Case Name:
F v. C

Between
A.F.., Applicant (responding party), and
W.C.., Respondent (moving party)

[2001] O.J. No. 6282

Toronto (North York) Registry No. D2488/98

Ontario Court of Justice

R.J. Otter J.

Heard: June 14-15 and 18, 2001.
Oral judgment: July 19, 2001.

(132 paras.)

Court Summary:

Access to child -- Form of order -- Suspension and termination -- Termination -- Grounds -- Exceptional circumstances to justify termination -- Father had been lax in pursuing his contacts with children and mother had become adamant that he should not be seeing them -- Father was not abusive, did not drink or smoke and posed no threat to their safety or welfare -- Court saw no valid reason to deny access in this case -- Nevertheless, since father and children had not seen each other for some time, any resumption of contact would have to be gradual and had to reflect children's responses.

Civil procedure -- Costs -- Entitlement or liability -- Presumption of entitlement for successful party -- Partial success -- Court found that, on balance, mother had achieved larger degree of success on support claim than father had achieved on access issue -- Moreover, mother had submitted offer to settle that was almost identical to court's decision on child support -- Court awarded mother "modest sum" of $1,000 for costs against father.

Civil procedure -- General -- Failure to comply with rules -- Court response -- Readjustment in nature of proceeding -- Payor against whom order had been made in his absence and who now sought to have matter reheard on alleged ground that he had not been served with notice filed application (almost as if he were launching claim de novo) -- Invok-

ing subrules 1(8), 2(2) and 2(3) of Family Law Rules, court converted payor's process to that of motion.

Support orders -- Assessment of quantum -- Child support guidelines -- Payor's income -- Attribution of income -- Payor "intentionally under-employed or unemployed" -- Payor father claimed to have lost his job, although there was reason to suspect that he had deliberately quit -- Since then until trial 2 years later, he could not prove that he had made any efforts to secure employment (aside from his bald claims that he had done so), could produced no job search records, offered no evidence of medical disability; or present any evidence that he was otherwise incapable of being gainfully employed -- Under circumstances of this case, court imputed annual income of $30,000 to father.

Support orders -- Variation -- Threshold test (Change in circumstances) -- Nature of change -- Payor's means -- Lowered income -- Even though served to court's satisfaction, payor failed to appear at previous hearing where, in his absence, court attributed income of $40,000 to him on basis of mother's evidence -- In meantime, payor had lost his job as truck driver, although there was reason to suspect that he had deliberately quit -- Shortly thereafter, his driver's licence had been suspended, which would have precluded work as truck driver, but only temporarily -- Court accepted these setbacks as changes in circumstance justifying variation, but court also found that payor showed no interest in finding work if it meant that he would have to pay child support -- He was in good health and had extensive work experience but was determined to avoid his obligation to provide child support -- Court gave him 3-month "holiday" from child support to find work but otherwise attributed annual income of $30,000 to him on which basis it issued new child support order

Statutes and Regulations cited:

Child Support Guidelines, O.Reg. 391/97 [as amended], section 14 and subsection 19(1).

Family Law Act, R.S.O. 1990, c. F-3 [as amended], section 33, subsection 37(2.1) and subsection 37(2.2).

Family Law Rules, O.Reg. 114/99 [as amended], subrule 1(8), subrule 2(2), subrule 2(3), subrule 15(14), rule 18 and Form 8.

Legal Aid Services Act, 1998, S.O. 1998, c. 26 [as amended].

Counsel:

Steven D. Benmor: counsel for the applicant mother.

Thomas G. Sosa: counsel for the respondent father.

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1 R.J. OTTER J. (orally):-- The parties are here for the promised oral judgment on the conclusion of the two-day trial and third day for submissions. The matter is really an application by Mr. C. and I used the word because he used a Form 8 (Application) that he was

seeking to vary the order of Provincial Judge James P. Nevins of 8 December 1998, as well as the order of 5 October 1998 wherein he seeks access.

2 His initial application called for a variation of those orders to provide for joint custody, access, a variation of the child support order of $570 per month from 1 October 1998. He was seeking to eliminate that entirely and then, or in the alternative, to reduce the support and rescind all arrears.

