2018 ONCJ 400
Ontario Court of Justice

Romero v. Malecka

2018 CarswellOnt 9445, 2018 ONCJ 400, 294 A.C.W.S. (3d) 560

Alvaro Francisco Valdes Romero (Applicant) and Barbara Malecka & Pawel Malecki and Kevin Knight & Magdalena Knight (Respondents)

Victoria Starr J.

Judgment: May 30, 2018
Docket: 146/17

Proceedings: additional reasons to *Romero v. Malecka* (2018), 2018 CarswellOnt 3153, 2018 ONCJ 128, Victoria Starr J. (Ont. C.J.)

Counsel: Alvaro Francisco Valdes Romero, for himself
Susan Berry, for Respondents, Barbara Malecka & Pawel Malecki
Julie **Stanchieri**, for Respondents, Kevin Knight & Magdalena Knight

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.e Costs of particular proceedings
XVII.11.e.iv Custody and access

Headnote

Family law --- Costs — Custody and access
Grandparents and maternal aunt and uncle brought successful motion for summary judgment for obtained temporary custody and residence of couple's two children they helped care for after parents separated, father moved to another city, and mother passed away — Hearing was held to determine costs — Father was ordered to pay costs, inclusive of fees, disbursements, and HST, of $8,000 to grandparents by way of $250 monthly payments and $7,000 to aunt and uncle by way of $77 monthly payments — Grandparents and aunt and uncle were almost wholly successful in obtaining relief sought and presumption they were entitled to costs was not rebutted — Custody decision was very important to all — Although father acted unreasonably and increased time on case by increasing steps to be taken and number of court appearances, conduct did not rise to level of bad faith warranting substantial costs, his actions were due to understandable belief it was his right to raise children, and real possibility father's poor mental health accounted for some of his poor behavior — As grandparents were successful, reasonable litigants and also custodians of children residing in their household, and given that father acted unreasonably and was paying no child support despite obligation to do so, it would be unfair and inappropriate to decline to award them costs — Disbursements, time spent and hourly rate for work performed was reasonable and proportional, but aunt and uncle claimed more legal fees than grandparents, unnecessarily defended motion and brought unnecessary cross-motion for substantive relief, and there was some unnecessary duplication — That said, aunt and uncle's submissions and materials complemented rather than duplicated grandparents' — Costs of multiple counsel and multiple parties pursuing common goal justified reduction in costs — Father had annual income of $22,000 and limited ability to pay substantial costs award —

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Grandparents and aunt and uncle had costs of first steps reserved and left undecided until final order was made, leaving father unaware that combined costs might exceed $26,000 — In event father was required to pay child support, change in circumstance was deemed to be material basis for taking fresh look at payment plan — Any order or agreement requiring father to pay child support was to constitute material change in circumstance allowing father to seek variation in payment terms but not total amount of costs — Grandparents' request that costs award be enforceable as incident of support was refused.

Table of Authorities

Cases considered by *Victoria Starr J.*:

S. (C.) v. S. (M.) (2007), 2007 CarswellOnt 3485, 38 R.F.L. (6th) 315 (Ont. S.C.J.) — considered

Serra v. Serra (2009), 2009 ONCA 395, 2009 CarswellOnt 2475, 66 R.F.L. (6th) 40 (Ont. C.A.) — followed

Rules considered:

Family Law Rules, O. Reg. 114/99
R. 18 — considered

R. 24 — considered

R. 24(1) — considered

R. 24(5) — considered

R. 24(8) — considered

R. 24(10) — considered

R. 24(11) — considered

Forms considered:

Family Law Rules, O. Reg. 114/99
Form 14B — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Romero v. Malecka* (2018), 2018 ONCJ 128, 2018 CarswellOnt 3153 (Ont. C.J.), respecting costs.

***Victoria Starr J.*:**

INTRODUCTION

1 Following the death of the mother of his children the applicant father made an application to this court for custody and

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primary residence of his children. At that time the children had been residing in the home of their maternal grandparents for about 10 years, had little contact with their father since 2014, and lived in Oakville. The father's plan was to relocate them to live with him in Ottawa. Concurrent with commencing proceedings, and prior to a case conference, the father brought an emergency motion for custody and primary residence.

