D.B. v. R.S., 2016 ONCJ 11 (CanLII)

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ONTARIO COURT OF JUSTICE

CITATION: *D.B. v. R.S.*, 2016 ONCJ 11
DATE: 2016·January 4
COURT FILE No.: Toronto DFO 12 10753 00

B E T W E E N :

D. B.
Applicant

— AND —

R. S.
Respondent

Before Justice P. J. Jones
Ruling on Costs released on January 4, 2016

Mr. William Hutcheson ..... counsel for the applicant

R. S. ..... on his own behalf

JONES, P. J.:

[1] On October 20, 2015, I released my decision after trial granting supervised access to the Respondent, and detailing various incidents of custody and access, including the right of the Applicant to apply for the child's passport and other government issued documentation without the Respondent's written permission. I also gave her permission to travel with the child outside the jurisdiction for periods up to one month without the Respondent's written permission. In addition, I ordered that the Respondent not be within one hundred metres of the mother's home, her place of employment, or the child's school. I specified that all communications should be limited to a communication program such as Family Wizard, and shall be limited to discussing the child and be used to rearrange access if necessary. I also limited the father's ability to bring a motion to change without first obtaining leave of the court, such motion for leave to be on notice to the Applicant.

[2] I sought and received submissions with respect to costs. This is my ruling with respect to costs.

[3] I have reviewed the submissions of the parties. The Respondent's submissions were not particularly helpful as he attempted, through his submissions, to reargue the issue of access, and actually submitted over 200 pages when the exhibits he attached to his submissions were added to his five page argument. (When I sought submission as to costs I limited each party to a five page submission.) Included in his exhibits were support letters from friends and coworkers, correspondence between counsel, his former lawyer's bill of costs, newspaper articles relating to domestic violence and the Motherisk inquiry, as well as a number of access notes from the supervised access centre.

[4] The Respondent was self- represented. What I distilled from his submissions relevant to the issue of costs were the following points.

1. That all issues except access were settled before trial and that only the issue of access was actually litigated. He indicated that given the position taken by the mother he had no choice but to put his position before the court.

2. He submitted that he had only a limited ability to pay given his legal costs previously incurred and the child and spousal support he had paid and the child support he was continuing to pay. (At trial, the Applicant withdrew her claim for further spousal support.)

3. He asked the court to consider the high cost of exercising supervised access in Kingston when assessing costs.

4. He claimed that most of the costs claimed were unnecessary and had arisen because of the incompetence and greed of mother's

counsel. He called the counsel a "prolific liar" who "lacked integrity" and who "was wasting the court time for his own selfish gain".

[5] I have reviewed the submission filed and the bill of costs prepared by the Applicant who was successful at the trial I note that the Applicant seeks an order for costs of $47,333.56 for the entire case (the total costs for the entire case incurred by the Applicant was $68,711 inclusive of disbursements and H.S.T).

[6] In determining the amount of costs to be awarded in this matter, I have considered the provisions of rule 24(1), 24(8), 2410), 24(11) and 24(12) which read as follows:

> 24(1) **Successful Party Presumed Entitled to Costs**—There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.
>
> 24(8) **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.
>
> 24(10) **Costs to be Decided at Each Step**—Promptly after each step in the case the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.
>
> 24(11) **Factors in Costs**—A person setting the amount of costs shall consider:
>
> a. The importance, complexity or difficulty of the issues;
>
> b. The reasonableness or unreasonableness of each party's behaviour in the case;
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> c. The lawyer's rates;
>
> d. The time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing argument, and preparation and signature of the order;
>
> e. Expenses properly paid or payable; and
>
> f. Any other relevant matter.
>
> 24(12) **Payment of Expenses**—The court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying on the case, including a lawyer's fees.

[7] I am satisfied that the Applicant was the successful party at trial, and I see no reason to depart from the rule that a successful party is presumptively entitled to her costs. I found no basis whatsoever to support the Respondent's contention that the Applicant's lawyer was incompetent, greedy, or a liar. I have reviewed the Offers to Settle served by the Applicant on the Respondent (four in total) and I am

satisfied that the order made after trial was more advantageous to the Applicant than what she had offered prior to the trial in hopes of obtaining a settlement. As such, I am satisfied that Rule 18(14) has been satisfied, and that the Applicant is entitled to costs on a full recovery basis.

[8] As well, but on other grounds, I find that the Applicant is entitled to her costs on a full recovery basis as I find that the Respondent has acted in bad faith given his persistent attempts to isolate the Applicant from her lawyer. I documented in my judgment the Respondent's bad faith attempts to have Mr. Hutcheson removed from the record by complaining to the judge, to legal aid, and to the Law Society. His actions in doing so went well beyond bad judgment and veered into the realm of bad faith. It was clear to me that he believed that if the Applicant could be stripped of her lawyer, he would be able to get his own way. This attempt to manipulate the system is serious and will not be tolerated and should be sanctioned in costs.