3 The initial issue was raised as to the technicality of his application -- namely, that under *Family Law Rules*, O.Reg. 114/99, as amended, he went by a Form 8 (an application) when a variation or a changing an order under subrule 15(14) was by way of motion. It was unclear whether or not it was seeking to change the earlier order that was made on a motion without notice or whether it was just a variation application.

4 Mr. C. through his counsel indicated that it was a variation application and that he intended to proceed with under subsection 37(2.1) of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended and section 14 of the *Child Support Guidelines*, O.Reg. 391/97, as amended. In dealing with the technical point, he addressed the rules. And first of all, subrule 1(8) deals with the court's discretion where there is a failure to follow the rules. The court can make an order that it considers necessary for a just determination of the matter. This should be put in the context of the primary objective of the rules, particularly subrule 2(2), to deal with cases justly and subrule 2(3), adopting a procedure that is fair to all and considering the saving of expense and time.

5 I chose to treat this as a motion, notwithstanding the absence of the correct form, to get to the core of the issue. And that it was to vary child support as well as to deal, as it turned out, with the issue of access as opposed to custody with a view to saving the parties time, expense and the stress of re-litigating the matter in the right form.

6 To put the issue back in its legal context, this is an application for variation and I will deal with the issue of child support. The court needs to be satisfied that there has been a change in circumstances within the meaning of the *Child Support Guidelines*, or that evidence not available in the previous hearing has become available. The court may then discharge, vary or suspend a term of the order prospectively or retroactively, may relieve the respondent from the payment of any part or all of the arrears or any interest due on them, and may make any order for the support of a child that the court could make on an application under section 33 of the *Family Law Act*.

7 The only other applicable provision from there, of course, is subsection 37(2.2), which directs that when making an order under the previous subsection, the court shall do so in accordance with the *Child Support Guidelines*.

8 In making or addressing the circumstances for a variation, the court must then address section 14 of the *Child Support Guidelines*, particularly paragraphs 1 and 2, which reads as follows;

> **14 Circumstances for variation.** -- For the purposes of subsection 37(2.2) of the Act and subsection 17(4) of the *Divorce Act* (Canada), any one of the following constitutes a change of circumstances that gives rise to the making of a variation order:

1. In the case where the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of a child or any provision thereof.
2. In the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either parent or spouse or of any child who is entitled to support.

...

9 It is also trite to reiterate that the burden rests on the party making the application. And the onus is on that party -- in this case, Mr. C. -- on the balance of probabilities.

10 First, I will look at the history of both the parties. They were never married. They met in September of 1988, started dating in February of 1989, commenced cohabitation in August of 1991 and ceased cohabitation, at least on the evidence of Ms. F., in February of 1996. There are two children of this relationship – B.C. (DOB) and K.C. (DOB).

11 On the litigation front, Ms. F. launched an application on 10 September 1998 seeking, amongst other relief, custody of both children and child support. That original application was returnable on 5 October 1998. Mr. C. was not present when a final order of custody was made of both children to the applicant mother by Judge Nevins. And there was no order dealing with the issue of access.

12 The matter was subsequently adjourned to 7 December 1998 to deal with the issue of child support. In Mr. C.'s absence on that date, the court imputed income of $40,000 per annum to him. In accordance with the guidelines entry for two children, he was ordered to pay $570 per month child support starting on 1 October 1998.

13 Mr. C. then launched this action by application dated 30 November 1999, again to reiterate, seeking joint custody and variation of child support from the order of 7 December 1998, to reduce or to eliminate monthly support and to rescind arrears, as well as to claim access to both children.

14 The trial on these issues on 14 and 15 June 2001, with submissions on 18 June, went over to today for judgment.

15 There was a consent order, just to put forth the full history of the litigation, on 8 June 1999 where permission was granted for blood tests for determination of paternity. The costs were to be borne by Mr. C., subject to further court order. On that date, he also obtained a refraining order permitting him to retain his driver's licence on the condition of paying ongoing child support in the sum of $570 from 1 June 1999. The blood tests were never done and that issue appears to be dormant at this time.

16 Mr. C. defaulted under the refraining order. He made a full payment in June of 1999 and a partial payment in July of 1999. As a result of the default, his driver's licence was suspended in September of 1999.

