CITATION: Edwards v. Kendall, 2020 ONSC 0445
COURT FILE NO.: 193-19
DATE: 2020 01 23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Paul Edwards, Applicant

- and -

Hilary Jacqueline Kendall, Respondent

BEFORE: Lemon J.

COUNSEL: Erika MacLeod, Counsel for the Applicant

Taryn Simionati, Counsel for the Respondent.

HEARD: In Writing

COSTS ENDORSEMENT

The Issue

[1] Ms. Kendall sought an order for interim custody of the couple's child and an order that Mr. Edwards' access be supervised until he completes an anger management class. She also requested an order that he not come within 500 meters of her address, except to facilitate access exchanges. Finally, she asked to amend her Answer.

[2] In response, Mr. Edwards sought to strike two exhibits from the materials. He opposed Ms. Kendall's request for custody and supervised access. Instead, he

asked that access transitions take place at a local Tim Hortons and that all communications be made by way of Our Family Wizard. He requested that neither party video or audio record the other without their express written consent. Finally, he wanted to renew and gradually increase his access to the child.

[3] In my endorsement of December 18, 2019, I granted all of Mr. Edwards' requests and dismissed Ms. Kendall's. Mr. Edwards seeks costs of $26,119.95 and Ms. Kendall asks that there be no costs order.

Authorities

[4] In *Mattina v. Mattina,* 2018 ONCA 867, our Court of Appeal recently said:

> [9] Section 131(1) of the *Courts of Justice Act,* provides that cost orders are in the discretion of the court. Rule 24 of the *Family Law Rules* sets out a framework for awarding costs for family law cases in the Family Court of the Superior Court of Justice, in the Superior Court of Justice and in the Ontario Court of Justice. Although the *Family Law Rules* do not expressly govern costs awards in the Court of Appeal, they have been used to guide this court's analysis on costs in family law disputes.
>
> [10] This court has held that modern family cost rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants; (2) to encourage settlement, and; (3) to discourage and sanction inappropriate behaviour by litigants. Rule 2(2) adds a fourth fundamental purpose: to ensure that cases are dealt with justly, and Rule 24(12), which sets out factors relevant to setting the amount of costs, specifically emphasizes "reasonableness and proportionality" in any costs award.
>
> [11] The *Family Law Rules* are a marked departure from some aspects of the *Rules of Civil Procedure*. As such, case law pertaining to costs

decided under the *Rules of Civil Procedure* should be approached with some caution.

[12] Rule 24(1) creates a presumption of costs in favour of the successful party of a motion, case, or appeal and the presumption that a successful party is entitled to costs applies equally to custody and access cases.

[13] Consideration of success is the starting point in determining costs. This presumption does not, however, require that the successful party always be entitled to costs. An award of costs is subject to: the factors listed in r. 24(12), r. 24(4) pertaining to unreasonable conduct of a successful party, r. 24(8) pertaining to bad faith, r. 18(14) pertaining to offers to settle, and the reasonableness of the costs sought by the successful party.

[14] Rule 24(12) sets out a list of factors the court shall consider in determining an appropriate amount of costs:

(a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:

i. each party's behaviour,

ii. the time spent by each party,

iii. any written offers to settle, including offers that do not meet the requirements of rule 18,

iv. any legal fees, including the number of lawyers and their rates,

v. any expert witness fees, including the number of experts and their rates,

vi. any other expenses properly paid or payable; and

(b) any other relevant matter.

[15] The *Family Law Rules* only expressly contemplate full recovery costs in specific circumstances, e.g. where a party has behaved unreasonably, in bad faith or has beat an offer to settle under r. 18(14).

[16] Rule 24(4) addresses the situation in which a successful party has behaved unreasonably:

> Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs.

[17] Rule 24(5) provides guidance on how to evaluate reasonableness:

> In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,
>
> (a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;
>
> (b) the reasonableness of any offer the party made; and
>
> (c) any offer the party withdrew or failed to accept.

[18] Rule 24(8) discusses the cost consequences for a party who has acted in bad faith:

> 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. [Citations removed]

[5] Just because an award of costs may be on a full indemnity basis does not mean that the successful party is entitled to whatever costs were incurred. The court assessing costs is still required to consider all of the factors in such an award. *United Soils Management Ltd. V. Mohammed*, 2019 ONCA 128.

[6] Costs awards, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties".

