CITATION: Jackson v. Mayerle, 2016 ONSC 1556
COURT FILE NO.: F67/13
DATE: 2016-03-03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Davis Jackson	)	Melissa Fedsin, for the Applicant
Applicant	)	
– and –	)	
Eileen Mayerle	)	Kanata Cowan, for the Respondent
Respondent	)	
	)	**HEARD:** September 15, 16, 17, 18, 21, 22, 23, 28, 29, 30; October 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; November 4, 5, 6, 9, 10, 12, 13, 2015

THE HONOURABLE MR. JUSTICE A. PAZARATZ

INTRODUCTION

> *"We are both reasonable people and I really think we can work this out without spending 40 to 50 thousand dollars a piece in lawyer fees only to have a judge tell us something we could arrange ourselves. Please I'm begging you to be reasonable."*

1. That was August 8, 2012. An e-mail by a father wanting to see more of his young daughter, written more than a year after separation. Months before this court case started.
2. Fast forward three and a half years.

> *"This trial has been financially disastrous for both parties."*

3. That was February 10, 2016. A concluding statement in *the mother's* written costs submissions following a 36 day trial.

4. The father wound up spending $300,000.00 on lawyers. But he won sole custody. So now he wants a quarter of a million dollars in costs.
5. The mother says he's asking for too much and she can't afford it anyway, because she spent more than $200,000.00 on her own legal fees.
6. There are many factors to be considered in deciding costs. I will review them below.
7. But pause for a moment to consider the overwhelming tragedy of this case.
8. These are nice, average people. Of modest means (now considerably more modest). They drive old cars and probably pinch pennies shopping at Costco.
9. And yet somehow, between them, they spent more than half a million dollars on lawyers *"to have a judge tell us something we could arrange ourselves."*
10. No matter what costs order I make, the financial ruin cannot be undone. They'll never recover. Their eight year old daughter's future has been squandered.
11. How did this happen? *How does this keep happening?*
12. What will it take to convince angry parents that nasty and aggressive litigation never turns out well?

BACKGROUND

13. The family profile:

    a. The Applicant husband is 45.
    b. The Respondent wife is 48.
    c. Their daughter Paige is eight years old.
    d. The parties started living together in 1997.
    e. They were married April 22, 2004.
    f. They separated July 26, 2011.

14. On January 5, 2016 I released a 204 page judgment following a (needlessly) lengthy trial. Among the issues:

    a. Custody designation.
    b. Timesharing schedule.
    c. Numerous specific parenting issues, including selection of school and educational program.
    d. Child support.
    e. Spousal support.
    f. Imputation of income to Respondent.
    g. Equalization of net family property.
    h. Resulting trust claim regarding a property which became the matrimonial home.

15. I have now reviewed lengthy written costs submissions which were invited at the end of my judgment.

COSTS ANALYSIS

16. In *Serra v. Serra* 2009 ONCA 395 (CanLII) the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

    a. To partially indemnify successful litigants for the cost of litigation.
    b. To encourage settlement; and
    c. To discourage and sanction inappropriate behaviour by litigants.

17. The assessment of costs is not a mechanical exercise. It's not just a question of adding up lawyer's dockets. *Boucher et al v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579; 71 O.R. (3d) 291 (Ont. C.A.); *Dingwall v. Wolfe* 2010 ONSC 1044 (SCJ).
18. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant. *Selznick v Selznick* 2013 ONCA 35 (Ont. C.A.); *Delellis v. Delellis* 2005 CarswellOnt 4956 (SCJ); *Serra* (supra); *Murray v. Murray* (2005) 2005 CanLII 46626 (Ont. C.A.); *Guertin v Guertin* 2015 ONSC 5498 (SCJ).
19. Rules 18 and 24 of the Family Law Rules govern the determination of both liability for costs and the amount of costs. While these rules have not completely eliminated judicial discretion, the rules nonetheless circumscribe the broad discretion previously granted to the courts in determining costs. *C.A.M. v. D.M.* 2003 CanLII 18880 (Ont. C.A.); *Andrews v. Andrews* [1980] O.J. No. 1503 (Ont. C.A.); *Wilson v Kovalev* 2016 ONSC 163. (SCJ).
20. Rules 18 and 24, and most of the case law focus on two words: "Success" and "Reasonableness". The latter entails two components:

    a. Reasonableness of behaviour by each party.
    b. Reasonableness of the amount of costs to be awarded.

21. The starting point in any costs analysis is the presumption that a successful party is entitled to costs. Rule 24(1). *Sims-Howarth v. Bilcliffe* 2000 CanLII 22584 (SCJ).

RULE 18 OFFERS

22. To determine whether a party has been successful, the court should take into account how the order or eventual result compares to any settlement offers that were made. *Lawson v. Lawson* 2008 CanLII 23496 (SCJ).
23. Rule 18 deals with the formalities and consequences of offers. Rule 18(14) provides that a party who makes a written offer at least seven days before the trial, and obtains an order as favorable as or more favorable than the offer, is entitled, unless the Court orders otherwise, to costs to the date that the offer was served and full recovery costs from that date.
24. Both parties have referred to their respective offers to settle in support of their positions on costs.

a. The Applicant claims that on the main issues his offers entitle him to full recovery of costs. He says on remaining issues his offers demonstrate that he made reasonable settlement proposals so he should still receive significant reimbursement for costs.
b. The Respondent disputes that any of the Applicant's offers trigger an entitlement to full recovery pursuant to Rule 18(14). She says to the contrary, their respective offers demonstrate that *she* was making more reasonable efforts to settle the case.