17 Winston C. has not worked since August of 1999. He has been in receipt of welfare -- that is, general welfare assistance -- since September of 1999 originally in the amount of $525 per month. When he ceased to have a permanent address, the shelter allowance was deleted, reducing him to the basic general welfare of assistance of $195 per month.

18 On his evidence, he has been unable to find work since the loss of that job. And accordingly, he has been totally unable to pay any support since that time and he has no money at this time to pay child support.

19 Additionally, he has not seen his children since May of 1999, over two years ago. And he would like access, having abandoned at this trial his claim for joint custody. Although he gave no evidence of any plan for restoration of access -- let alone a reasonable plan, especially in light of his not seeing his children for so long -- he has had virtually no contact, except for two brief occasions to his son K. He had extensive contact, especially in the early years to his daughter B. But neither child is indicated since May 1999.

20 It is noteworthy to observe that his last visit with the children was arranged by him with Ms. F. to meet at McDonald's restaurant at the Malvern Town Centre, ostensibly for access. And he did spend some time with both children on that occasion. His real purpose however, in my view, was to serve Ms. F. with the court papers for this variation application. He has not seen the children since. He has made no effort to see them since. He has not sent them any cards, gifts, greetings or anything -- which, in my view, corroborates my assertion above.

21 The *bona fides* of his desire to consider what is best for his children has to be questioned, especially in light of his raising the issue of paternity and then failing to proceed with it. On the evidence of Ms. F., both children are currently very happy, healthy. K. does have an allergy, described as lactose intolerance. They are both doing well in school.

22 Ms. F.'s evidence is that they are not lacking in anything except "not having a father in their lives". She obviously rued this comment when pressed both on cross-examination by the father's counsel and by the court, ultimately adopting a somewhat intransigent position by stating that she was not prepared to facilitate access again.

23 Mr. C., in Ms. F.'s view, is not abusive and does not drink or smoke. He does not constitute a threat to the safety and welfare of the children.

24 In my view, the best interests of the children must always be paramount and must prevail even over the intractable position of mother and a father's interest in children that seems ancillary to the issue of his child support obligations. There is no valid reason to deny access here. The access window should be open, at least open, in the best interest of the children who know that "Dad" exists and who will want, in time, with encouragement, some contact.

25 Any resumption of such contact should be slow and gradual and should reflect the responses of the children. Accordingly, on this issue, I would order the respondent, Mr. C., to have access to his children as arranged between him and Ms. F. to include birthday cards, Christmas greetings, gifts and other correspondence. Ms. F. is to foster and encourage gradual contact and access by the children with their father.

26 Back to the issue of child support. Mr. C. has a history of employment. Educationally, he dropped out of high school after grade XI. But did on one occasion complete approximately two-thirds of a computer course on a part-time basis at Seneca College.

27 He is currently 44 years of age, in good health with no disability. While at school from the age of 17, he worked part time as a grocery clerk at a Dominion store and moved to full-time employment.

28 From 1987 to 1992, engaged in real estate speculation where he bought at least two properties. He did renovations and rented them out. He did repairs, managed and maintained those properties, primarily on his own, with a view to selling for profit. Unfortunately, he got caught up on the downturn of the economy and lost them in a bankruptcy.

29 Overlapping his real estate ventures, Mr. C. operated his own business, C. Haulage. He hauled gravel and engaged in snow removal. It was really a sole proprietorship operated by Mr. C.. That business too failed in the economic downturn.

30 From 1992 to 1993, he was a car salesman, working with three different car dealerships. He characterized himself as an average salesman.

31 From 1993 to 1999, he appears to have been a taxi driver in Jamaica, on the evidence of Ms. F.. He would also purchase goods in Canada and re-sell them in Jamaica for a profit.

32 In 1999, the time of this application, or motion more correctly now, he worked for Motion Supply Inc., as a truck driver -- it being a placement agency. This job terminated in August of 1999. His evidence was that he was let go in August of 1999. When cross-examined, he indicated that his employment was terminated because he no longer had a driver's licence and therefore could not do the job.

33 Ms. F. was of the belief that he quit because of garnishment for child support. There was no direct evidence on this point. There is some support for the position of Ms. F., as Mr. C. on his own evidence indicated his licence was not suspended until September of 1999, even though he ceased work in August of '99. And he made at least partial payment under the old order in August of 1999.

