

2019 ONCJ 477  
Ontario Court of Justice

Santos v. Santos

2019 CarswellOnt 10506, 2019 ONCJ 477, 306 A.C.W.S. (3d) 491

**BRYAN SANTOS (APPLICANT) and TAMMY MARIE SANTOS (RESPONDENT)**

S.B. Sherr J.

Heard: June 21, 2019  
Judgment: June 21, 2019  
Docket: D22042/18

Counsel: James H. Herbert, for Applicant  
Efua Cobbina, 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

Mother was granted temporary custody of parties' son, father was granted temporary supervised access to child and mother's motion to travel with child was dismissed — Parties made submissions as to costs — Father was to pay mother's costs of \$2,400 at rate of \$200 per month — Mother served offer to settle that offered that she had temporary sole custody of child and father countered with offer that did not give mother temporary custody — Costs consequences set out in subrule 18(14) of Family Law Rules (Ont.) were to apply to custody issue — There was divided success on remaining issues — Motions were important to parties, they were not complex or difficult — Time, rate and expenses claimed by mother were proportionate — Motions were necessary because father's behaviour frustrated implementation of court's temporary order that his access take place at supervised access centre — Father had limited financial resources and father should be using resources in short-term to pay for private supervised access provider.

**Table of Authorities**

**Cases considered by S.B. Sherr J.:**

*Beaver v. Hill* (2018), 2018 ONCA 840, 2018 CarswellOnt 17345, 143 O.R. (3d) 519, 17 R.F.L. (8th) 147 (Ont. C.A.) — referred to

*Berta v. Berta* (2015), 2015 ONCA 918, 2015 CarswellOnt 19550, 128 O.R. (3d) 730, 343 O.A.C. 237, 75 R.F.L. (7th) 299 (Ont. C.A.) — referred to

*British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 114 C.R.R. (2d) 108, 2003 CSC 71 (S.C.C.) — referred to

*Jackson v. Mayerle* (2016), 2016 ONSC 1556, 2016 CarswellOnt 3329, 73 R.F.L. (7th) 278, 130 O.R. (3d) 683 (Ont. S.C.J.) — considered

*Lawson v. Lawson* (2008), 2008 CarswellOnt 2819 (Ont. S.C.J.) — referred to

*M. (C.A.) v. M. (D.)* (2003), 2003 CarswellOnt 3606, 43 R.F.L. (5th) 149, 231 D.L.R. (4th) 479, 67 O.R. (3d) 181, 176 O.A.C. 201 (Ont. C.A.) — referred to

*Mattina v. Mattina* (2018), 2018 ONCA 867, 2018 CarswellOnt 17838 (Ont. C.A.) — considered

*Mohr v. Sweeney* (2016), 2016 ONSC 3238, 2016 CarswellOnt 7716 (Ont. S.C.J.) — referred to

*Sims-Howarth v. Bilcliffe* (2000), 2000 CarswellOnt 299, 6 R.F.L. (5th) 430, 2000 ONSC 22584 (Ont. S.C.J.) — referred to

*Snih v. Snih* (2007), 2007 CarswellOnt 3549 (Ont. S.C.J.) — referred to

#### **Rules considered:**

*Family Law Rules*, O. Reg. 114/99

Generally — referred to

R. 2(2) — considered

R. 18(14) — considered

R. 24(1) — considered

R. 24(4) — considered

R. 24(6) — considered

R. 24(12) — considered

ASSESSMENT of costs in family law matter.

***S.B. Sherr J.:***

#### **Part One - Introduction**

1 On June 21, 2019, the court gave oral reasons granting the respondent (the mother) temporary custody of the parties' 22-month old son (the child). The court ordered that the applicant (the father) have temporary access to the child to be supervised by a private supervised access provider. After 8 visits, the court will review if the father's access can be supervised by his partner or his father. The mother's motion to travel with the child to Lebanon this summer was dismissed.

2 The mother seeks her costs of \$3,200. The father asks that no costs be ordered.

#### **Part Two - Legal considerations**

3 The Ontario Court of Appeal in *Mattina v. Mattina*, [2018 ONCA 867](#) (Ont. C.A.) , set out that 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 that cases are dealt with justly under subrule 2 (2) of the *Family Law Rules* (all references to the rules in this decision are to the *Family Law Rules*).