2 The maternal grandparents defended the proceedings, and in their answer cross claimed for, among other things, joint custody with the children's maternal aunt and her husband and for the children's primary residence to be with the grandparents and eventually with the maternal aunt and uncle. They responded to the motion by making a motion of their own for various heads of relief and both the maternal grandparents and the maternal aunt and uncle brought a motion for the aunt and uncle to be added as parties. The maternal aunt and uncle also brought a motion for substantive relief.

3 The motion and cross motions were heard on May 11, 2017. The father was not successful in securing any of the substantive relief he sought. Much of the relief sought by the grandparents and the maternal aunt and uncle, including the request for the aunt and uncle to be added as parties, was granted on consent. The maternal aunt and uncle were added as parties and the maternal grandparents were granted temporary custody of the children along with temporary residence. The father was granted access. Costs of the motions were reserved.

4 Subsequently the maternal grandparents, who had both served their material within the timelines set out in my order dated May 11, 2017, were forced to bring a 14B motion for an order granting an extension of time to file their respective answers, 35.1 affidavits. They were forced to do this because the father did not provide his consent to late filing. They were successful on the 14B motion. The order was made June 13, 2017. Costs of the motion were reserved.

5 Ultimately the claims were disposed of by way of motion for summary judgment brought by the four respondents and heard on February 9, 2018. Although the father defended the motion by way of making submissions, he filed no material in response. All of the respondents were almost wholly successful in obtaining the relief they sought. The issue of costs was reserved and directions were given with respect to cost submissions. Directions were also given to the father to serve and file a sworn financial statement with all required attachments, in the event that he sought to advance an inability to pay argument.

6 The court received the written cost submissions and bill of costs of both the maternal grandparents and the maternal aunt and uncle. It also received the father's written cost submissions. The father's cost submissions were set out in an affidavit. He also filed a sworn financial statement. Further reply submissions were received from the two sets of respondents.

POSITIONS

7 The maternal grandparents seek their costs of the motions heard on May 11, 2017, the 14B motion heard June 13, 2017, and the summary judgment motion heard on February 9, 2018. Specifically they seek costs on a full recovery basis and fixed in the amount of $14,150.53. That amount is comprised of $8808.57 to prepare motion on May 11, 2017 and 14 be motion of June 13, 2017, and, $5341.96 to prepare for and attend at the summary judgment motion.

8 The maternal grandparents also ask that any cost award be enforced by the Family Responsibility Office.

9 The maternal aunt and uncle also seek costs on a full recovery basis fixed in the amount of $17,645.29. These costs relate to the May 11, 2017 motion as well as the summary judgment motion heard on February 9, 2018.

10 The position of the respondents is based on these primary factors:

(1) their success;

(2) the father's unreasonable behaviour;

(3) the father's decision not to use his legal aid certificate properly to retain and be represented by counsel;

(4) the maternal grandparents' assertion that the father acted in bad faith;

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(5) the reasonableness of their conduct in terms of efforts to settle;

11 The father opposes any order as to costs. The basis for his position can be summed up as follows:

(1) The respondents are asking for something he does not have - money. He has no ability to pay;

(2) it was reasonable of him to fight for his children and his family as he is their father and capable of parenting them;

(3) The amount of costs sought is an excessive use of resources given that the two responding parties had a common goal. The suggestion, it seems, is that they did not need to retain two separate and expensive counsel and/or, could have taken steps to mitigate their costs by pooling their resources (i.e. having one lawyer attend at court);

(4) It was not unreasonable of him to discharge his legal aid lawyer (she assisted him very briefly). The outcome he claims she wanted to pursue was not aligned with that which he wished to achieve. I surmise from his submissions that his view is that she was paternalistic and not taking his instructions;

(5) The need for two sets of respondents is the result of the reality of the grandparent's circumstances and plans and not necessitated by anything he did or did not do. For example, he says, the maternal grandparents planned to retire in Poland and it is that plan which necessitated the pursuit of a joint plan with the maternal aunt and uncle.

THE ISSUES

12 The issues I must decide are these:

(1) Are either or both sets of the respondents entitled to recover their costs;

(2) If so, what is the appropriate amount to awarding costs to either or both sets of respondents?

(3) How should the costs be paid?

(4) Should any cost order be enforced by the Family Responsibility Office as an incident of child support?

THE LAW

13 Rule 24 of the *Family Law Rules*, O. Reg. 114/99, governs the determination of costs in family law proceedings and this case in particular as no formal offer to settle was made by anyone that meets the criteria under rule 18.

