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# Lee v. Belperio, 2012 ONSC 6389 (CanLII)

Date: 2012-11-13  
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**FAMILY COURT FILE NO.:**

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## **SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Nicole Lee, Applicant

**AND:**

Marco Belperio, Respondent

**BEFORE:** The Honourable Madam Justice H.A. McGee

**COUNSEL:** Shelly Kalra, for the Applicant

Roselyn T. Pecus, for the Respondent

**HEARD:** September 21, 2012

### **COSTS ENDORSEMENT**

1. On September 13, 2012, the applicant mother brought an emergency motion for certain orders without notice, prior to the issuance of pleadings, or a Case Conference.

2. Justice Kaufman heard the emergency motion that day and granted a restraining order preventing the father from contacting or communicating with the mother and their daughters except through counsel, email, text, telephone, Skype and through supervised access. The father was also restrained from coming within 500 metres of three locations, except for agreed terms of supervised access. The order terminated on September 21, 2012 when the matter was set to return on notice to the father.

3. On September 21, 2012 I heard the return of the mother's motion and the father's cross motion for a return to the shared parenting schedule previously agreed, that the parents use a coordinator for future disputes, for appointment of the OCL and certain other relief.

4. In reasons released September 26, 2012, I found that there was no urgency to the mother's September 13 motion per Rule 14 (4.2) of the *Family Law Rules*. I declined to continue any of the terms granted to the mother on September 13 with the effect of returning the parties to the terms previously agreed within their November 20, 2009 Separation Agreement. I also granted immediate terms for the father to have the children for an important family event.

5. The parties have each made vigorous costs claims. I thank each for fulsome and helpful written submissions.

#### **Claim for Costs**

6. The respondent father was the successful party. He seeks a full recovery of his costs in the amount of \$18,006.26 inclusive of disbursements and HST.

7. Counsel for the applicant mother asks for an order that each party bear his or her own costs, alternatively that costs be reserved to the trial justice, or alternatively that costs be fixed at \$1,500.00.

#### **Request for No Costs**

8. Upon service of the mother's materials, the father faced a dire choice of comprehensively responding within 7 days, or ceasing contact with the children for an extended period.

9. The effect of the order sought and initially granted was to instantly transform a lengthy status quo of joint parenting to one of supervised access. The issues were of critical importance to the children as well as the parents. Moreover, the court is fully cognizant that an order for supervised access is an order for no access while intake procedures within a supervised access centre are initiated. [1]

10. The father was wholly successful on the motion. There is a presumption of costs to a successful party. There was no divided success. Neither was there any unreasonable conduct by the father that would disentitle him to an award of costs. He shall have his costs.

### **Request to Defer Costs to Trial**

11. Costs are to be decided at each step of the proceeding; Rule 24(10.) There are strong policy reasons for this approach. The court must make consistent efforts to attach events to their consequences in a timely manner.

12. Deferring costs to the trial judge would place the question of costs before a justice who did not hear the original event. The trial judge should not deal with requests for costs that were addressed or should have been addressed at these prior steps in the case. *Islam v. Rahman* 2007 ONCA 622 (CanLII), 2007 ONCA 622 (CanLII), 2007 ONCA 622 (CanLII), 2007 ONCA 622

### **Quantum of Costs**

13. Neither party served an offer to settle - the usual starting point in assessing costs. The respondent father's limited ability to prepare an offer in the seven days between initial notice of the mother's intentions and the return of the emergency motion is noted. The mother's motion was undertaken without notice, thus precluding an offer to settle.

14. The father seeks a full recovery of his costs. Rule 18 (14) of the *Rules* provides one manner in which a Court can assess a full recovery of costs, but it is not an exclusive path. Full recovery can also be provided in circumstances of bad faith, or in rare cases that may be appropriate from time to time.

### **Bad Faith**

15. The father seeks a finding of bad faith per rule 24(8.) He proposes that the mother intentionally mislead the court by making various inaccurate and misleading statements, including the attachment of incomplete portions of chats between the parties.