34 Mr. C. testified that he has been searching constantly for employment and unsuccessfully for almost two years, maintaining that he has applied at several places, sent out résumés to many potential employers. He claims that he has eked out an existence on public assistance, loans from friends and financial support from friends.

35 When pressed on cross-examination to furnish details of what he had done as to how many applications he had made, where he had applied, any responses from employer, even a copy of the résumé that he allegedly had sent out, when asked to name any friend who had lent him money, let alone how much, his answers were vague, evasive and unresponsive. He could not provide the name of one place that he applied for work. He could not produce a resume or even name one friend who had lent him money. In my view, his efforts are limp, if not non-existent, and certainly not credible.

36 The conclusion is inescapable. Mr. C. is not generally interested in finding work. He probably has not applied or had only done so faint heartedly. His sole purpose in my view is to avoid his obligation to provide child support. He does not intend to work if it means

having to pay for the support of the children. His good health and his extensive experience and his willingness to seek employment in the past support that view. I reject his position that he is unable to find work. I do accept that he lost his job as a truck driver in August of 1999, but remain doubtful that such termination was not of his own volition.

37 I also accept that the absence of a driver's licence would preclude his working as a truck driver, but only temporarily. Any court would be more than receptive to issuing a re-fraining order on short notice if it meant a resumption of employment and a restoration of child support payments.

38 Clearly, in a situation where a payor is intentionally or deliberately avoiding his obligation to provide child support as here, the court is justified in invoking subsection 19(1) of the *Child Support Guidelines*, which is the provision dealing with imputing income. The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include:

> *(a)* the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;
>
> ...

39 Judge Nevins in his order of 7 December 1998 imputed an income to Mr. C. of $40,000 per annum. On the basis of the evidence of Ms. F. given to Judge Nevins, Mr. C. was employed as a truck driver at the time.

40 Mr. C. was not present on 7 December 1998. He maintained that he had not been served with court papers because he was in Jamaica. On this issue, the evidence in the trial of Ms. F. is that she served Mr. C. on 25 September 1998 with the necessary court papers in the lobby of her residence at 35 P.C.T., Toronto in the presence of her friend, Patricia Hudson. She handed Mr. C. the papers. As she left, she observed his reading them in the lobby of the apartment building. On 30 September, she found the same papers in a plastic bag outside her door at her apartment. These she produced at trial.

41 Mr. C. throughout this period of time in his own evidence maintained that he still used as a mailing address and occasionally as a residential address 44 VR, apartment 911, in Toronto. On this issue, I accept the evidence of Ms. F. and reject the evidence of Mr. C.. His evidence throughout was not candid, forthright, was disingenuous in his questioning on many issues. As I indicated earlier, he was evasive, unresponsive, ostensive pauses before responding to the questions, and ambiguous, consistent with his real intention of avoiding child support and being relieved of any accumulated debt for arrears.

42 I have no hesitation to find, to the extent that it is helpful, that the original application of Ms. F. was indeed on notice to Mr. C..

43 Nevertheless, $40,000 is an inappropriate amount for imputed annual income. In my view, a more realistic figure, based on Mr. C.'s own financial statement filed in this motion as exhibit 1, showing an annual income at that time as a truck driver -- but even without his

being a truck driver, I find an appropriate and a reasonable imputed income to be $30,000 per annum. Such a change in income warrants a variation of child support in accordance with the guidelines. The guideline amount for two children is $446 per month. Having lost his employment, in my view, it would be reasonable that he would require some time to find additional or new employment. A reasonable period of time would be three months within the loss of his job, or certainly by December of 1999.

44 But during those three months, he could not reasonably be expected to have the ability to pay child support, as he was on welfare and should get some credit.

45 In the final analysis, I would impute an income as of 1 December 1999 of $30,000 per annum. And I would reduce the arrears to reflect this new calculation.

46 Effective 1 October 1998, the child support as I indicated should be $446 per month. He should get credit for the duration of the order from 1 October 1998. In my calculation, that works out to $4,092. Additionally, he should get three months' credit, as I indicated, while he could have reasonably sought employment for those three months, that total $1,338. In my view, he should get a total credit of $5,430.

