

2016 ONCJ 141
Ontario Court of Justice

Qadeer v. Jaffer

2016 CarswellOnt 3924, 2016 ONCJ 141, [2016] W.D.F.L. 2482, 264 A.C.W.S. (3d) 965

Sara Qadeer, Applicant Aqeel Jaffer, Respondent

Roselyn Zisman J.

Judgment: March 14, 2016

Docket: D71727/14

Counsel: **Efua** Cobbina, for Applicant
Barry Nussbaum, for Respondent

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law

[XVII Practice and procedure](#)

[XVII.11 Costs](#)

[XVII.11.e Costs of particular proceedings](#)

[XVII.11.e.iv Custody and access](#)

Headnote

Family law --- Costs — Custody and access

Parties had two children — Father resided in Pakistan — Mother brought application for custody — Father was noted in default — Mother was granted final order for custody — Father brought application for specified access and mother filed answer seeking child support — Father did not file reply — Father did not intend to return to Canada — Father did not comply with disclosure obligations — Mother’s motion to strike father’s pleadings was granted and mother was permitted to proceed on uncontested basis with respect to imputing income to father for child support purposes — Father’s motion for access was stayed until he paid costs — Mother brought motion for full recovery costs — Motion granted in part — Father was to pay costs fixed at \$5,000 inclusive of disbursements and applicable taxes — Mother was entitled to close to full recovery of all of her costs for wasted attendance on case conference and for her success on motion to strike father’s pleadings — Neither party made any offers to settle — Mother could not make offer to settle because of father’s lack of disclosure — Motion to strike father’s pleadings was not complex but was of great importance to mother — Father’s conduct was unreasonable.

Table of Authorities

Cases considered by Roselyn Zisman J.:

Berta v. Berta (2015), 2015 ONCA 918, 2015 CarswellOnt 19550 (Ont. C.A.) — considered

Biant v. Sagoo (2001), 2001 CarswellOnt 3315, 20 R.F.L. (5th) 284, [2001] O.T.C. 695 (Ont. S.C.J.) — followed

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521, 48 C.P.C. (5th) 56, 188 O.A.C. 201,

71 O.R. (3d) 291 (Ont. C.A.) — considered

Ruffudeen-Coutts v. Coutts (2012), 2012 ONCA 263, 2012 CarswellOnt 4777, 15 R.F.L. (7th) 35 (Ont. C.A.) — referred to

Serra v. Serra (2009), 2009 ONCA 395, 2009 CarswellOnt 2475, 66 R.F.L. (6th) 40 (Ont. C.A.) — followed

Sordi v. Sordi (2011), 2011 ONCA 665, 2011 CarswellOnt 11272, 283 O.A.C. 287, 13 R.F.L. (7th) 197 (Ont. C.A.) — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99

Generally — referred to

R. 18(14) — considered

R. 24(1) — considered

R. 24(8) — considered

R. 24(11) — considered

RULING on costs.

Roselyn Zisman J.:

Introduction

1 The Applicant (“mother”) commenced an Application in September 201 for custody and orders with respect to incidents of custody. The Respondent “father”) who resides in Pakistan was noted in default as although he was properly served he had not filed any responding materials. On December 22, 2014 the mother was granted a final order for custody and for orders with respect to obtaining passports and travelling with the children without the father’s consent. However, the order also provided that it was without prejudice to the father’s ability to apply for access to the two children on proper notice to the mother.

2 The father then filed an Application seeking specified access. The mother filed an Answer seeking child support and spousal support. The father did not file a Reply.

3 When the father commenced his Application for access it was not clear if it was his intention to return to Canada. During the course of the proceedings the father confirmed that it was not his intention to return to Canada. The father had not seen the children since June 2014 and for the previous three or four years he had flown between Canada and Pakistan on a number of occasions.

4 The parties and counsel attended before me on August 13, 2015¹ for a case conference. The father did not file a financial statement and therefore it was not possible to have any meaningful attempts to resolve the support issues. Costs were reserved and a disclosure order was made. The father was ordered to provide his disclosure by October 16, 2015. A settlement conference was set for November 5, 2015.