25. Curiously, the Respondent submits the Applicant "…should not be entitled to substantial costs as he was not *more successful* than any of his offers to settle." But Rule 18(14)(5) states that a pre-requisite to full recovery is that the party obtained an order "*as favourable* or more favourable than the offer." [Emphasis added, in both references]
26. I will review each party's offers.
27. On July 20, 2014 the Applicant served a formal offer to settle which was severable. In written submissions the Respondent described this offer as non-severable "and as a result unacceptable." But upon reviewing the document it is clear that it *was* severable.
28. The Respondent was given the option of accepting any of five distinct parts. She did not accept any part of the offer.

a. Part A of the offer provided that the recommendations of a section 30 custody assessment would prevail. This part of the offer included certain provisions which were not included in my final order, and as a result Rule 18(14) is not triggered. But the Applicant was substantially successful in obtaining an order which incorporated most of the assessor's recommendations. And in a number of areas the result at trial was more favourable to the Applicant than the terms of his offer. For example, the Applicant had offered to leave Paige at Guy Brown School in the Respondent's district, but he was ultimately successful in being allowed to transfer Paige to his own school district. The Respondent should have strongly considered accepting Part A of the offer.
b. Part B required the Respondent to obtain a mental health assessment. This was not *ordered* by the court. The Respondent says such a mental health assessment was "proven by Dr McMillan unnecessary". But assessor Michelle Hayes disagreed, and in my judgment I urged the Respondent to deal with unresolved psychological problems. For reasons which I elaborated on in my judgment, it would have been a good idea for the Respondent to agree to follow up on her mental health issues -- particularly since the Applicant was prepared to pay half the cost.
c. Part C provided that the Applicant would pay spousal support in the sum of $978.00 per month until June 30, 2019 based upon the Respondent's income being set at $40,000.00. It also included provisions regarding releases and a limitation that the order could only be varied downward. The Applicant did not match this provision in the final order.
d. Part D provided that the Applicant would make a net set-off child support payment in the sum of $484.00 per month based on the Respondent's income being imputed at $40,000.00. The Applicant obtained a result more favourable than his offer, in that the Respondent's income ended up being imputed to be $60,000.00, and he was ordered to pay a lower sum of $324.00 as set-off child support.

e. Part E provided that the matrimonial home would be sold immediately, with each party to receive an advance on equalization in the amount of $50,000.00, and with the balance of funds to be held in trust pending further order. This provision does not specifically match the result at trial.

29. On September 24, 2014 the Applicant filed a one-paragraph offer to settle the custody issue on the following terms: "The Applicant shall have sole custody of the child of the marriage….". The Applicant matched this offer at trial.
30. The Applicant and the Respondent each claimed sole custody. The dispute was not simply about the symbolism of a custody label. The trial – and my judgment – focussed on decision making and control in relation to the child.

a. Much of the evidence focussed on the Respondent's obsessive, controlling and exclusionary behaviour in relation to Paige.
b. I found that the Respondent had repeatedly abused opportunities for control. She made bad decisions in relation to the child, out of spite and self-interest.
c. As a result I found that there was no area in which the Respondent could be entrusted with decision making.
d. I found it necessary to specify that – after opportunities for consultation -- the Applicant shall have sole and final decision making authority with respect to all issues in the child's life (except for religion, which was non-contentious in any event).
e. I included a very detailed formula for joint participation in the selection of extra-curricular activities for Paige (since this was a major area of dispute).

31. Both parties acknowledge that parenting issues – particularly the custody designation and the timesharing schedule – dominated the trial.
32. The Applicant emphasizes that he was completely successful in relation to the custody designation, and that in fact he obtained a more favourable result in that the court granted him very specific and enhanced decision making authority.
33. The Respondent says his September 24, 2014 offer was "in no way appealing" because it did not provide the Respondent with any safeguards or security with respect to her continued relationship with Paige. She also complains there were no financial components to this offer, nor any mention of timesharing. She says it was "not constructive or helpful to settling the case."
34. I disagree with the Respondent's position in relation to the Applicant's September 24, 2014 offer.
35. Offers to settle are to be encouraged, and severable offers (or offers on specific issues) are particularly helpful to the settlement process. The Applicant's September 24, 2014 offer in relation to the custody designation stood independently from the Applicant's earlier severable offer dated July 20, 2014.
36. On August 19, 2015 the Applicant served a formal offer to settle which was severable, divided into four distinct parts. If any of the parts were accepted before August 21, 2015 there would be no costs in relation to that part. If accepted after August 21, 2015, the

Applicant would be entitled to seek costs from the date the Application was served with respect to that issue.

a. Part A of the offer stated "The Applicant Father shall have sole custody of the child." This was dealt with as a distinct issue. It was a re-statement of the Applicant's September 24, 2014 offer in relation to the custody designation. As noted, this was the main issue at trial and the Applicant was successful in obtaining sole custody.
b. Part B of the offer related to child support. It provided that the Applicant would pay the Respondent set-off child support in the sum of $474.00 per month based on the Applicant's income of $100,000.00 and the Respondent having an imputed income of $45,000.00. There were other terms which were not contentious at trial. This was virtually a re-statement of the Applicant's position on child support in his July 20, 2014 severable offer. As previously noted, the Applicant obtained a result more favourable than his offer.
c. In Part C the Applicant offered to pay $1,350.00 spousal support until August 1, 2016. The Respondent obtained a more favourable result on spousal support. This part does not trigger cost consequences in favour of the Applicant.
d. Part D provided that the Respondent would make an equalization payment of $230,000.00 within 45 days. This would include any claims in relation to the Applicant's pension. While the Applicant's calculations may have been close to the mark, at the Applicant's request property issues were determined differently. He was determined to be a one-half owner of the home. He will be entitled to 50% of the equity in the property as of the date of disposition. His net recovery may be close to $230,000.00, but he did not obtain this specific result in the final order.

