

Case Name:

D.v. D.

**Between
D.D., applicant, and
A.D., respondent**

[2005] O.J. No. 1308

138 A.C.W.S. (3d) 490

Newmarket Court File No. 14425/03

Ontario Superior Court of Justice

L.M. Olah J.

Heard: By written submissions.

Judgment: April 1, 2005.

(13 paras.)

Civil procedure -- Costs -- Where success divided -- Offers to settle -- Party and party or partial indemnity -- Assessment or fixing of costs -- Considerations -- Disbursements -- Family law -- Custody and access -- Maintenance and support -- Child support -- Spousal support -- Awards -- Periodic payments -- Retroactive awards -- Marital property -- Equalization.

Application by the wife for costs on a full recovery basis. She sought costs for the issues that were settled before trial. These issues were custody, access and child support. She also sought costs for issues that were outstanding during the seven-day trial. These issues were spousal support, retroactive child support and the equalization of the net family property. The parties each served offers to settle. The wife was successful regarding retroactive child support and retroactive and current spousal support. She was partially successful regarding the net equalization payment and regarding a specific property. The wife's offer regarding equalization was \$50,000 higher than what she achieved. The amount of the wife's claim was \$95,308. The hourly rate of the wife's lawyer was \$250. He devoted 288 hours to this matter.

HELD: Application allowed in part. The court would only consider costs for matters heard by it. It would also consider costs for the trial preparation time. It was unreasonable that the husband did not accept the wife's offer to settle regarding spousal support. However, his conduct was not manifestly unreasonable. The wife was not entitled to costs on a full recovery basis because the husband did not act in bad faith. His failure to make timely disclosure was not unreasonable behaviour that showed he acted in bad faith. He was tardy in some of his production but produced significant financial disclosure and provided a reasonable explanation for the delay. The hourly rate was reasonable but the time devoted was excessive, based on the average complexity of this case. The wife was awarded \$42,000 for fees and \$5,983 for disbursements. Such was to be paid within 30 days.

Statutes, Regulations and Rules Cited:

Family Law Rules Rule 18, Rule 24, Rule 24(5)(c), Rule 24(10), Rule 24(11)

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Counsel:

Steven Benmor, for the Applicant

Mark Greenstein, for the Respondent

[Editor's note: A corrected version was released by the Court April 13, 2005. The changes were not indicated. This document contains the amended text.]

ENDORSEMENT ON COSTS

1 L.M. OLAH J. (endorsement):-- The applicant wife requests costs for issues that were settled before trial, namely: custody, access, child support; as well as costs for the issues outstanding at the seven-day trial, namely: spousal support, retroactive child support, and equalization of the net family property.

2 Rule 24(10) requires that the costs be decided at each step in the case. Therefore, this court will only consider costs for matters heard by this judicial officer as well as costs for the preparation for the trial, or for any step that another presiding judicial officer put over to this court. A review the endorsements reflects no referral from another presiding judge with respect to costs for a specific event, other than the endorsement of Wildman J. dated December 11, 2003, which dealt with costs in general. I take Wildman J's endorsement to mean that she did not address the issue of the costs of the motion before her on December 11, 2003. All other endorsements were either silent as to costs, or dealt with the costs of the event.

3 Pursuant to rule 18 of the Family Law Rules, the applicant wife served two Offers to Settle on December 22, 2003, namely:

- 1) with respect to spousal support, in the amount of \$2,000 from March 1, 2002 together with the cost of living clause;
- 2) with respect to the net equalization payment, wherein the applicant was to receive a net equalization payment of \$50,000;
- 3) one-half of the net proceeds of the sale of the Caledon property;
- 4) contents to be divided equally based on value.

The applicant wife's offers were properly executed by both herself and her counsel.

4 The respondent husband's counsel served an Offer to Settle in his correspondence dated April 9, 2004, which correspondence was not executed by the respondent husband (a minor error) as follows:

- 1) child support based on the respondent husband's income up \$90,000;
- 2) spousal support in the amount of \$1,500 per month, commencing May 01, 2004;
- 3) no equalization payment;
- 4) no retroactive child or spousal support;

- 5) wife to keep contents, save and except the Syrian Cabinet and paintings and certain personal items;
- 6) the Caledon property to be sold, and after reimbursement to the respondent husband for payments made with respect to the property, the proceeds to be divided equally.

