

CITATION: Leybourne v. Powell, 2018 ONSC 6274
COURT FILE NO.: 112/17 (Guelph)
DATE: 2018 10 22

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

AARON CARL LEYBOURNE

Applicant

- and -

SHANNON ELIZABETH POWELL

Respondent

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) *Erika MacLeod*, for the Applicant
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) *Ian James Howard Brown*, for the
) Respondent
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) **HEARD:** January 16, 2018,
) at Guelph, Ontario

2018 ONSC 6274 (CanLI)

Price J.

Costs Endorsement

NATURE OF MOTION

[1] The parties have been unable to resolve the issue of responsibility for the costs of Ms. Powell's motion seeking to restrict Mr. Leybourne's access to their daughter, Ruby, who was then almost four years old, and for Mr. Leybourne's cross-motion to increase his access to Ruby and for financial disclosure, both of which motions were argued on January 16, 2018, and resulted in an Order on that date. These reasons address the costs of those motions.

BACKGROUND FACTS

[2] The parties were married for three years and have one child together, Ruby Leybourne, who was the subject of Ms. Powell's motion. Ms. Powell vacated the matrimonial home with Ruby and restricted Mr. Leybourne's access to Ruby, alleging that he was an alcoholic.

[3] The OCL investigated, the Children's Aid Society was involved, and Mr. Leybourne's doctor made recommendations, but the parties were unable to resolve the issue of when Mr. Leybourne should exercise access, whether it should include overnight access, and whether his access had to be supervised.

Motions to restrict access and to increase access

[4] Ms. Powell made an emergency motion to restrict Mr. Leybourne's access to Ruby. She wanted to maintain the access schedule that she had imposed after she separated from Mr. Leybourne, and for his access to be supervised.

[5] Mr. Leybourne obtained an adjournment and on January 10, 2018, made a cross-motion for increased access to Ruby. He wanted to increase his access to overnights on Monday, Wednesdays, Fridays, and Sundays each week, being 8 out of 14 nights.

Mr. Leybourne's motion for disclosure

[1] Mr. Leybourne's motion also requested an Order for disclosure, some of which he had requested in a Request for Information that he had served on Ms. Powell eight days earlier, on January 2, 2018.

[2] Ms. Powell did not respond to the Request until January 15, 2017, when she served a Certificate of Financial Disclosure with which she produced income

tax and employment documents that Mr. Leybourne had requested in his motion, which he had not included in his Request for Information.

[3] Ms. Powell signed a consent at court on January 16, 2018, to provide the additional disclosure that Mr. Leybourne had requested within 30 days. That consent formed part of the Order. She produced the required documentation a month later, on February 15, 2018.

Outcome of the motions

[4] The Order made on January 16, 2018, granted Mr. Leybourne access for two afternoons per week and one overnight. The Order restricts Mr. Leybourne's access on the weekend to his home and requires him to have a family member present unless Ms. Powell requests, and Mr. Leybourne provides, a breathalyser, in which case "family supervision" is dispensed with for that weekend.

[5] At the hearing on January 16, 2018, Ms. Powell consented to an Order requiring her to disclose the remaining documents requested by Mr. Leybourne within 30 days.

ISSUES

[6] The Court must determine which of the parties, if either, should be required to pay the other's costs of the motions, and in what amount.

PARTIES' POSITIONS

[7] Mr. Leybourne submits that he was successful in the motions and is presumptively entitled to an Order requiring Ms. Powell to pay his costs. He says that he achieved an outcome that was more favourable than either party's Offers to Settle. His lawyer has been practicing law for three years and he requests

costs on a full recovery basis in the amount of \$8,266.40 inclusive of disbursements and HST.

[8] Ms. Powell submits that Mr. Leybourne was unsuccessful in obtaining as much access as he sought in his motion and that she was successful in obtaining an Order for supervision of Mr. Leybourne's access, unless he submitted to a Breathalyzer test. Her lawyer was called to the Bar in 2001, and based on his hourly rate of \$350.00 per hour, she requests costs in the amount of \$9,845.13 inclusive of H.S.T.

ANALYSIS AND EVIDENCE

[9] A successful party is presumed to be entitled to his or her costs, pursuant to Rule 24(1) of the *Family Law Rules*. The preferable approach in family law cases is to allow costs on a full recovery basis, provided the successful party acted reasonably and the costs claimed are proportional to the issues and results and were within the range that the opposing party should have expected if unsuccessful in the motions.¹

[10] Costs Orders are designed to achieve three principal purposes, (a) to indemnify successful litigants; (b) to sanction unreasonable conduct of the litigation; and (c) to encourage settlement.²³

Offers to Settle

[11] Mr. Leybourne served a severable offer to settle on January 10, 2018. Because of the full recovery provisions of Rule 18(14), severable offers enable

¹ *Family Law Rules*, O Reg. 114/99, Rule 224(1); *Sims-Howarth v. Bilcliffe*, *Sims-Howarth v. Bilcliffe*, 2000 ONSC 22584 (CanLII), para. 11; *Biant v. Sagoo* 2001 ONSC 28137 (CanLII), para. 1

² *Paranavitana v. Nanayakkara*, 2010 ONSC 2257 (CanLII)

³ *Serra v. Serra* 2009 ONCA 395 (CanLII); *Docherty v. Catherwood*, 2016 ONSC 2140 (CanLII); *Chan Fong et al v. Chan et al*, 1999 ONCA 205246 (CanLII)

the court to award full recovery costs for some or all of the costs if the party is successful on a severable term of an offer.