37. The Respondent says the Applicant's August 19, 2015 offer was only open for acceptance for two days before potential cost consequences were triggered. She says this was insufficient time to allow the Respondent to contemplate and for counsel to report on the offer to settle to the Respondent.

a. Nonetheless, the August 19, 2015 offer met all of the Rule 18 formalities, and remained in place up to and including the 36 day trial.
b. An offer which predetermines a costs entitlement is often unhelpful. Costs are more appropriately dealt with after substantive determinations have been made.
c. But in this case, the Applicant wasn't predetermining a costs entitlement. He was saying he *couldn't* ask for costs if the offer was accepted within two days. If accepted thereafter, he *could* ask for costs. There was no predetermination that he would be awarded costs.
d. I agree with the Respondent that the "no costs" window wasn't very long.
e. But an offer which accurately predicts the result on substantive issues and reserves costs to be determined by the Court, is still a valid Rule 18(14) offer.

38. While the Respondent admits the Applicant was successful in obtaining custody, she says the custody section of his offer was not sufficiently comprehensive to be accepted.

a. She notes that the court order was much more comprehensive than merely a one line endorsement granting the Applicant custody.
b. She says multiple safeguards were ordered to ensure that the Respondent was not excluded from Paige's upbringing.
c. She says these safeguards were not contemplated in any of the three offers the applicant made.

39. I disagree with the Respondent's suggestion that the Applicant's custody offers on September 24, 2014 and August 19, 2015 should not trigger cost consequences.

a. The custody designation herein was distinct from timesharing; which in turn was distinct from information sharing; which in turn was distinct from the name change issue, etc.
b. A specific determination of the custody designation would not preclude consideration of other parenting issues.
c. Resolving the custody designation would have significantly reduced the scope of the trial.
d. But while both parties acknowledge that parenting issues consumed by far the majority of trial time (the Applicant says 90%), it is more difficult to specifically apportion how much time was devoted to the custody designation (for which the Applicant is presumptively entitled to full recovery), and how much time was devoted to timesharing and ancillary issues (for which a lower scale of indemnification would apply).

40. The Respondent acknowledges she should have accepted the child support section. But she emphasizes that she obtained a more favourable result regarding spousal support.
41. The Respondent served five formal offers to settle.
42. On September 10, 2014 the Respondent served a severable offer, divided into sections.

a. It proposed either sole custody to the Respondent or parallel parenting with the Respondent to have final decision making authority.
b. It also proposed primary residence to the Respondent with the Applicant to have alternate weekend access.
c. There was no contested issue addressed by this offer which would trigger any cost consequences.

43. The Respondent served a severable offer on December 1, 2014.

a. It included various financial options, none of which came close to being achieved by the Respondent.
b. It repeated sole custody to the Respondent, or parallel parenting with the Respondent to have final decision making.
c. There is not a single section of this offer which meets Rule 18(14) requirements to trigger cost consequences.

44. The Respondent served a severable offer April 16, 2015.

    a. It included separate sections for equalization, spousal support, child support, custody and timesharing.
    b. The result after the trial was worse for the Respondent than the terms she proposed under any heading.

45. The Respondent served a severable offer April 21, 2015.

    a. Most of the alternatives entailed the Respondent having primary residence.
    b. One alternative entailed the parties sharing alternating weeks with Friday exchanges. This arrangement was ordered for the immediate future, but presumptively the Respondent's time will be reduced in September 2016.
    c. As a result none of the provisions of this offer trigger Rule 18(14) cost consequences.

46. The Respondent served an offer in relation to equalization on August 25, 2015.

    a. She offered to pay the Applicant $176,284.84 and she would retain the house.
    b. The Applicant obtained a better result at trial.
    c. The Respondent faults the Applicant for making only one offer to settle regarding equalization on August 19, 2015. But the Applicant's offer in relation to equalization was closer to the ultimate result than anything offered by the Respondent.

47. To trigger full recovery costs a party must do as well or better than *all* the terms of any offer (or a severable section of an offer). *Paranavitana v. Nanayakkara*, [2010] O.J. No. 1566 (SCJ); *Rebiere v Rebiere* 2015 ONSC 2129 (SCJ); *Scipione v Scipione* 2015 ONSC 5982 (SCJ). The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order (*Sepiashvili v. Sepiashvili,* 2001 CarswellOnt 3459, additional reasons to 2001 CarswellOnt 3316 (SCJ); *Wilson v Kovalev* 2016 ONSC 163 (SCJ).
48. However, even if Rule 18(14) doesn't apply, Rule 18(16) allows the court to consider any written offer, the date it was made, and its terms.
49. I find that the Applicant's offers trigger a presumption of full recovery pursuant to Rule 18(14) in relation to the following issues:

    a. The child support set-off calculation from July 20, 2014 onward.
    b. The custody designation (as distinct from timesharing and other parenting issues) from September 24, 2014 onward.

50. As I will discuss more fully below, I also consider the Applicant's offers as demonstrating reasonable efforts to settle in relation to the following issues:

    a. Implementation of the majority of the section 30 custody assessor's recommendations, from July 20, 2014 onward.

b. Encouraging and facilitating the Respondent to address her emotional issues impacting on parenting from July 20, 2014.
c. Resolution of equalization and property issues from August 19, 2015 onward.
d. Quantification of the Respondent's income.