14 The subrules relevant to the circumstances of this case are as follows:

24.(1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.

. . .

(5) In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,

(a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;

(b) the reasonableness of any offer the party made; and

(c) any offer the party withdrew or failed to accept.

. . .

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(8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

. . .

(10) Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.

15 Rule 24 (11) provides a further list of factors that a court must consider when setting the amount of costs:

(a) the importance, complexity or difficulty of the issues;

(b) the reasonableness or unreasonableness of each party's behaviour in the case;

(c) the lawyer's rates;

(d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;

(e) expenses properly paid or payable; and

(f) any other relevant matter. O. Reg. 114/99, r. 24 (11).

16 In *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40, [2009] O.J. No. 1905, 2009 CarswellOnt 2475 (Ont. C.A.), at paragraph 8, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

(1) to partially indemnify successful litigants for the cost of litigation;

(2) to encourage settlement; and

(3) to discourage and sanction inappropriate behaviour by litigants.

ISSUE #1: ENTITLEMENT

17 There is no question that the maternal grandparents were the successful parties on the father's motion as well as their cross motion heard on May 11, 2017, on the 14B motion heard on June 13, 2017, and on the summary judgment motion.

18 There is no doubt that the respondent maternal aunt and uncle were also substantially successful on both the May 11, 2017 motions and the February 9, 2018 motion for summary judgement.

19 On the basis of their successes, alone, each set of respondents is presumptively entitled to costs.

20 The respondents are also entitled because the presumption of entitlement has not been rebutted, by virtue of any egregious conduct on their part. To the contrary, they acted very reasonably. They made repeated efforts to try and resolve the issues, without delay and protracted litigation. Both sets of respondents made efforts to settle the issues even before the proceedings started. They were willing to attend and indeed proposed mediation. They were also prepared to negotiate a settlement at the OCL disclosure meeting.

21 The respondents are also entitled to costs because the father acted unreasonably. His conduct, unlike that of the respondents, drove up the amount of time required to deal with the case by increasing the number of steps that had to be taken as well as the number of court appearances. It also unduly prolonged the inevitable. The increased work and time spent by counsel, meant that the costs of this litigation to the respondents were increased.

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22 Examples of the types of things the father did which lead me to find that he acted unreasonably include:

(1) The father does not deny that he made no effort to settle the issues. He also does not deny that he refused to engage in settlement discussions, was unwilling to attend at mediation, and even refused to engage in negotiations at the OCL disclosure meeting, even after hearing from the OCL of his sons' needs and strong views and preferences.

(2) Rather than engage in mediation or negotiation prior to the start of the case, he elected not just to apply to the court for the substantive relief he wanted but to bring a motion prior to a case conference and on an emergency basis. Given the circumstances, including his absence from the children's lives, the long-standing status quo with respect to their residence, and the lack of information available at the time with respect to their views and preferences (a significant factor given their ages), and the complete lack of any emergency, it was unreasonable of him to have made his motion when he did. His decision to do so and his position on the motion necessitated a response from the respondents early on in the proceedings. Both the time and consequent expense to them of defending the motion and obtaining an order, in the case of the grandparents in their favour, could have been avoided had the parties attended a case conference first. Thus, his decision drove up the legal costs of the maternal grandparents in particular

(3) The father's failure to consent to the request of the maternal grandparents for an extension of time to file their materials meant that they were forced to bring a 14B motion to obtain an order from the court permitting them to do so. There is absolutely no justification for refusing to give consent, particularly given that the documents were served with in the timelines under the order. His failure to give consent drove up the maternal grandparents' legal fees by forcing them to take what should have been a completely unnecessary step;

(4) The father took an unreasonable position on the summary judgment motion. There was, as I found no genuine issue for trial. Although he made extensive submissions in opposition, he filed no responding materials whatsoever and attempted to lead evidence from the body of the court, rather than giving it under oath. Thus, not only was his position unreasonable but his conduct of the motion was too. His actions prolonged the hearing as Counsel were forced to raise objections and the court was forced to redirect him repeatedly.

23 Counsel submit that the father acted unreasonably in pursuing extensive access and then failing to utilize or exercise all of the access he was granted. Given my findings with respect to the reasons why the respondent did not exercise all of his access (he was experiencing some mental health issues and financial distress) as set out in my summary judgment decision, I do not find his conduct to be entirely unreasonable. However, there is some element of unreasonableness given that he failed to consistently exercise his access both before and after the period during which he claimed he was experiencing mental and financial distress.