47 The evidence at trial is that the arrears as of 1 June 2001 were $16,497.71. On 1 July, they would have increased to $17,067.71. Giving the appropriate credit for $5,430, I would fix the arrears as of 1 July 2001 at $11,637.71. And the order for ongoing child support would be $446 per month in accordance with the guidelines as of 1 August 2001. And I have endorsed the record accordingly.

48 Any other issues that counsel may wish to raise?

49 Mr. SOSA: No, Your Honour.

50 Mr. BENMOR: And the only outstanding issue would likely be costs. Does Your Honour want to hear submissions on that point?

51 THE COURT: I'll hear -- just give me a moment.

52 Mr. BENMOR: Although I don't have a copy of the offer to settle that Ms. F. had served on the father, I think counsel both will agree that there was an offer made by Ms. F. imputing income to the father of $30,000 and a guideline figure for that. And that ...

53 THE COURT: Oh, that's -- I must be thinking of another file. I was just checking the file to see if there was an issue of -- if there was a sealed offer in the file. I don't see one.

54 Mr. BENMOR: It was silent on the issue of access. And my friend had in response to that offer advised me that the offer itself was silent as to access. And it was our position throughout pre-trial before the trial that there really was no issue of access. If Mr. C. wished to have access, he could have it. And throughout that period, he didn't, as we know. And he hasn't even since the time of trial.

55 The fact that the offer itself was silent as to access should not preclude the court from using the offer for the purposes of awarding costs. On the issue however of the offer *vis-à-vis* child support, although Your Honour does not have the offer before you, what it specifically said was that, from the commencement date of Judge Nevin's order of 1 October 1998, Mr. C. should pay the guideline figure based on an income of $30,000. And I

think it's fair to say that Your Honour's order of today clearly is equal to or better or more favourable to Ms. F..

56 For that on an ongoing basis, I can't comment as quickly as I've just received your oral decision on the set off of 5,000 and change that you've provided *vis-à-vis* the arrears amount. But I submit that, if Mr. F. [*sic*] were to have accepted the offer based on an income of $30,000 commencing on 1 October 1998, this trial would have been avoided. And it was a reasonable position to have taken by Ms. F..

57 If Your Honour does not ...

58 THE COURT: What was the date of the offer?

59 Mr. BENMOR: I'm sorry?

60 THE COURT: What was the date of the offer to settle?

61 Mr. BENMOR: Here it is. We have a copy of it, as it turns out. The date of the offer is 16 September 2000. And for Your Honour's reference, it specifically says on an income of $30,000 for two kids the guideline figure is $446, starting on 1 October 1998.

62 And then the -- well, if I may take a moment, Your Honour, I might be able to provide you with a copy. We're going to just try and find an extra copy, Your Honour, if I may take a moment.

63 Mr. SOSA: I have a file copy, Your Honour. Perhaps my friend can continue and we could provide you ...

64 Mr. BENMOR: For greater clarity on the issue of the arrears, the offer states that the arrears of child support that have accumulated since 1 October 1998 shall be adjusted according to paragraph 1 of this offer to settle, which is $446, at the $30,000 income level under the guidelines, starting on 1 October. And it shall be paid as follows: The respondent shall file his tax returns for the past three years and any of his refunds and GST rebates shall be paid to the applicant. And the balance of the arrears shall be paid by the respondent at the rate of $100 a month. And the other part of the offer, paragraph 3, provides that there should be annual disclosure of the respondent's income by way of tax returns, notices of assessments and T-4s. And paragraph 4 of the offer states that each party shall bear his or her own costs.

65 I believe that the offer was a reasonable one at the time. And it comes very close to, if not matching or exceeding the order that Your Honour has made but for the mathematical calculations *vis-à-vis* the issue of arrears, which I can't provide to you at this moment.

66 If Your Honour does not accept that the offer was more favourable than Your Honour's decision today, then I ask that costs be awarded to Ms. F. on a party-and-party scale. On a full indemnity scale, I would ask for costs in the amount of $7,500. On a party-and-party scale, I'm asking for costs in the amount of $5,000, payable by the father forthwith.

67 THE COURT: Sorry, full indemnity seven five?

68 Mr. BENMOR: Correct.

69 THE COURT: Party and party, $5,000?

70 Mr. BENMOR: Correct. It had come out in earlier evidence that both parties are provided representation by way of Legal Aid Ontario. And pursuant to the legislation there, I suggest that this should not be taken into account in awarding costs. The father has made the ...