51. I find that none of the Respondent's offers trigger cost consequences in her favour on any issue pursuant to Rules 18(14) or (16).

RULE 24 FACTORS

52. Rule 24(4) provides that a successful party who has behaved unreasonably may be deprived of all or part of their costs, or ordered to pay all or part of the unsuccessful party's costs. The Respondent acknowledges that the Applicant was successful on at least some issues, but she submits that the Applicant behaved unreasonably and this should reduce his costs entitlement. I disagree. As evidenced by the Applicant's August 8, 2012 e-mail, I find that the Applicant consistently attempted to take a practical and conciliatory approach to the parenting issues which dominated and drove this litigation.
53. In contrast, I find that in many different ways *the Respondent's* behaviour was unreasonable. I must consider that behaviour within the context of Rules 24(5); 24(8); and 24(11)(b).
54. Among the examples of the Respondent's unreasonable behaviour relevant to costs:

a. After an extended period of flexible and beneficial timesharing, in about August/September of 2012 the Respondent embarked on a campaign to shut the Applicant out of the child's life.
b. The Respondent rejected reasonable proposals (such as mediation) to resolve sensitive parenting issues. She maintained a unilateral and inflexible attitude, despite the negative impact her behaviour was having on the child.
c. While the Respondent repeatedly described the trial as "his ruthless litigation", the reality is that the Respondent's dictatorial approach left the Applicant with no alternative but to eventually bring an Application and then a motion.
d. Even after the timesharing schedule was resolved through a series of interim orders, the Respondent pursued a relentless campaign to marginalize and exclude the Applicant from the child's life.
e. The Respondent was oblivious to the negative impact her uncontrolled emotionality and manipulations were having on the child.
f. The Respondent insisted that she was a superior parent and that Paige was resistant to contact with the Applicant – even though the Respondent's own witnesses described both parents in equal terms, in relation to parenting skills and attachment to the child.
g. The Respondent advanced dubious allegations with no credible supporting evidence. For example during the trial she alleged Catherine White had videotaped children at school. She then withdrew this allegation. She then resurrected the allegation, despite uncontroverted evidence that White was in another city at the time of the alleged incident.
h. The Respondent manipulated and fabricated evidence.

i. The Respondent attempted to introduce into evidence surreptitious recordings, without proper notice. She recorded interviews of the child and repeatedly drew her into the adult conflict. She coached the child about what to tell others.
j. She engaged in provocative and dangerous behaviour, such as stalking and driving behind the Applicant's car after he picked Paige up for access.
k. On several key topics, I concluded that the Respondent's evidence was not credible. More commonly, I concluded the Respondent's evidence demonstrated a profound lack of insight and fairness.
l. The Respondent resisted and subverted efforts to obtain – or take advantage of -- professional assistance for Paige.
m. The Respondent insisted she wanted Paige to attend school in whatever school district the Respondent lived in – but the Respondent provided no evidence that she had realistically explored or identified her housing options.
n. In relation to the ownership of the matrimonial home, the theory of the Respondent's case was poorly articulated, and the Respondent didn't even respond to critical evidence presented by the Applicant with respect to a resulting trust.
o. In relation to imputing income, the Respondent's suggestion that she could not work on a fulltime basis until Paige turned 18 defied modern life reality.

55. The Applicant submits that much of the Respondent's unreasonable behaviour was so extreme as to constitute "bad faith". Pursuant to Rule 24(8), if a party has acted in bad faith, the court shall decide costs on a full recovery basis and order the party to pay them immediately.
56. But Rule 24(8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. *S.(C.) v. S.(C.)* 2007 CanLII 20279 (ON SC), [2007] O.J. No. 2164*; Piskor v. Piskor* [2004] O.J. No. 796 (SCJ); *Cozzi v. Smith* 2015 ONSC 3626 (SCJ).
57. In *S.(C) v. S.(C)* (supra) Perkins, J. defined bad faith as follows:

> In order to come within the meaning of bad faith in subrule 24(8), behaviour must be shown to be carried out with intent to inflict financial or emotional harm on the other party or other persons affected by the behaviour, to conceal information relevant to the issues or to deceive the other party or the court. A misguided but genuine intent to achieve the ostensible goal of the activity, without proof of intent to inflict harm, to conceal relevant information or to deceive, saves the activity from being found to be in bad faith. The requisite intent to harm, conceal or deceive does not have to be the person's sole or primary intent, but rather only a significant part of the person's intent. At some point, a party could be found to be acting in bad faith when their litigation conduct has run the costs up so high that they must be taken to know their behaviour is causing the other party major financial harm without justification.

58. Bad faith is not synonymous with bad judgment or negligence. Rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation: *Children's Aid Society of the*

Region of Peel v. F.(K.J.), 2009 ONCJ 252 (CanLII), [2009] O.J. No. 2348 (OCJ); *Biddle v. Biddle*, 2005 CanLII 7660 (SCJ); *Leonardo v. Meloche*, 2003 CanLII 74500 (SCJ); [2003] O.J. No. 1969 (SCJ); *Hendry v. Martins*, [2001] O.J. No. 1098 (SCJ).