24 Counsel for the maternal grandparents submits that the father acted in bad faith and thus, pursuant to sub rule 24(8) the maternal grandparents are entitled to their costs and on a full recovery basis. Counsel relies on the decision of Perkins, J. in *S. (C.) v. S. (M.)* [2007 CarswellOnt 3485 (Ont. S.C.J.)], 2007 CanLII 2079. In that case the court found that it is not necessary for the primary purpose of litigation conduct to be to deceive or conceal for a party to be found to have acted in bad faith. It is sufficient for at least some measure of the conduct to be for that purpose.

25 While I take no issue with the principal enunciated in both the decision and the sub rule I am not persuaded that there was any element of an intent to deceive or conceal on the part of the father, and thus, am not prepared to make a finding that the father's conduct rose to the level of bad faith. There is no evidence that he tried to deceive or conceal anything, or of any other nefarious intent. The evidence simply does not support this.

26 In fact, from the father's submissions and what evidence I do have it is very clear to me that the father truly believes that as the children's remaining living biological parent it is both his right and their right to be raised by him now. Indeed, this, and his unwillingness or inability to see things any other way, likely accounts for why he brought the emergency motion heard on May 11, 2017, and why he opposed a negotiated outcome once the OCL held the disclosure meeting, and why he opposed the summary judgment motion. His belief as to the test, while incorrect from a legal standpoint, is understandable. It was, I find, his motives sincere and genuine.

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ISSUE #2: WHAT IS THE APPROPRIATE AMOUNT TO AWARD IN COSTS?

27 In determining the issue of quantum, I have turned my mind to the factors set out in subrule 24(11) as well as considered and given weight to the unreasonable and cost generating conduct of the father and the reasonable and cost saving efforts of the respondents, as outlined already.

28 I would also note at this juncture that there is no evidence before me to corroborate the submission made by the grandparents that the father did not properly avail himself of the resources available to him as a result of being issued a legal aid certificate. There is no evidence on this point other than the father's. Based on that evidence I agree with the father that he should not have been compelled to continue with a lawyer whom he claims he felt was not his advocate. I place no weight on this submission and make no finding that the father acted unreasonably in this regard.

29 I am also mindful that the purpose of cost awards goes beyond indemnification. Another purpose is to discourage unreasonable conduct and encourage reasonable conduct. Yet another is to promote early resolution through settlement. To fulfill the purpose of both specific and general deterrence of unreasonable conduct, the level of costs must be set high enough to send a message to this father and to other similarly situated litigants of modest means, that while parties are free to decide for themselves how they will conduct litigation, the decisions they make will have consequences; and, the consequence of acting unreasonably and of failing to make early and repeated efforts to settle, is that they will pay costs, even if they are of limited or modest financial means.

30 Likewise, to encourage litigants like the respondents in this case, who have behaved reasonably, made meaningful efforts to settle, and who have retained counsel to help them advance reasonable positions, the cost awarded, must be high enough to make them and other would be litigants do likewise in future.

31 An important consideration is the fact that the respondents, particularly the grandparents, are not only successful and reasonable litigants but also the custodian of the children and it is their household (the grandparents) in which the children reside primarily. Having faced an opposing party who acted unreasonably and who is not paying child support despite an obligation to do so, it would be unfair and inappropriate to decline to award them costs. Failing to make a meaningful cost award in favour of the respondents, would mean that the custodians of the children and by extension the child, effectively subsidize the increased litigation costs resulting from the unreasonable behaviour of the opposing litigant. This is because the funds that would otherwise be available in the custodial parent's household are thrown away.

32 I have also reviewed the bill of costs presented by each set of respondents. I find it disturbing that the secondary respondents, the maternal aunt and uncle, incurred and are seeking a greater amount in legal fees than the grandparents. The maternal aunt and uncle were supporting the grandparents' motion and plan. I am unclear as to why they too had to bring a motion for the exact same substantive relief. Thus, I find there was some unnecessary work duplicative time spent and reflected in the bill of costs for the aunt and uncle in relation to the May 11, 2017 motions. Despite this I none the less find that:

(1) The time spent for the work performed is overall reasonable and proportional;

(2) The hourly rate charged by each lawyer is commensurate with their level of experience as well as those to whom they delegated work;

(3) The amounts claimed for disbursements are also reasonable.