71 THE COURT: I'm quite familiar with the operation of the *Legal Aid Services Act, 1998* and costs.

72 Mr. BENMOR: I'm sure you are. I'm just -- in the event that my friend suggests that there should not be an award of costs because of that, I simply wanted to point that out. That it was the father's application. The reason why we had a two-day trial and a third day of submissions and we're here today is because of the father. He took a position that I submit was not reasonable. He had not accepted an offer that I submit was reasonable. We had a trial that was not necessary and therefore he should bear the costs of that and not the taxpayers.

73 THE COURT: Mr. Sosa?

74 Mr. SOSA: Your Honour, my friend did indicate and I assisted him in making reference to an offer to settle that was provided by him. I replied to that offer to settle and I requested from him a revised one or some type of an amended offer to settle in my letter to him in November of 2000. I said that the issues are child support, arrears and access. I mention this because the offer to settle, which was submitted to me for consideration, makes no reference to the access issue. Accordingly, some clarification will be required in this regard. And I requested him to follow up with me to at least make an offer of access and none was forthcoming.

75 THE COURT: Did you make a counter offer of access?

76 Mr. SOSA: I waited to hear back from him. We were in the process of -- we then went to a legal aid settlement conference to discuss all these issues.

77 THE COURT: Your client was the applicant. He would have outlined what access he wanted. Anyway ...

78 Mr. SOSA: When the position is that no access is acceptable from the other side, that's the position we found ourselves in. No access at all. And I can -- I also ...

79 THE COURT: She stumbled on that point in her evidence.

80 Mr. SOSA: Yes. And I also have the issue that these parties are both legally aided. And I will rely on that in that it's essentially going to be ...

81 THE COURT: Well, in law, it's irrelevant, isn't it?

82 Mr. SOSA: Yes.

83 THE COURT: Even under the case law under costs, they're entitled, notwithstanding, to obtain party-and-party, full party costs, regardless of the legal aid tariff.

84 Mr. SOSA: Yes, I understand. And I ...

85 THE COURT: And they have to make an assignment to legal aid of those costs.

86 Mr. SOSA: That's correct. And I know you have much or more familiarity with those regulations than anybody. So I won't belabour ...

87 THE COURT: Even legal aid wouldn't accept your argument, Mr. Sosa.

88 Mr. SOSA: Well, this is essentially going to ...

89 THE COURT: Under the legislation and the jurisprudence. Anyway, it doesn't preclude you making your submission.

90 Mr. SOSA: Yes, and it's legal aid paying legal aid. I think, Your Honour, that ...

91 THE COURT: It's legal aid being indemnified or achieving some recovery.

92 Mr. SOSA: That's the mechanism.

93 THE COURT: They have one party in charge of recovery of costs.

94 Mr. SOSA: I would respectfully submit, Your Honour, that my client -- there was a live issue for access and he did get the window, as you mentioned, opened up to it. There is some ...

95 THE COURT: That's all he got.

96 Mr. SOSA: And that is some measure of success. It's more than what Ms. F. had offered. And more than what ...

97 THE COURT: Well, she was intransigent but he didn't put much of a position forward.

98 Mr. SOSA: He didn't put what you would consider a viable plan of care.

99 THE COURT: No, "I want to take the kids to McDonald's. I'm going to get a place. I'm going to get them to visit with cousins." That kind of stuff.

100 Mr. SOSA: He wants to know his kids.

101 THE COURT: There's none of that in place. He took the position that -- well, that she stood in his way. He never brought an earlier application for variation saying alternate weekends or summer vacation or anything like that.

102 Mr. SOSA: No, there was nothing of that sort. But he was dealing with a -- well, we heard the evidence at trial. It was a position where no access was what she wanted. And now I'm saying that there's a little bit more than that. So I think that he did acquire some relief in connection with the access issue.

103 THE COURT: He had a small measure of success, yes.

104 Mr. SOSA: I also refer to the offer to settle my friend referred to. Under the existing order that he sought -- that Mr. C. sought to vary -- he was required to pay $570 per month and arrears were accumulating under that order. The offer to settle did in fact reduce it to $446. But then it had a provision that arrears would be paid off at the sum of $100 a month. So therefore, Mr. C., who was on social assistance making something around in the neighbourhood of $590 would have been required under that offer to settle to provide the sum of $556 per month to honour his support obligation.