59. There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. The court can determine that there shall be full indemnity for only the piece of the litigation where bad faith was demonstrated. *Stewart v. McKeown*, 2012 ONCJ 644 (OCJ); *F.D.M. v. K.O.W.* 2015 ONCJ 94 (OCJ).
60. To establish bad faith the court must find some element of malice or intent to harm. *Harrison v. Harrison* 2015 ONSC 2002 (CanLII).
61. Bad faith can be established by the intentional failure to fulfill an agreement in order to achieve an ulterior motive or, an intentional breach of court order with a view to achieving another purpose: *Piskor v. Piskor*, (supra); *Erikson v. Erikson* 2000 CanLII 29675 (SCJ); *Hunt v. Hunt* 2001 CanLII 39078, [2001] O.J. No. 5111 (SCJ).
62. Even in the absence of bad faith, costs may be ordered on a full recovery basis and payable forthwith. *Sims-Howarth v. Bilcliffe* (supra).
63. I agree with the Applicant that there are instances of bad faith behaviour by the Respondent -- notably, manipulating and falsifying evidence. But by far the majority of the Respondent's unreasonable behaviour – as troubling as it may be – does not reach that threshold of constituting "bad faith" as contemplated by Rule 24(8).
64. But even where behaviour falls short of being bad faith, where unfounded allegations significantly complicate a case or lengthen the trial process, this constitutes unreasonable behaviour relevant to the costs determination. Family law litigants are responsible and accountable for the positions they take during litigation. *Hackett v. Leung* (2005) 2005 CanLII 42254, 22 R.F.L. (6th) 314 (SCJ); *Katarzynski v. Katarzynski*, 2012 ONCJ 393 (SCJ); *Toscano v Toscano* 2015 ONSC 5499 (SCJ). *Scipione v Scipione* (supra).
65. Rule 24(6) directs the court to consider whether there was divided success, and if so, to apportion costs appropriately.
66. "Divided success" does not necessarily mean "equal success". And "some success" may not be enough to impact on costs.

    a. Rule 24(6) requires a contextual analysis.
    b. Most family court cases involve multiple issues.
    c. Not all issues are equally important, equally time-consuming or equally expensive to determine.
    d. Comparative success can be assessed in relation to specific issues:

        i. Did a mid-point number prevail on a financial issue?
        ii. Did a compromise result on a parenting issue?

    e. Comparative success can also be assessed globally in relation to the whole of the case:

        i. How many issues were there?

ii. How did the issues compare in terms of importance, complexity and time expended?
iii. Was either party predominantly successful on more of the issues?
iv. Was either party more responsible for unnecessary legal costs being incurred?

67. Where success in a step in a case is divided, the court may exercise its discretion to apportion costs as appropriate (Rule 24(6)). The court may also in those circumstances award costs to the party who was more successful on an overall global basis. *Boland v. Boland* [2012] O.J. No. 1830 (OCJ).
68. I find that there was divided success in the sense that each party obtained *some* of the relief they requested. But in no circumstance was there *equal* success.
69. Among the areas where the Applicant was successful:

a. He obtained sole custody in his favour.
b. He adopted the contents of the section 30 custody assessment and he was largely successful in obtaining an order incorporating those recommendations.
c. He was successful resisting the Respondent's request that the child's surname be changed. This issue involved more than just a matter of symbolism. I found that the Respondent's unilateral and self-serving behaviour caused Paige to be acutely sensitized to the issue of her name, and that opportunities for further confusion and ambiguity had to be eliminated.
d. He was successful obtaining an order that Paige would transfer schools to James W. Hill in Oakville, and that her continued enrolment in French Immersion would be in his discretion.
e. He was successful on the issue of timesharing exchanges.
f. He was successful establishing that he was a beneficial one-half owner of the matrimonial home, with the result that he will have equal control over disposition of the property, and he will be entitled to one-half of the significant post-separation increase in the value of the home.
g. He was successful imputing income to the Respondent for purposes of child and spousal support.

70. The Respondent enjoyed some success at trial, including:

a. Having the Applicant's employment pension value factored into the equalization calculation (as opposed to dividing it at source, as the Applicant had proposed).
b. She obtained a significant spousal support order.
c. She obtained certain parenting provisions ensuring her continuing involvement in Paige's life, notwithstanding the sole custody designation in the Applicant's favour.
d. She obtained some very minor financial adjustments totalling $1,920.64.

71. And there were some individual issues where neither party got exactly what they wanted:

a. Each party requested primary residence of the child as their first choice. Each party indicated they could live with equal timesharing as an alternative. The Respondent

successfully resisted the Applicant's 8-8-8-8-5-5 timesharing schedule, even though it was endorsed by the assessor. She was also successful in establishing that to the extent that timesharing is to occur on alternating weeks, the transition is to be on Fridays rather than Thursdays as requested by the Applicant.

b. But the ultimate timesharing provisions contained in the order are more complicated than either party had proposed. In the immediate future, there will be equal timesharing. There is a presumption that in September 2016 primary residence will revert to the Applicant. But the Respondent has been given the opportunity to try to rebut that presumption and seek to continue alternating weeks if she is able to satisfy the court that issues relating to her behaviour and school travel arrangements have been addressed in a satisfactory manner.
c. Each party wanted to maintain physical possession of Paige's documents and important papers. I ordered that in even numbered years the Applicant would retain possession of the original documents, and in odd numbered years the Respondent would retain possession of the originals.

72. The Applicant was successful with respect to a number of procedural issues which arose during the 36 day trial. For example:

a. He successfully opposed the admissibility of surreptitious recordings made by the Respondent (she ultimately withdrew the request).
b. He successfully opposed the admissibility of a critique of the section 30 assessment, which the Respondent sought to introduce.
c. While he acknowledged the Respondent's family physician could be qualified as an expert in the general practice of medicine, he successfully opposed her being qualified as an expert with respect to mental health.