33 I have considered and given some but not very much weight to the father's argument that the respondents' use of resources was excessive and that they could have mitigated their costs given they had a common goal. I do not see how this is possible with respect to the portion of the May 11, 2017 motions wherein they sought to be added as parties. Also, given their support of the grandparents' plan, it was still necessary for them to submit affidavit evidence in support of the grandparents' motion. Once they were added as parties, on consent, they had no choice but to fully participate in the summary judgment motion.

34 Furthermore, and most importantly, I did not find their work particularly duplicative. In fact, the submissions and

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materials filed complemented each other rather than duplicated each other. Further their respective affidavits were focused and showed that thought had been given to reciting only those facts necessary and within the affiant's knowledge. When making their oral submissions on the summary judgment motion, counsel for the aunt and uncle was very careful not to reiterate the same arguments made by the grandparents' counsel, and instead, simply try to add to what had already been submitted. A perfect example of their complimentary, rather than duplicative approach and work, is reflected in the written cost submissions. These were all cost saving measures that were both appropriate and reasonable.

35 There are a number of other factors which I find justify a reduction in the amount to be awarded to each set of respondents. These considerations have resulted in an ultimate award that is significantly less than full recovery. Each of these are set out below.

36 First, the decision about who would have custody of the children, where they would reside primarily, the access they would have with either their father or their extended maternal family, transportation to and from access between Ottawa and the GTA, non-removal and other issues decided by me, were very important - *to everyone*. The circumstances giving rise to this litigation, that it was conducted by parties who were no doubt grieving the loss of the children's mother, adds an emotional dimension / charge to the litigation.

37 Second, I would limit the amount of costs recoverable by the maternal aunt and uncle with respect to the May 11, 2017 motion significantly for these reasons: While the maternal aunt and uncle were successful in obtaining party status at the May 11, 2017 hearing, this status was granted on consent. I also have no evidence that there was any attempt to negotiate this issue specifically prior to preparing materials for the motion.

38 Further, the maternal aunt and uncle's position was at its weakest at the early stage of the proceeding. At that point in time, their position could have been advanced through the maternal grandparents or better yet, by simply supporting the position of the maternal grandparents which was the strongest position. It was thus, not necessary for them to defend the motion or bring a cross motion for substantive relief, at that time.

39 A third mitigating factor is this: this case was made more complicated by the fact that there were two sets of respondents and thus two counsel. This increased the time and expense. The reason for this, however, has nothing to do with the father. It has everything to do with the frailties in the grandparents' ability and willingness to shoulder the load of raising these children full-time, alone, and long into the future. It is this that necessitated a joint plan with the maternal aunt and uncle.

40 It is only fair in such circumstances and particularly given that the weakness in the joint plan at the start of the case that there be a significant reduction in the amount of costs to be awarded to both sets of respondents so as to recognize their responsibility for the added costs of there being multiple counsel and multiple parties pursuing a common goal.

41 The fourth mitigating factor relates to the father's inability to pay the amount of costs sought. His evidence is that his annual income is $22,000 a year, and, as at the time when he swore his financial statement he had slightly more than $6000 in savings. Although it is true that the father did not provide copies of his income tax returns and notices of assessment in support of his position regarding costs, and as per my order, his failure to produce backup documentation to corroborate his income and financial stressors does not mean he has no defence. It goes to weight.

42 In this case I accept his evidence and find that he has limited ability to pay a substantial cost award to each of the respondents. I say this based on his evidence and based on my decision on the summary judgment motion. In deciding the summary judgment motion I placed significant weight on the evidence which demonstrated instability in both the father's mental health and finances. It would be disingenuous and unfair of me to now pretend that he is stable enough both from a mental health and financial perspective to pay a significant cost award.

43 Having said this, while this is a mitigating factor it is only one factor relevant to the determination of the amount to be awarded, and generally, ought to be addressed by structuring a payment plan suited to those limited financial circumstances, rather than completely negating any award of costs. In this case I have nominally reduced the amount to be awarded to reflect limited ability to pay. Where I have given relief to recognize his limited financial means, is in structuring a payment plan that he is likely to be able to honour.

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44 The fifth mitigating factor and one upon which I place significant weight is the real possibility that the father's poor and unstable mental health may account for some of his poor behaviour. No one challenged the evidence of the OCL that the father's mental health has been unstable both historically and during the year in which this litigation took place. It may very well be that his mental health issues exacerbated things, by clouding his reasoning and judgment. This certainly could account for some portion of his lack of preparedness, disorganized litigation conduct, and his unreasonably held beliefs, and dogged pursuit of an outcome that met his needs but not those of his children.

