F0216/00AN
Court File 5134/97

IN THE ONTARIO COURT OF JUSTICE

PROVINCIAL DIVISION

BETWEEN:

THE MOTHER

APPLICANT

AND

THE FATHER

RESPONDENT

RULING
ON
FIXING OF COSTS
(WRITTEN)

OF THE HONOURABLE JUDGE

SHERRILL M. ROGERS

AT NEWMARKET, ONTARIO

RELEASED: JANUARY 19, 1998

For the Applicant	Steven D. Benmor
For the Respondent	Bruce Day

RULING
ON
FIXING OF COSTS

ROGERS, P.C.J.;

The matter before me is a fixing of costs that arose out of the personal difficulties of the father and the mother. The trial was heard in June 1997. Judgment was released in July 1997 and the request for the court to fix costs has been argued. I must comment as I have commented before on the high degree of professionalism and organization of counsel. They were of great assistance to the court.

MONIES EXPENDED

Counsel for the applicant, Mr. Benmor has prepared his summary of time dockets for the court. The time dockets prior to trial are entirely reasonable and are reflective of a sincere effort to obtain disclosure and, therefore, settle. Further, the time dockets for preparation for trial and the trial itself are entirely reasonable. The only area that I have difficulty with is the preparation for final argument. The court did request written submissions as an effort to solve timing problems. Mr. Benmor indicated at the time that he was able to make submissions orally but the court decided otherwise. Although written submissions do require more particularity, it would seem that at the time of the close of the trial Mr. Benmor was in the position to make argument. I think the amount of time thereafter is excessive and I would allow only six hours.

That reduces the time by 16 ½ hours. The time should be further reduced by an amount of three hours being the time for a motion on February 6, 1997. Costs have already been awarded on that. This reduces the total amount of hours to 77.9 hours.

Counsel for the father has indicated that he has no quarrel with Mr. Benmor's hourly rate of $150.00. While this is a generous amount for a lawyer called in 1994, the court accepts that amount. That brings the total cost for allowed time to $11,685.00.

The court has no difficulty with the amount claimed for disbursement. While the amount for photocopies was queried, I accept the necessity for considerable photocopying and the costs allocated to it. In addition, I feel that the expense of $14.45 to obtain a faxed court case was reasonable given that counsel felt he had to have the case. The total amount of disbursements is, therefore, $308.84. The total amount claimed is, therefore, $11,993.84.

OFFER TO SETTLE

There were two Offers to Settle served by the mother. The first was prior to the interim motion and was withdrawn. The second offer was on the table at the time of the trial. The respondent also filed an Offer served June 4, 1997.

The two parties were in agreement with respect to custody. That was to be with the child's mother. The access issues revolved around the extent of access but also the time it would be held. The father preferred Sunday afternoons. The mother preferred Sunday mornings. The court determined that the morning

access was more appropriate for this child and ordered such. The court went further than the parties and defined access over a far greater period of time. As the timing of morning versus afternoon access was very important to the parties, the mother carried the day on this issue.

The issue of support is canvassed in the Offers. The father offered to pay the sum of $385.00 and the mother would have settled for the sum of $500.00 per month. The court ordered the sum of $435.00 retroactive to August 1, 1996 when the child was born, the sum of $540.00 from August 1, 1997, and the sum of $605.00 from January 1, 1998. The court had ordered the sum of $435.00 at an interim motion on February 6, 1997. The Offer of the father retreated significantly from that order. The mother was clearly successful on this issue. The other issues in the Offer were not significantly divergent.

It is, therefore, clear that the mother was the successful party with respect to the Offers of Settlement. These Offers were all in compliance with the Rules of the Provincial Court. After the trial and during the costs motion, the court opened the Offers, examined them and given the findings above, will, therefore, take into consideration the terms of the Offer for the purposes of determining costs.

DISCLOSURE ISSUES

Mr. Benmor suggests that there should be strong comment from the court with respect to the behaviour of the respondent on the issue of disclosure and that strong comment should take the form of costs. Mr. Benmor suggests that there should be full recovery for the mother because of the behaviour of the father.

It is clear that throughout the litigation, the mother's solicitor was requesting more disclosure than he was getting. Mr. Benmor never does receive a number of items. The courts wishes to look at these in turn;

1) Notice of Assessment – 1994, 1995, 1996

   These were never presented but as the father had not filed tax returns, they would not be easily obtainable.

2) Personal Records – 1996, 1997 of Respondent's Amway distributorship –
   earnings and expenses

   The disclosure on this was the statement of business activity which was later found in the Income Tax Returns. The statement provided in the Income Tax return is clearly not the data which was going to be of use to the applicant's solicitor.

An important issue throughout the trial was the amount of time that was expended by the respondent on the Amway business and whether it was a valid expenditure of time. A question was raised whether the father was sincerely pursuing the Amway business or ought to be seeking another means of providing for his child. This was a significant disclosure issue and the reluctance of the father to provide such disclosure did seriously impede the progress of the trial.

3) Bank Account Statements
   Few statements were provided and it would have been more appropriate that this disclosure had been made early and completely.

The rest of the disclosure requests were either met or met, in part, or not as significant as the above.

The noted reluctance of the respondent to fully engage in the issues before the court seemed to have root in his reluctance to acknowledge and accept his responsibilities as a father. Clearly, this was not a planned pregnancy and he

was never pleased to have this thrust upon him. However, his reluctance to grapple with the issues extended to the time of trial.

The court never had adequate evidence to ascertain if the father's plan to supplement his part time employment with the bank was feasible or whether he ought to maximize his income by another means. Without evidence, the court projected his bank earnings to a full time position as one could not reasonably choose to continue the Amway business if it provided less.

It is this court's view that his reluctance was a part of his lack of disclosure as well. He just did not seem to be able to come to terms with his new responsibilities and the fact that he had matters to attend to in order to fulfil his obligations to the court and his child. The court has already noted in the earlier Judgment the immaturity of the respondent and this, no doubt, is a considerable part of his reluctance.

The court is of the view that considerable disadvantage was created for both the applicant and the court because of the lack of disclosure, in particular, the lack of clarity about the Amway business. It was very difficult for the court to determine how much income could be generated by the Amway business and how much time was being expended on it.

Such non-disclosure for whatever reasons calls for sanction by the court.

EXTENT OF RECOVERY

The respondent did not accept a reasonable Offer to Settle which turned out to be more to his advantage than the judgment of the court. If Offers to Settle are to

have any meaning, there should be significant costs which flow from such a rejection of litigation risk management.

The applicant was successfully on the major points in contention at the trial. The parties did, however, reach a resolution on some of the issues contained in the original application, namely, the issue of custody, insurance plans and health care plans.

The lack of financial disclosure provided by the father was an impediment to the smooth flow of settlement negotiations and the conduct of the trial. Such behaviour calls for sanction by the court.

The exercise that this court is engaged in is one of fixing costs, not one of assessing costs. This is a summary procedure and is meant to provide a quick resolution for parties on an important point such as costs.

While success has been largely that of the mother, the above-noted issues which were resolved prior to trial do have an impact on full recovery. The court is of the view that there should be some credit given for this resolution.

The court, therefore, orders the respondent to pay the applicant the sum of $9000.00 and disbursements in the amount of $308.84. The total amount of $9308.84 is attributable one half to the cost of obtaining a support order. These costs are to be paid one half by July 1, 1998 and the remaining amount by May 1, 1999.

Rogers, J.