4 Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003 SCC 71](#) (S.C.C.) , paragraph 25.

5 Costs awards are discretionary. Two important principles in exercising discretion are reasonableness and proportionality. See: *Beaver v. Hill*, [2018 ONCA 840](#) (Ont. C.A.) .

6 An award of costs is subject to the factors listed in subrule 24 (12), subrule 24 (4) pertaining to unreasonable conduct of a successful party, subrule 24 (8) pertaining to bad faith, subrule 18 (14) pertaining to offers to settle, and the reasonableness of the costs sought by the successful party. See: *Berta v. Berta*, [2015 ONCA 918](#) (Ont. C.A.) , at paragraph 94.

7 Subrule 24(1) creates a presumption of costs in favour of the successful party. Consideration of success is the starting point in determining costs. See: *Sims-Howarth v. Bilcliffe*, [\[2000\] O.J. No. 330](#) (Ont. S.C.J.) . To determine whether a party has been successful, the court should take into account how the order compares to any settlement offers that were made. See: *Lawson v. Lawson*, [\[2008\] O.J. No. 1978](#) (Ont. S.C.J.) .

8 Subrule 18 (14) sets out the consequences of a party's failure to accept an offer to settle that is as good as or better than the trial result of the person making the offer. It reads as follows:

#### **COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER**

18(14) A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.
2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
3. The offer does not expire and is not withdrawn before the hearing starts.
4. The offer is not accepted.
5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

9 Subrule 24 (6) states that if success in a step is divided, the court may apportion costs as appropriate.

10 Divided success does not equate with equal success. It requires a comparative analysis. Most family cases have

multiple issues. They are not equally important, time-consuming or expensive to determine. See: *Jackson v. Mayerle*, 2016 ONSC 1556 (Ont. S.C.J.) , paragraph 66, per Justice Alex Pazaratz.

11 Subrule 24 (12) reads as follows:

24 (12) In setting the amount of costs, the court shall consider,

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.

12 The court should also take into consideration the ability of a party to pay costs. See: *M. (C.A.) v. M. (D.)* (2003), 67 O.R. (3d) 181 (Ont. C.A.) . However, a party's limited financial circumstances will not be used as a shield against any liability for costs but will be taken into account regarding the quantum of costs. See: *Snih v. Snih* [2007 CarswellOnt 3549 (Ont. S.C.J.)], 2007 CanLII 20774 (pars. 7-13). Those who can least afford litigation should be the most motivated to avoid unnecessary proceedings. See: *Mohr v. Sweeney*, 2016 ONSC 3238 (Ont. S.C.J.) .

### **Part Three - Offers to settle and success**

13 The mother served a severable offer to settle dated May 8, 2019. The father accepted her offer regarding temporary child support. The mother also offered that she have temporary sole custody of the child. The father countered with an offer to settle that did not give the mother temporary custody of the child, but gave her decision-making responsibility over defined issues. Neither offer to settle addressed the access or travel issues.

14 The costs consequences set out in subrule 18 (14) will apply to the custody issue.

15 There was divided success on the remaining issues. The mother was successful on the access issue and the father was successful on the travel issue.

16 The dominant issue on the motions was the access issue.

### **Part Four - Analysis**

17 These motions were important to the parties. They were not complex or difficult.

18 The court finds that the time and rates claimed by the mother are reasonable and proportionate.

19 The expensed claimed by the mother are reasonable.

20 The mother acted reasonably in this matter.

21 These motions were necessary, in large part, because the father's behaviour frustrated the implementation of the court's temporary order that his access take place at the Toronto Supervised Access Centre. The access centre refused the case due to the father's abusive behaviour to its staff. The court found on these motions that the father's access needed to be supervised by a neutral professional supervised access provider because of his abusive conduct towards the mother.

22 Although it wasn't what the court ordered, the father's offer to settle the temporary custody issue was reasonable. He acted reasonably by settling the temporary support issue.

23 The court considered that the father has limited financial resources. It wants the father to use those resources in the short-term to pay for the private supervised access provider. The court will delay his payment of the costs that will be ordered.

**Part Four - Final order**

24 Taking into account all of these factors the father shall pay the mother's costs of \$2,400.

25 The father may pay these costs to the mother at the rate of \$200 each month, starting on November 1, 2019.

*Order accordingly.*

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