5 The father sought and was granted an extension to file his disclosure by November 2, 2015 but as this may not have permitted the mother sufficient time to review the disclosure and prepare a proper brief, the endorsement provided that costs

could be ordered if the conference needed to be adjourned.

6 At the settlement conference held on November 5, 2015, the father had not fully complied with the outstanding disclosure order and a further disclosure order was made. The father was ordered to pay costs of \$500 immediately. Leave was granted to the mother to bring a motion to strike the father's pleadings if he did not comply with the outstanding disclosure orders. A further date of December 23, 2015 was set for a continued settlement conference.

7 At the attendance on December 23, 2015 the mother was granted leave to proceed with a motion to strike the father's pleadings due to his non-compliance with the orders for disclosure. The motion was granted and the mother was permitted to proceed on an uncontested basis with respect to imputing income to the father for child support purposes. The father's motion for access was stayed until he paid the cost order of November 5, 2015 and any further costs that were to be ordered. Counsel were provided a timetable to submit written submissions for costs.

Position of the parties

8 The mother seeks full recovery of her costs for the wasted attendance on the case conference of August 13, 2015 in the amount of \$2,618.33 and for the motion to strike the father's pleadings in the amount of \$2,893.56 inclusive of applicable taxes and disbursements.

9 The father concedes that the mother is entitled to costs as the successful party on the motion to strike his pleadings but submits that the costs claimed are exorbitant for the preparation and attendance on the August 13, 2015 case conference and for the motion to strike. He also submits that the father is impecunious and this is a factor that the court should consider.

Applicable legal principles

10 Rule 24(1) of the *Family Law Rules* provides guidance on costs on a family law context. Rule 24 (1) sets out the basic assumption that a successful party is entitled to costs. This provision still permits a court broad discretion in determining if costs should be paid, by whom and in what amount.

11 Rule 24 (11) provides a further list of factors a court should consider in dealing with 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 behavior in the case;
- c. the lawyer's rates
- d. the time properly spent on the case, including conversations between the lawyer and the party, 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.

12 In *Serra v. Serra*, [2009] O.J. No. 1905 (Ont. C.A.) at para. 8, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

1. to partially indemnify successful litigants for the cost of litigation;

2. to encourage settlement; and
3. to discourage and sanction inappropriate behavior by litigants.

13 In *Biant v. Sagoo*, [2001] O.J. No. 3693 (Ont. S.C.J.) Justice Perkins considered the costs award scheme under the *Rules* and commented, at para. 20:

[T]he preferable approach in family law cases is to have costs recovery generally approach full recovery, so long as the successful party has behaved reasonably and the costs claimed are proportional to the issues and the result. There remains, I believe, a discretion under r. 24(1) to award the amount of costs that appears just in all the circumstances, while giving effect to the rules' preeminent presumption, and subject always to the rules that require full recovery or that require or suggest a reduction or an apportionment.

14 The Ontario Court of Appeal in the recent case of *Berta v. Berta*, 2015 ONCA 918 (Ont. C.A.) has again endorsed the *Biant* court's approach to the determination of costs in family law disputes. See also *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 263, 15 R.F.L. (7th) 35 (Ont. C.A.), at para. 4; *Sordi v. Sordi*, 2011 ONCA 665, 13 R.F.L. (7th) 197 (Ont. C.A.), at para. 21; *M.(A.C.)*, at para. 40.

15 As the court concluded in the case of *Berta v. Berta*, *supra* at para. 94, a successful party in a family law case is presumptively entitled to full recovery costs. An award of costs on this basis, however, is subject to the factors listed in Rule 24(11), the directions set out under Rule 24(8) (bad faith) and Rule 18(14) (offers to settle), and the reasonableness of the costs sought by the successful party.²

16 I am also mindful that the court's role in assessing costs is not necessarily to reimburse a litigant for every dollar spent on legal fees. As was pointed out in *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634 (Ont. C.A.), the award of costs must be fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings rather than an exact measure of actual costs to the successful litigant.

17 Neither party made any offer to settle in this case.

18 From the mother's perspective it is understandable that she did not make an offer to settle it was not possible for counsel to do so in light of the father's lack of full and complete financial disclosure regarding his source of income and lack of proof of his claim that he was unable to work for medical reasons.