16. A finding of bad faith leads to an automatic award of costs on a full-recovery basis. The case law sets out a high standard which must be met to establish a finding of bad faith. Bad faith generally implies conscious doing of a wrong such as intimidating an opposing party, purporting falsehoods and deliberate breaches of orders.

17. Claims of bad faith must be carefully approached within cases involving children. Parents are powerfully motivated by the fear of harm to their children, irrespective of any intention to cause harm to the other parent. Too often it is an irrational or distorted fear of harm to a child that drives a parent to the courts. And although the innocent parent ought not bear the costs of such a misguided adventure, neither should it be automatically assumed that the moving parent acted out of bad faith.

18. I have carefully considered the father's claim for a finding of bad faith. The incomplete chats drew judicial comment, but were not relied upon. Most importantly, the mother did receive a letter from the Children's Aid Society which

was attached to her materials and indicated a basis for involvement. Although the letter was ultimately insufficient to support the relief sought by the mother, it does serve to mitigate a claim of bad faith.

19. I make no finding of bad faith.

### **Unreasonable Litigation Conduct**

20. A finding of unreasonable litigation behaviour by the losing party is an important factor that may be considered in determining the quantum of costs. Unreasonable litigation behaviour includes a plan to secure a court order without notice in circumstances that are not urgent. It may also include conduct that fails to first consider to effect of the litigation on the children and their attachment to the other parent.

21. As stated by Justice Perkins in *Parson v. Parsons* 2002 CanLII 45521 (ON SC), (2002) 31 R.F.L. (5<sup>th</sup>) 373:

When the unsuccessful party has acted unreasonably the successful party should not have to financially “pick-up” or absorb the result of the unsuccessful party’s impulsive decisions. While the court recognizes that the costs order may “fan the fires”, I interpret the rules as recognizing that there must be consequences for unreasonableness. There is an element of behaviour modification to a costs order in that it encourages a change in attitude from a “litigate with impunity” mindset.

22. I find that the mother was unreasonable in not providing notice of the motion, or first issuing a Motion to Change the Separation Agreement.

23. This motion was of importance. Although not complex, it was made difficult by the manner in which it was framed as urgent relief. The motion created significant risk for both parents and removed any opportunity for calm reflection or consideration of alternatives.

24. The lawyer and law clerk’s rates for father’s counsel as set out in her Bill of Costs are appropriate, particularly given the diligence necessary to respond to this motion within one week. It was not unreasonable for the father to incur disbursements for a medical report given the allegations of the mother.

25. The time spent on the father’s affidavits and supporting affidavits was perhaps over extensive, but not disproportionate given the nature of the mother’s allegations against the father. Ultimately, some of the time docketed may be better attributed to the action in the whole and be recoverable as the matter proceeds.

26. The three objectives of costs awards as set out in *Serra v. Serra*, [2009] O.J. No. 1905 (OCA): to partially indemnify successful litigants for the cost of litigation; to encourage settlement; and to discourage and sanction inappropriate behavior by litigants are applicable to all matters before the court. The father should be relieved of his costs in a meaningful way.

27. At the same time, the court recognizes that a significant award of costs may interfere with the children's best interests and the mother's ability to provide care: *(A.C.) V. M. (D.)* 2003 CanLII 18880 (ON CA), (2003), 67 O.R. (3d) 181, [2003] O.J. No. 3707 (C.A.). The mother does not address her ability to pay costs within her submissions. Neither has the matter progressed far enough for the court to have financial statements available.

28. In consideration of all these factors and in attempting to achieve a meaningful indemnification of the father balanced by an objective view of appropriate costs and a regard of what the mother should have anticipated paying if unsuccessful; I award the father \$12,000.00 in costs, inclusive of disbursements and HST, payable forthwith.

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Justice H.A. McGee

**Date:** November 13, 2012

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[1] Which can take up to five weeks depending on the Centre, intake procedures and availability

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