[12] Mr. Leybourne achieved an outcome more favourable than the Offer he served on January 10, 2018. His Offer would have given him current unsupervised access with no overnights. The Order gave him increased unsupervised overnight access, provided he passed a Breathalyzer test. His Offer required disclosure with a deadline for acceptance without costs. Disclosure was ordered on consent after the deadline for acceptance without costs. The Offer did not expire and was not withdrawn or accepted. Mr. Leybourne is therefore presumptively entitled to his costs to the date of the Offer on a partial indemnity scale and on a full recovery basis from the date of the Offer onward.

[13] Ms. Powell made two Offers to Settle, the first in November 2017 and the second on January 11, 2018. The outcome of the motions was not as favourable to Ms. Powell as her Offers, the terms of which were not severable. The first Offer provided for overnight access every Tuesday and graduated weekend access beginning November 2017. After three consecutive Fridays overnight access would have increased to alternate weekends, and a Thursday overnight would have been added. The requirement that a family member be present would not terminate until then. The second Offer did not address the schedule. The Offers would not have given Mr. Leybourne unsupervised overnight access. The Order gave him increased unsupervised overnight access, provided he passed a Breathalyzer test.

[14] It is not disputed that the access issues were important to both parties. The issues were not complex, but the results would have an impact on the parties' relationships with Ruby, which is not readily quantifiable in financial

terms. There were two court appearances as a result of the fact that Ms. Powell brought her motion on an emergency basis and Mr. Leybourne required an adjournment to respond to it.

[15] Ms. Powell's conduct was unreasonable insofar as she brought her motion on an urgent basis and refused to consent to an adjournment. The adjournment was granted and the costs were reserved to the hearing of the motion.

[16] Ms. Powell made unsubstantiated allegations about Mr. Leybourne's ability to care for Ruby in order to gain a strategic advantage in the proceeding. Ms. Leybourne's conduct was reasonable. Ms. Powell complains that Mr. Leybourne made a motion for disclosure only eight days after serving a Request for Information. The motion included documents whose production was required by s. 21 of the *Federal Child Support Guidelines* ("FCSG") and additional documents. Rule 13 permits an Order for disclosure not specifically provided for in s. 21 of the *FCSG* where a Request is made that is not complied with within seven days. Mr. Leybourne cannot be faulted for moving after the seven day period had passed. Ms. Powell could have avoided the motion by producing the documents required by s. 21 *FCSG* and Rule 13 and by responding promptly to Mr. Leybourne's Request for Information, even if her response had offered a timetable for production of the documents requested.

[17] A litigant whose conduct was reasonable and who is successful in a proceeding should not be required to bear the costs of having his rights tested.⁴

[18] Mr. Leybourne's lawyer's rates and time spent on the motions were reasonable. His counsel has practiced family law for three years and as a lawyer who has practiced for less than 10 years, was entitled to claim costs, on a partial

⁴ *Serra v Serra* 2009 ONCA 395 (CanLII)

indemnity scale, of up to a maximum of \$225.00 in 2005, according to the *Information for the Profession Bulletin* issued that year by the Costs Sub-Committee of the Rules Committee (the "*Costs Bulletin*"), which can be found immediately before Rule 57 in both the Carthy and the Watson & McGowan editions of the *Rules*, which sets out maximum partial indemnity hourly rates for counsel of various levels of experience. That amount, adjusted for inflation, is currently \$277.51. She claims \$250.00 on a full recovery basis, which is below the maximum of \$277.51 on a partial indemnity scale.

[19] Mr. Leybourne's counsel delegated tasks to her staff, where possible, possible to minimize costs. She was well prepared for the motion. Ms. Powell has not asserted that an Order for costs would impose undue hardship on her. The costs that Mr. Leybourne has requested are within the range of what Ms. Powell should have expected if unsuccessful. Her own lawyer claimed higher costs, in the amount of \$9,845.133 inclusive of HST. Although Mr. Brown is more senior and commands a higher hourly rate, Ms. McLeod, who charges a lower rate, achieved a successful outcome at a lower overall cost. Her client is entitled to the costs in the amount he claimed.

CONCLUSION AND ORDER

[20] For the foregoing reasons, it is ordered that:

1. Ms. Powell shall pay Mr. Leybourne's costs in the amount of \$8,266.40, inclusive of HST and disbursements.
2. Ms. Powell shall pay pre-judgment interest on the above costs at the rate prescribed by the Courts of Justice Act from January 16, 2018, to the date of this Order, and post-judgment interest thereafter.

Price J.

Released: October 22, 2018

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