Application of legal principles to the facts

19 In determining the amount of costs, I have considered the legal principles and the following factors as set out in Rule 24 (11) as follows:

a. *the importance, complexity or difficulty of the issues*: The motion to strike although not complex was of great importance to the mother. The result permitted her to proceed with the litigation in a cost efficient and expeditious manner. A case conference is a pivotal step in family law proceedings. If counsel are properly prepared and if the parties have provided all of the necessary information to each other and the court, the issues can be narrowed, settlements can be reached and the court can assist the parties in moving the case forward. The father's position that the complexity of a case conference is minor at best and essentially only a without prejudice discussion shows a lack of understanding of the importance of this step in the court process. While the issues were not complex, they could not be resolved as the father did not comply with basic financial disclosure orders and came to court unprepared thereby increasing the costs for the mother.

b. *the reasonableness or unreasonableness of each party's behavior in the case*: the father's conduct in this case was

unreasonable from the outset. The father caused numerous delays by either serving materials late or not serving the required materials. He failed to pay costs ordered against him and failed to comply with the orders for disclosure. The father submits that he acted reasonably and tried his best to comply with the disclosures orders that were difficult as he resided in Pakistan. However, the father chose to move to Pakistan. Although he claimed to be impecunious he failed to provide the necessary disclose so that the court could determine how he was able to fund his trips to Canada and support himself. He refused to provide financial disclosure and medical evidence to permit the court some insight into his accurate financial circumstances and his ability to provide any child support.

c. *the lawyer's rates*: Counsel for the Applicant was called to the bar in 2009 and her hourly rate of \$300 is reasonable. Counsel appropriately delegated work to a law clerk whose hourly rate is \$150.

d. *the time properly spent*: A detailed bill of costs was provided. I do not accept the submissions of father's counsel that the time spent for the preparation and attendance on the case conference was excessive. It is time consuming for counsel to prepare a comprehensive case conference brief, update their client's financial statement, review the opposing side's brief and meet with their client to review the materials and discuss a reasonable outcome or what further disclosure may be necessary for the case to move forward. In many instances if both counsel are properly prepared a case conference can be very productive in resolving many issues in a case. That is precisely the reason that counsel should ensure that this is not a wasted attendance for which costs may be ordered. With respect to the motion to strike, I would reduce some of the time spent as it was a very uncomplicated motion. I would also deduct the travel time as counsel's office is in this jurisdiction. However, overall the time spent was reasonable.

e. *the expenses properly paid and payable*: The usual disbursements are claimed.

f. *any other relevant matter*: Counsel for the father submits that the court should consider the father's financial circumstances. Although I agree that a party's ability to pay is a relevant consideration, in this case it is precisely because the court could not determine the father's financial circumstances due to his lack of full disclosure that his pleadings were struck.

20 In considering all of these factors, I find that the mother is entitled to close to full recovery of all of her costs for both the wasted attendance on the case conference and for her success on the motion to strike the father's pleadings.

Order as follows:

1. The Respondent Aqueel Jaffer shall pay to the Applicant Sara Qadeer costs fixed at \$5,000 inclusive of disbursements and applicable taxes.
2. The Family Responsibility Office shall enforce this order as a support order.
3. Support Deduction order to issue.
4. The Respondent's motion to change shall be stayed until he has paid the cost order of November 5, 2015 for \$500.00 and this order of \$5,000.00 and until he has complied fully with the outstanding orders of August 13, 2015 and November 5, 2015 for financial disclosure.

Order accordingly.

Footnotes	
1	Counsel were granted permission to vacate the first appearance court and a later date was set for the case conference to coincide with a date when the Respondent would be in the jurisdiction

2

The Ontario Court of Appeal issued a corrigendum on January 18, 2016 to para. 94 of the decision which eliminated the words “full recovery” and “on this basis” that were quoted in the court’s original decision. The paragraph above has been corrected to reflect the correction. The correction does not change my decision that in this case close to full recovery is warranted for all of the reasons referred to in the body of this decision. I also note that the Ontario Court of Appeal in the case of [Forrester and Dennis 2016 ONCA 214](#) released on March 16, 2016 at para. 22 confirms that in family law cases it is within a judge’s proper discretion to award close to substantial indemnity costs.

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