[9] C. Perkins, J. in S (C) v. S.(M.)2007 CanLII 20279 (ON SC), 2007 CarswellOnt 3485 considered the meaning of "bad faith" in Rule 24(8) and wrote in paras 16 and 21 the following which I adopt,

> 16. ...."Bad faith" has been explained as "not simply bad judgment or negligence but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity...(it contemplates a state of mind affirmatively operating with furtive design or ill will" See Biddle v. Biddle,2005 CanLII 7660 (ON SC), [2005] O.J. No. 1056 (Ont. S.C.J.) at par. [14]. ....The essence of bad faith is the representation that one's actions are directed toward a particular goal while one's secret, actual goal is something else, something that is harmful to other persons affected or at least something they would not willingly have supported or tolerated if they had known. However, not all bad faith involves an intent to deceive. It is rare but not uncommon in family law cases, for bad faith to be overt---an action carried out with an intent to inflict harm on another party or a person affected by the case without an attempt to conceal the intent.....
>
> 21....There are, however, some aspects of the father's behaviour in this case.....that do fall within "bad faith" as intended by the rule. ....He made complaints against lawyers and other professionals, when he was unhappy with the way they performed their duties, not merely to report what he believed to be negligence or misconduct, but also as his form of punishment and vengeance....

[10] Having decided that it is appropriate to fix costs at a full recovery basis, I am not satisfied that I should fix costs of the various stages before trial for which I was not the judge. The issue of costs is in the

discretion of the judge hearing the step. See Biant v. Sagoo 2001 CanLII 28137 (ON SC), [2001] O.J. No. 3693. Furthermore, to do so would be to ignore Rule 24(10), which provides that costs should be promptly fixed in a summary manner at each stage of the proceeding by the judicial officer dealing with that step.

[11] In this case, the step I dealt with was the trial, and I am prepared to fix costs as it relates to the preparation for the trial, the trial itself and the preparation of cost submissions. In addition, I am prepared to deal with the costs relating to the preparation of the pleading and the affidavit material presented at trial as it makes sense that these costs would reasonably be fixed at the point of trial.

[12] According to the bill of costs submitted on this file, the Applicant, at various times retained her lawyer privately and then through the Legal Aid plan when she became impecunious. I accept that I am not limited to fixing costs at a legal aid rate and am able to fix costs according to her counsel's private rate if I feel that such rate is reasonable in the circumstances. See Ramcharitar v. Ramcharitar, Jagam and Legal Aid Ontario (2002), 2002 CanLII 53246 (ON SC), 62 O.R. (3d) 107, and Holt v. Anderson, 2005 CanLII 44179 (ON SCDC), 2005 CanLII 44179 (Ont. Div. Ct.) A rate of $250 per hour for a lawyer with 7 years' experience is, in my opinion, very reasonable.

[13] In fixing costs, I have considered the bill of costs and have not simply approached this task as a mechanical exercise where I have taken the time expended and multiplied by a set hourly rate. Rather, I have adopted the reasoning laid out in the Court of Appeal decision of Boucher v. Public Accountants Council (Ontario), (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 and have set an amount that I feel is fair and reasonable for the unsuccessful party to pay given the circumstances of this case.

[14] In fixing costs, I have considered the Respondent's submission that he has only a limited ability to pay costs. This submission must be put into context. I note he is a high school teacher and home owner who previously had been represented by counsel at considerable expense who told the court that he no longer had the ability to pay for his own lawyer and who unwillingly attended at trial unrepresented. His ability to pay is a factor I have considered. This, however, is not the only factor in fixing what is "fair and reasonable". I have considered the three factors identified by A. Pazaratz J. in Izyuk v. Bilousov, 2011 ONSC 7476 (CanLII), 2011 CarswellOnt 14392, in paragraph 54, namely,

1. To partially indemnify successful litigants for the cost of litigation,

2. To encourage settlement, and
3. To discourage and sanction inappropriate behaviour by litigants.

[15] All of these factors are apposite in this case. In all the circumstances I have fixed costs at $30,000 inclusive of disbursements and H.S.T. In doing so, I have allowed costs relating to the preparation of the pleadings, the affidavit material presented at trial, preparation for trial and the attendance at the two day trial, preparation of the bill of costs and the factum. I have been more generous in the allocation of costs relating to the preparation for the two-day trial than might otherwise have been the case as the judge at the trial management conference required the parties to prepare affidavits for all witnesses called at trial and to tender such affidavits as the witnesses' examination in-chief. As a result, what would have been a five-day trial became a two-day trial and the preparation for trial by counsel became more onerous and time consuming.

[16] I have set the amount in accordance with what I feel is fair and reasonable for the unsuccessful party to pay given the circumstances of this case for the following reasons:

a. The Respondent proceeded with this case notwithstanding that there was an offer outstanding that was more favourable to his position on access than was the order ultimately granted after the trial.

b. The Respondent acted in bad faith when he continued his unrelenting attacks on the Applicant's counsel with a view to depriving the Applicant of her chosen counsel.

[17] In my opinion, this award of costs will meet all of the three primary objectives identified in Izyuk v. Bilousov supra. This award will:

1. Partially indemnify the Applicant for her costs incurred, and in this case, on an appropriate scale, given the outstanding offer to settle which was not accepted by the Respondent and the bad faith shown by the Respondent in his handling of this case as was identified in my judgment,

2. It will encourage settlement should issues arise in the future and will encourage the Respondent to consider the reasonableness of his position,

3. It will encourage the Respondent to behave appropriately (i.e. it will encourage the Respondent to respect the court process and will discourage extra-judicial efforts to defeat the court process through collateral attacks on counsel.)

ORDER TO GO

[18] Accordingly, costs are fixed at $30,000 payable to the Applicant by the Respondent forthwith.

Released: January 4, 2016

Signed: Justice P. J. Jones