(See: *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (C.A.), 71 O.R. (3d) 291, at para. 24).

Analysis

[7] There seems to be a trend of late for counsel to make costs submissions without any basis in fact. Ms. Kendall submits that her materials were "concise and to the point." I repeat from my endorsement:

> That access exchange resulted in Ms. Kendall's motion being filed November 22, 2019. That motion included a 22-page supporting affidavit, made up of 63 paragraphs and attached exhibits A through T. It was meant to justify her refusal for further access to Mr. Edwards.
>
> Mr. Edwards provided his motion and responding affidavit November 25, 2019. It included 18 pages of single-spaced size-10 font with 156 paragraphs and exhibits A-Q.
>
> On November 27, 2019, Ms. Kendall filed her response of 22 pages, 99 paragraphs and exhibits A-U.
>
> On November 29, 2019, Mr. Edwards filed his reply affidavit of 15 pages, 100 paragraphs and only exhibits A-C.

Almost all of the allegations and denials in the affidavit material pre-date the November 18, 2019, agreement to mediate the increased access. The allegations and denials go back to 2017. Much of the material is made up of irrelevancies and redundancies.

[8] Ms. Kendall's materials generated a need for a response. Once she filed her materials, nothing could be "concise and to the point."

[9] Ms. Kendall objects to one of the entries in Mr. Edward's Bill of Costs. "For example, she billed 1 hour on November 27, 2019 to enter timelines in the calendar." However, the entry sets out that the time was spent:

> To entered timelines for motion in calendar, to reviewed motion materials, discussed with EM. To reviewed emails from client, EM, to email to client, to saved email to client file.

[10] While I agree that the entry seems to be little work for a long time, it is entirely different than as described by Ms. Kendall.

[11] Ms. Kendall submits that "the Applicant kicked the Respondent's cat." That determination was not made in her favour. To make costs submissions contrary to the ruling is not a productive effort.

[12] Ms. Kendall's motion was brought for a date upon which the motion was then adjourned. She seeks costs for that adjournment. She ignores that she was unsuccessful in her motion. The adjournment costs were part of her unsuccessful motion. There is no reason for Mr. Edwards to pay for that attendance.

[13] As can be seen by the authorities above, the successful party is presumed to be entitled to costs. To submit that there should be no costs is to ignore the obvious.

[14] Mr. Edwards made a severable offer to settle. No part of it was accepted by Ms. Kendall. The offer was matched by my order. Ms. Kendall made no offers to

resolve any of the issues. Pursuant to r. 18(14), Mr. Edwards is entitled to costs, including full recovery costs, unless the court orders otherwise. There is nothing in Ms. Kendall's submissions that deal with this reality. When one party beats their offer and the other makes no offer, the costs consequences will likely be significant.

[15] This was a very important issue for both parties and counsel needed to prepare accordingly. The materials were thick, and factums were prepared. Both attendances in court were on an emergency basis. While some of the issues were standard family law fare, the issue of striking video evidence obtained from a door camera would require counsel to do research beyond the usual.

[16] Given the extent of the materials, I do not find the time spent by Mr. Edwards' counsel to be unreasonable. It is large but so too was the record as commenced by Ms. Kendall. Having said that, however, Mr. Edwards' materials did not fail to provide a detailed response to each of Ms. Kendall's complaints whether relevant or not. Some of that responding material was unnecessary.

[17] At the time of the motion, Ms. Kendall provided her Bill of Costs. If successful, she was seeking costs of $18,289.56. Given that, she would know the range of costs to be paid if she were unsuccessful.

[18] Mr. Edwards submits that I should find bad faith on the part of Ms. Kendall. I made no such findings on these contradictory materials for the motion; I cannot do

so with respect to costs. However, this was "high conflict, scorched earth" litigation. That conduct comes with a high cost.

[19] Ms. Kendall submits that she is of limited means and that should affect the result with respect to costs. While Mr. Edwards is employed and Ms. Kendall is on maternity benefits, neither could afford this motion.

[20] Taking all of those factors into consideration, I order Ms. Kendall to pay costs fixed in the amount of $25,000.00 payable at the end of trial or other resolution of this proceeding.

Justice G.D. Lemon

Date: January 23, 2020

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BETWEEN:

Paul Edwards

Applicant

– and –

Hilary Jacqueline Kendall

Respondent

COSTS ENDORSEMENT

Lemon, J

Released: January 23, 2020