be sanctioned by a costs award: *Mattina* at para 10.

[17] In assessing entitlement, the court may also consider any written offers to settle. The father did provide a written offer to settle on March 30, 2022, which he argues demonstrates his effort to resolve some of the issues. The father did obtain an order that is as favourable in that the court did not accede to the mother's request for parenting time at her sole discretion and ordered the father to have supervised parenting time. However, the amount of parenting time ordered was less than what the father sought, and moreover, it requires the father to attend for reunification therapy with the children before a final graduated parenting schedule can be established.

[18] There are also several other problems with the offer to settle. First, the offer did not comply with the requirement of Rule 18(14) in that it was not made a full 24 hours before the motion date. Second, the offer was not severable so that the mother could accept just some parts. Third, the offer is silent on two other principal issues for the mother: child support and disclosure which should be accorded issues of considerable weight in these proceedings.

[19] The father maintains that child support was resolved and did not have to be litigated because he has always agreed to pay child support. However, The father fails to recognize, however, that the challenge for the mother has not been if child support should be paid, but how much. This is because the father has not been forthright about his financial income, including his disability status, making it difficult to discern the correct amount of arrears and ongoing support to be paid: *Ross v Holmes* at para 102. If the issue was as straight forward as the father suggests, and he was amenable to paying an amount in accordance with his income, it was incumbent on him to set out precisely what his income has been, including any disability or severance from his employer, and to provide the supporting documentation. His offer to settle is completely silent on the issue of child support.

[20] Moreover, I disagree with counsel's suggestion that this issue was "resolved" because it was discussed following the December 2021 hearing and that the mother had failed to follow up on it. At the time of the motion hearing of March 2022, the parties remained in conflict about whether arrears owed up to June 24, 2018, were limited to the fixed amount of \$10,800 ordered by Justice Kershman upon consent of the parties or whether the mother was entitled to seek additional arrears once the father's actual income was determined. These arrears were separate and apart from the \$10,800 of child support arrears that I ordered the father to pay for the period July 1, 2018, to July 1, 2022. In short, the issue of child support arrears was far from resolved.

[21] For all these reasons, I find the father is not entitled to costs.

[22] As noted in my decision, the mother's conduct in withholding parenting time from the father was also unreasonable. However, the father did not bring a motion to enforce the mother's breach of the existing court order, and as stated in my decision, the mother's safety concerns were not entirely without merit particularly upon examination of the affidavits of Kenneth Fields and Todd Ross. Nonetheless, I find this not a case where the mother's conduct should be sanctioned by way a costs award to her.

[23] Upon consideration of the divided success, the weight attributed to each of the issues, the conduct of the parties, and the offer to settle, I find that each party shall bear their own costs for

the motion which includes preparation and attendance of both proceedings on December 20, 2021, and March 31, 2022, as well as their preparation for the written costs submissions.

N Somji

Somji J.

Date: October 3, 2022

CITATION: Ross v. Holmes, 2022 ONSC 5601
COURT FILE NO.: FC-15-2492
DATE: 2022/10/03

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Darryl Ross, Applicant

AND:

Cynthia Holmes, Respondent

BEFORE: Somji J.

COUNSEL: Allison Lendor, for the Applicant

Alison Boyce, for the Respondent

COSTS ENDORSEMENT

Somji J.

Released: October 3, 2022