5 A review of my judgment reflects that the wife was:

1. wholly successful with respect to retroactive child support;
2. wholly successful with respect to retroactive and ongoing spousal support;
3. partially successful with respect to the net equalization payment;
4. partially successful with respect to the Caledon property.

Accordingly, pursuant to rule 24 the applicant wife, being in large part successful, is presumptively entitled to costs. She seeks costs on a full recovery basis, arguing that the respondent husband's refusal to accept favourable offers to settle is tantamount to unreasonableness. However, the applicant wife's offer with respect to the net equalization payment of \$50,000 was higher than what she achieved, such that the respondent husband's refusal to accept this offer cannot be construed as unreasonable pursuant to rule 24(5)(c).

6 With respect to the wife's offer with respect to spousal support, it was unreasonable that the husband did not accept this offer.

7 Despite the issue of unreasonableness, costs on a full recovery basis must meet the test of bad faith. As established by V.J. MacKinnon J., "Bad faith can be established by conduct that is intended to deceive or mislead another. It can also be established by the intentional failure to fulfil an agreement in order to achieve an ulterior motive." (see Erickson v. Erickson, [2000] O.J. No. 5789, court file number: 00FL868, May 16, 2000).

8 My review of the evidence does not persuade me that the respondent had acted in bad faith. There is some suggestion that the respondent husband's failure to provide full and timely disclosure constituted "unreasonable behaviour". However, unreasonable behaviour itself cannot be construed as bad faith in order that the quantum of costs be on a full recovery basis.

9 The issue of timely production was addressed early in the trial and I invited counsel to address this issue at the end of trial in order that I could review the timely production by both parties. During the course of the trial, I was concerned that both parties failed to produce valuations or documentation that was readily available to them before trial. Such lack of disclosure by both parties unnecessarily increased the trial time. Although the respondent husband was tardy in some of his production, he did produce significant financial disclosure and he provided a reasonable explanation for the delay in production (recent retainer of counsel). I do not find that he acted in bad faith during the course of the trial.

10 S. 24(11) lists factors for the court to consider in setting the amount of costs as follows:

1. Importance, complexity or difficulty of the issues

The most important and complex issues in this case was the imputation of income to the respondent and the valuation of his dental practice. However, a good portion of the trial time was expended on the establishment of the net equalization payment and in particular, the valuation of the various assets. The valuation of the assets was not of itself complex; however, establishing values of the assets took much trial time, as both parties failed to provide valuations such that the net equalization payment determination could be expedited.

2. Reasonableness

Despite the fact that I found the respondent husband somewhat unreasonable in his rejection of the wife's offer to settle spousal support, on the whole, I did not find the respondent husband manifestly unreasonable.

3. Lawyers rates

Although there appears to be no indication as to when the applicant's counsel was called to the bar, his hourly rate of \$250 appears reasonable.

4. Time spent on case

The applicant's counsel's accounts reflect that 288.90 hours were expended on the matter, including seven days of trial and preparation. I find the time spent by the applicant's counsel somewhat excessive, given the average complexity of the case. It should also be noted that the applicant received costs thrown away in the amount of \$4,500 in January 2005, and yet the hours already paid for continue to be reflected in the costs requested before this court.

5. Expenses

The disbursements as reflected in invoice #827 and "sample" shall be reduced by the cost of the clerical services which are subsumed by the hourly rate, such that the disbursements accepted as reasonable are \$5,983.55.

Conclusion

11 I agree with Blishen J. in *Biddle v. Biddle*, [2005] O.J. No. 1056, March 14, 2005, where she states that in determining costs "there must be flexibility in examining the fac-

tors under subrule 24(11). Rigidly adding hours spent and multiplying by counsel's hourly rate to arrive at an amount on costs, an approach contemplated by the Ontario Costs Grid, is to be discouraged."

12 The applicant wife claims costs on a full recovery basis, inclusive of disbursements and GST, in the sum of \$95,308.50. However, taking into consideration all the factors and circumstances discussed above, namely: no basis for a full recovery, split success on some issues, rule 24(10), payment of costs thrown away in the amount of \$4,500, I find that the sum of \$42,000 for fees and \$5,983.55 for disbursements, as well as GST calculated on the fees and disbursements, to be a fair, reasonable and substantial award.

13 Such amount to be payable by the respondent husband to the applicant wife within 30 days.

L.M. OLAH J.