105 THE COURT: $546.

106 Mr. SOSA: $546. Yes, so the 100 plus the guideline figure. His ability to do that on a welfare income was an impossibility. And I don't think that the offer ...

107 THE COURT: But that avoids the real issue. He could have worked.

108 Mr. SOSA: Yes, and Your Honour has adjudicated on that issue and weighed and balanced all the evidence. But what I'm saying is this, if it wasn't a viable offer from that perspective in that Mr. C. would have had no ability to honour that in view of not only the guideline amount but the arrears being paid off in the amount of $100 a month, when his income was very close to that. So he would have had to give his total welfare cheque over and have no ability to even have the necessities of life.

109 THE COURT: You see, that's not the point.

110 Mr. SOSA: I know that's not the point, but it's the fact.

111 THE COURT: The point is he could have been working. He has a history of working.

112 Mr. SOSA: And Your Honour has addressed that in your decision.

113 THE COURT: I even gave him a three-month break in there where he could have.

114 Mr. SOSA: That's correct.

115 THE COURT: I'm being a bit charitable on the interpretation of determination of his last job. And regardless of what the Family Responsibility Office does, a court would give a refraining order if even perhaps ...

116 Mr. SOSA: He was not able to ...

117 THE COURT: ... on whatever terms they considered appropriate. If he just starts a job on probation. So if it's a licence that he wants, get back here. He can start work next week if I can get an order, a refraining order.

118 Mr. SOSA: And he did acquire a refraining order and he was just unable to comply with it.

119 Your Honour, just in respect to the issue of costs, I would request that there be no order as to costs, in view of the fact that the offer never acknowledged the issue of access, which was a live issue. And second, that it was unreasonable in that it would have essentially taken up the entire income that he was reporting to have on the basis of his social assistance. So that would be my respectful submission, Your Honour.

120 THE COURT: Anything further, Mr. Benmor, in reply?

121 Mr. BENMOR: Nothing, Your Honour.

122 THE COURT: It is trite to assert that the unsuccessful party should have to pay costs and the successful party should receive costs, especially where a matter goes to trial. In evaluating that axiom, one looks at what the offers were, considers the provisions of rule 18 and determines the outcome. And here, the result was certainly on the issue of imputed income, quantum of child support, the offer was right on, matching on all fours the order that I made just a short while ago.

123 I did not deal with the arrears, at least in terms of-payment towards ongoing arrears. I did reduce the arrears. I reduced the arrears by an amount in excess of what would have resulted by the offer, namely three months support at $446 per month, which I felt was a reasonable time to obtain other employment. Otherwise, aside from that three months or $1,338, it would have been the same.

124 I am also assuming of course that the arrears continue to accumulate from the offer. Indeed we even added it, to pending the judgment in this case.

125 On the issue of access, Mr. C. had a modest measure of success because there was no mention of it at all in the offer. So it's a matter of each party's experiencing some degree of success. Both parties are obviously of limited means as evidenced by the nature of the retainer, which is now disclosed in the submission on the issue of costs. It matters not, in my view, that the parties were so retained. Legal Aid is entitled to as an assignee under the legislation and, if I remember correctly, at least one or two masters' decisions on the issue of costs were disposed in the same fashion as the parties would be if they had privately retained counsel.

126 In my view, money should primarily go for ongoing support, then arrears. And when there are more limited means than that, this should reflect on the issue of costs. However, in my view, the matter would not have proceeded as far as it had gone, at least on support, if Mr. C. had been a little more reasonable and Ms. F. somewhat.

127 Having said that, on balance Ms. F. perhaps achieved a larger degree of success than Mr. C. and should be permitted some modest sum for costs. I think in the circumstances an appropriate amount is $1,000. So the respondent to pay applicant costs fixed at $1,000.

128 Okay. So endorsed on the record.

129 Mr. BENMOR: Can Your Honour order that a support deduction order be issued accordingly. And we will file a support deduction notice today.

130 THE COURT: Yes, of course. A support deduction order will be issued. Okay. All right.

131 Mr. BENMOR: Thank you, Your Honour.

132 Mr. SOSA: Thank you, Your Honour.