73. Overall, the Applicant was not only predominantly successful, but he was entirely or mostly successful on the issues which consumed the greatest amount of trial time.
74. Rule 24(10) establishes the general principle that the court should determine the issue of costs promptly after each step in the case. If a specific order for costs is not made at the end of a step in the case, including a conference or motion, or costs are not reserved, a judge dealing with a subsequent step or the trial judge should not generally consider the costs associated with that step when determining costs. *Gammon v. Gammon,* 2008 CarswellOnt 6319 (SCJ); *Fawcett v. Richards,* 2009 CarswellOnt 3229 (SCJ); *Islam v. Rahman,* 2007 ONCA 622 (CanLII), 2007 CarswellOnt 5718 (Ont. C.A.); *Wilson v Kovalev* (supra).
75. Some costs claims were determined at motions. A small component of the Applicant's current costs claim relates to earlier steps where costs were not addressed at the time. Rule 24(10) precludes such recovery.
76. Rule 24(11) sets out additional factors to be considered in determining costs.
77. Rule 24(11)(a) directs the court to consider the importance, complexity or difficulty of the issues. I find that:

a. The primary parenting issue (including the custody designation; timesharing; and ancillary matters) was extremely important.

b. The factual dispute in relation to parenting issues was quite complex, largely because of the Respondent's pervasive and protracted campaign to monopolize every aspect of Paige's life, and marginalize the Applicant.
c. Custody and timesharing were largely fact-driven. The facts were complex. A great deal of skill and tenacity was required by the Applicant's counsel to address many individual incidents and put them into an overall context. I agree with the Applicant's counsel that the trial was a "massive undertaking."
d. Professional witnesses added to the complexity.
e. The legal issue in relation to ownership of the matrimonial home was complicated and quite important.

78. The Applicant now seeks full recovery of his costs in the amount of $249,512.01, calculated:

a. July 29, 2013 – September 23, 2014: 3 page bill of costs totalling $32,916.59.
b. September 24, 2014 to November 13, 2015: 5 page bill of costs totalling $216,595.42.

79. This does not include approximately $26,000.00 the Applicant paid to former counsel.
80. In addition the Applicant seeks $5,693.51 for the preparation of costs submissions, as set out in a 2 page bill of costs.
81. He also wants the Respondent to reimburse him for her half of the $20,604.08 he advanced to social worker Michelle Hayes for the section 30 custody assessment. He says the Respondent's half should be $10,302.04.
82. There is no absolute requirement that a bill of costs must follow an "itemized by date and task" format. But given the amount of money being claimed, and the fact that varying levels of indemnification will apply to different issues, a much more detailed breakdown of the Applicant's costs claim would have been both helpful and appropriate. In *Blank v. Micallef* 2009 CanLII 60668, 2009 CarswellOnt 6790 (SCJ) a costs claim was reduced because the lawyer's bill of costs provided insufficient detail, and simply provided a general breakdown with a total of 49.2 hours. Ricchetti J. stated at paragraph 18: "It is impossible for me to determine whether the hours were reasonably necessary without a breakdown of the time spent on each task."
83. Rule 24(11)(c) directs the court to consider the reasonableness of the lawyers' rates. Rule 24(11)(d) directs the court to consider the time spent on the case.

a. Ms. Fedsin was the only counsel appearing for the Applicant throughout the 36 day trial. Her hourly rate of $275.00 is reasonable.
b. Ms. Fedsin had a law clerk assist her throughout the trial at a rate of $30.00 per hour. Given the complexity of the file and the multiple volumes of written materials, I find this to be reasonable as well.

84. But the Applicant's bills of costs provide little explanation of significant charges by other lawyers:

a. Karen Law, $225.00 per hour
b. Whitney Smith, $260.00 per hour

c. Jeffrey Petermann, $395.00 per hour
d. Kevin Caspersz, $440.00 per hour
e. Stephen Durbin initially $585.00 per hour and later $775.00 per hour
f. Jodi Feldman $600.00 per hour

85. The Applicant's bills of costs also include significant charges by non-lawyer support staff:

a. Kaila Scarrow, $30.00 per hour
b. Jeannette Chartier, $100.00 per hour
c. Eryne Crough, $115.00 per hour
d. Diane Englehardt $135.00 per hour
e. Beverly Orr, $140.00 per hour
f. Karen Langston, $210.00 per hour
g. Diana Rokicki, $210.00 per hour
h. Claire Atkinson, $210.00 per hour

86. In addition, $1,899.00 is charged as a disbursement for a "contract law student" with no explanation.
87. As stated, the Applicant is entitled to *a presumption* of full recovery pursuant to Rule 18(14) in relation to the following issues:

a. The child support set-off calculation from July 20, 2014 onward.
b. The custody designation (as distinct from timesharing and other parenting issues) from September 24, 2014 onward.

88. As well, some isolated findings of bad faith would broaden the scope of a "full recovery" analysis.
89. But that still doesn't justify the Applicant's request for "full recovery" of all costs on all issues from July 29, 2013 to the completion of trial (and effectively to the present date).
90. Despite the presumptive provisions of Rule 18(14) the court still retains the discretion to award less than full recovery costs. *MacDonald v. Magel* 2003 CanLII 18880, 67 O.R. (3d) 181 (Ont. C.A.); *Guerten v Guertin* 2015 ONSC 5498 (SCJ).
91. Even where the "full recovery" provisions of the Rules are triggered – either by an offer which meets Rule 18(14) requirements, or by a finding of bad faith – quantification of costs still requires an overall sense of reasonableness and fairness. *Goryn v. Neisner* 2015 ONCJ 318 (OCJ). The Rules do not require the court to allow the successful party to demand a blank cheque for their costs. *Slongo v Slongo* 2015 ONSC 3327 (SCJ). The court retains a residual discretion to make costs awards which are proportional, fair and reasonable in all the circumstances. *M.(C.A.) v. M.(D.)* (supra); *Scipione v Scipione* (supra).
92. In *Biant v. Sagoo* 2001 CanLII 28137, [2001] O.J. No. 3693 (SCJ) Justice Perkins stated:

> "The preferable approach in family law cases is to have cost 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."

93. In *Sepiashvili v Sepiashvili* (supra) Justice Wildman J stated at paragraph 20:

> "…Regardless of the outcome of the case, a client is not entitled to direct vast resources to litigation and expect full reimbursement. When the rules use the term "full recovery costs", there is an implied qualification that the costs incurred must be reasonable. There must be some assessment of the most effective use of resources to present the case, and some attempt to approach the matter in a cost-effective manner….."

94. The costs determination must reflect proportionality to the issues argued. There should be a correlation between legal fees incurred (for which reimbursement is sought) and the importance or monetary value of the issues at stake. *Pagnotta v. Brown* [2002] O.J. No. 3033 (SCJ); *Gale v. Gale* (2006) CarswellOnt 6328.
95. By the same token, proportionality should not result in reduced costs where the unsuccessful party has forced a long and expensive trial. *Murphy v. Murphy* 2010 ONSC 6204 (SCJ); *Philippe v Bertrand* 2015 ONSC 2449 (SCJ).
96. The Supreme Court of Canada has recognized in *Hyrniak v. Mauldin* 2014 SCC 7 (CanLII) that timeliness, affordability and proportionality are essential components of any legal system that seeks to provide true access to justice. Affordability and proportionality require that lawyers budget their time. The expenditure of a disproportionate amount of docketed time will not be sanctioned by the court. *Karkulowski v Karkulowski* 2015 ONSC 3171 (SCJ).
97. Simplistically, a common theme in the "reasonable expectations" and "proportionality" analyses is that the loser should not have to reimburse the winner for excessive or unnecessarily expensive litigation behaviour which might be regarded as "overkill". *Scipione v. Scipione* (supra).
98. While it is not mandatory that an unsuccessful party reveal their own legal costs for comparative purposes, in this case the Respondent has disclosed that her overall legal fee for this same case is perhaps two-thirds that of the Applicant's. And throughout, she was represented by a single lawyer with only one law clerk (who didn't attend the trial).
99. The size of an unsuccessful party's legal bill does not in any way dictate that the successful party's legal bill is limited to the same amount. Sometimes the winner was successful *precisely* because their lawyer put more work into the file. But at the very least the unsuccessful party's legal bill may be of assistance as a benchmark for proportionality.
100. As I noted in my lengthy judgment, this 36 day trial didn't need to be *a 36 day trial*. It was originally estimated as a 20 day trial, and even *that* would have been more than most families could afford. Both parties must assume responsibility (although not equally) for the fact that considerable trial time could have been saved.
101. The Respondent says the Applicant called too many witnesses. I have some difficulty with this criticism. *The Applicant* had to adduce a lot of evidence on parenting issues, because *the Respondent* was creating a lot of problems. The volume of information, and the repetitive nature of certain damaging behaviours were vitally important to the court's ultimate decision.
102. But the manner in which evidence was presented – and tested – is relevant to the consideration of proportionality and overall efficiency.

a. Much of the evidence could have been presented by way of an agreed statement of facts. To the extent that such agreement is elusive in high conflict files, much of the evidence could have been resolved by way of a Request to Admit. These fundamentally important time-saving options could have significantly narrowed the scope of the trial, and perhaps eliminated at least some of the 20 witnesses.
b. There was no reference to pre-trial Questioning having taken place. The Applicant's testimony spanned six days. The Respondent's testimony was spread over nine days (with interruptions). While cross-examination was productive for both counsel, more focussed questioning could have saved a lot of time.
c. Assessor Michelle Hayes was cross-examined by the Respondent's counsel for two full days, with none of her thorough and very helpful evidence being undermined in any way. Afterward, the Respondent elected to present no reply evidence.
d. The Respondent's counsel's vigorous cross-examination of various teachers and CAS workers was largely unproductive (with the exception of CAS worker Julie-Ann Pearce).

103. It is not the trial judge's place to control how counsel choose to present their case. Indeed, I suspect the very fact that this trial went 36 days might lead to the predictable suggestion that perhaps I should have taken a more active role in trial management. But this was a high conflict custody case, and both parties had an urgent need to be heard. I understand this.
104. But choosing to cause or allow a trial to become protracted comes with cost consequences for both parties.

a. The winner has to establish that they couldn't have achieved that same level of success without incurring all of their costs.
b. The loser has to establish the winner could still have been successful, even without putting in so much time or effort.
c. The winner can't be given a blank cheque to spend as much as they want to achieve a result.
d. The loser will be hard-pressed to argue "you fought too hard to prove you were right."

105. Rule 24(11(f) directs the court to consider any other relevant matter. This includes the aforementioned considerations of reasonable expectations and proportionality.
106. As well, a court must consider a party's ability to pay costs. *MacDonald v. Magel* (supra); *Biant v. Sagoo* (supra).
107. But while a party's limited financial circumstances is a factor for the court to consider, it should not be used as a shield against *any* liability for costs and should only be taken into account regarding the quantum of costs. *Snih v. Snih* 2007 Canlii 20774 (SCJ); *Quinn v. Nicholson* 2013 ONSC 1125 (SCJ); *Luke v. Luke* 2014 ONSC 422 (SCJ).
108. The impact of a costs order on a party's ability to provide for a child must also be considered. *Beckett v. Beckett* 2010 ONSC 2706 (CanLII), [2010] O.J. No. 1957 (SCJ); *Emmerson v Emmerson* 2015 ONSC 2949 (SCJ). But this cuts both ways:

a. A large costs order against an unsuccessful party may affect their ability to provide for a child in their care.
b. But inadequate reimbursement for costs may similarly impoverish a child residing in the successful party's household.

109. In this case, the Applicant has custody of Paige and she will be residing in his household at least half the time – presumptively most of the time as of September 2016.

a. The Applicant says he is of modest means.
b. He says he was forced to deplete all of his savings and is now more than $300,000.00 in debt, primarily as a result of this needless litigation.
c. He says the Respondent has the ability to pay costs, given the fact that she will be receiving approximately $250,000.00 from the net proceeds of sale, plus a small equalization payment – in addition to the assets she retained after separation.
d. He says the Respondent's July 28, 2015 financial statement shows assets of $96,484.44 not including her interest in the matrimonial home, with only a $20,000.00 car loan owing to her parents.

110. The Respondent disputes the Applicant's claims.

a. She says she does not have the assets or means to satisfy the Applicant's request for a large costs order.
b. Her savings have been depleted.
c. She says she owes her father substantial money.
d. Unlike the Applicant she has not re-partnered, and does not have the "fall back" of a second income in her home.
e. She missed almost two months of work as a result of the trial.
f. As a result she is in a difficult situation financially and cannot afford to pay significant costs.
g. She argues that impoverishing her with an astronomical costs order will "do nothing but tip the scales in favour of the Applicant to allow him to marginalize the Respondent's role in Paige's life".
h. She does not deny that she will likely receive about $250,000.00 when the matrimonial home sells. But she says "It makes no sense to strip the Respondent of every penny of her net worth for the sake of the child."

111. Overall, in arriving at a costs figure which is reasonable to both parties, I must balance many considerations.

a. The Respondent's behaviour on the main parenting issue was unreasonable – both before *and throughout* the litigation. This was not just a case of two loving parents each being committed to their child. The Respondent set out to demolish the Applicant's relationship with his daughter. It backfired, and now she's scrambling to avoid her time with the child being further eroded. She has been given an opportunity

to try to mitigate her position. But there can be no doubt the Applicant was overwhelmingly successful on the main issues.

b. There was divided success in relation to the remaining issues including the house, the pension, imputing income, child support, and spousal support.
Arguably, the Applicant was more successful on the issues which required the greatest amount of time.

c. The Applicant is presumptively entitled to elevated costs pursuant to Rule 18(14) (on the issues of the custody designation and child support) and also in relation to some incidents of bad faith behaviour. Beyond that, there is a presumption that the Applicant is entitled to recovery for costs by virtue of his success and reasonable behaviour (both as a parent and as a litigant).

d. Both parties – and particularly the Respondent -- must assume responsibility for the fact that this 36 day trial became needlessly protracted.

e. And the bottom line is that the Applicant's request for more than a quarter of a million dollars in costs must be considered in the context of fairness, proportionality, affordability, and reasonable expectations and allocation of resources.

f. Winning – even winning big time – does not automatically mean the loser has to write a blank cheque on costs.

g. And the greater the amount being requested, the greater the need to explain exactly what legal work was done, and why it had to be done. In this respect, the Applicant's bills of costs should have been much more informative (particularly as to why so many lawyers and support staff had to work on this one file; and why certain common issues required so much legal research).

112. Which gets us back to the Applicant's plaintive e-mail on August 8, 2012, begging the Respondent to be reasonable. Specifically informing her of potentially ruinous cost consequences. In retrospect, his somber warning about "spending 40 to 50 thousand dollars a piece in lawyer fees" now amounts to wishful thinking.

113. All of this could have been avoided.

114. All of this *should* have been avoided.

115. Courts have an obligation to deliver that message, so parents will stop pretending that hard-ball custody litigation is "for the sake of the child."

THE ORDER

116. The Respondent shall pay to the Applicant costs fixed in the sum of $192,000.00 inclusive of all disbursements, reimbursements and HST. This includes $2,000.00 in relation to the preparation of comprehensive costs submissions (and reply submissions).

117. The Applicant asks that costs be enforceable by the Family Responsibility Office. But I find that approximately ten per cent of the trial related to support or maintenance. Accordingly, $19,000.00 of the costs order shall be enforceable by the Director of F.R.O, pursuant to section 1(1)(g) of the *Family Law Responsibility and Support Arrears Enforcement Act* 1996. *Wildman v. Wildman* 2006 CanLII 33540 (ON CA), (2006) 82 O.R. (3d) 401 (Ont. C.A.).

118. Finally, the Applicant briefly requested that the costs be paid from the Respondent's share of the net proceeds of sale. The Respondent briefly opposed this. In the absence of

any comprehensive submissions, case law or statutory authority, I make no determination on this issue. If counsel wish to pursue it, they should bring a regular motion returnable before me.

Pazaratz, J.

Released: March 3, 2016

CITATION: Jackson v. Mayerle, 2016 ONSC 1556
COURT FILE NO.: F67/13
DATE: 2016-03-03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Davis Jackson

Applicant

– and –

Eileen Mayerle

Respondent

REASONS FOR JUDGMENT

Pazaratz, J.

Released: March 3, 2016