45 Nonetheless, litigation is expensive and people who can't afford it should be the ones most concerned about costs and motivated to insulate themselves from a cost order. Just as it is not the father's fault that the grandparents need the maternal aunt and uncle's support in caring for and raising these boys, so too is it not the fault or responsibility of any of the respondents that the father is of limited financial means and may come to this litigation with mental health and financial instability issues. For this reason, the frailties of the father do not completely inoculate him from liability.

46 A sixth consideration that leads me to award far less in costs than full recovery is my assessment of what the father could reasonably have expected to pay in costs in all the circumstances. While he ought to have expected to pay a significant amount in costs, he could not likely have expected to pay combined costs in excess of $26,000 for the three steps in the case for which costs are sought. This is in part because the issue of costs of the first two steps (May 11, 2017 and June 13, 2017) were reserved and left undecided until after the final order was made.

47 The problems with the approach the respondents' took - to have costs reserved - are myriad. I will focus on the two that I find particularly problematic in this case. First, the message intended to promote the three main purposes of costs awards, is not delivered in time to discourage future unreasonable conduct and encourage timely settlement. Second, litigants, particularly the unsophisticated and ill prepared and uninformed self-represented litigants like the father in this case, are not likely to learn either the hourly rates of the lawyers nor the amount of time that goes into being properly prepared for each step. They may never have seen a bill of costs or dealt with a lawyer before. Until they see a bill of costs and feel the sting of a cost order, they are likely to have unrealistic expectations.

48 In this case, had a substantial cost order been sought at the first opportunity, May 11, 2017, the father would have learned right away that his modest financial means would not serve as a shield against a substantial cost award and he would, from that point on, have had a clear picture of the lawyers' hourly rates, and of the kind of time, and thus, amount of costs that would be sought and possibly ordered against him if he continued to behave unreasonably, take unreasonable positions, fail to try and settle the issues and case, and lose.

49 After taking into account all of the considerations I have outlined in this decision and weighing them, and after also considering the jurisprudence I was referred to and all of the relevant provisions of sub rule 24, I find that a fair and reasonable amount to award in costs to the respondent's is as follows:

(1) $8,000 in costs are awarded to the maternal grandparents;

(2) $7,000 in costs are awarded to the maternal aunt and uncle.

ISSUE #3: MANNER IN WHICH COSTS ARE TO BE PAID

50 I have considered the submissions of the maternal grandparents that based on $22,000 the father would be required to pay $327 a month in *Guideline* table child support based on an annual income of $22,000. I have also considered that while he deposes in his most recent financial statement (submitted specifically to allow the court to assess his inability to pay argument), that he has slightly in excess $6,234.85 in a savings account, he also has about $12,589.77 in debt. I have also considered the fact that he is not paying any child support at this time. Finally, I am mindful that to exercise access to his children, the father incurs the costs associated with the commute - costs he can ill afford. I do not want to jeopardize his ability to continue to visit his children as this would not be in their best interests.

51 In all of the circumstances, I find it fair and appropriate to order that he pay the sum of $327 a month in total towards the costs I have awarded, split, and $250 to the maternal grandparents per month and $77 per month towards the maternal

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aunt and uncle.

52 I want to be very clear that had the father been paying child support I would have ordered a far lesser monthly amount. For this reason I have attached to my order the term that in the event that the father is required by order or agreement to pay child support, that change in circumstance shall be deemed to be material and justify taking a fresh look at the payment plan.

ISSUE #4: FRO ENFORCEMENT

53 The maternal grandparents have asked this court to direct that the costs awarded be enforced by the Family Responsibility Office as an incident of support. I do not agree at all with counsels' submission that this matter had anything whatsoever to do with child support. Further, while I have referred to the table amount payable as a litmus test in determining the appropriate amount to order the father to pay towards costs on a monthly basis, this does not bring my order for costs into the realm of child support. As such, I decline to make the order requested.

CONCLUSION

54 For all these reasons I make the following order with respect to costs:

(1) The applicant father shall pay costs of the May 11, 2017 motions, June 13, 2017 14B motion, and summary judgment motion heard on February 9, 2018, to the respondent grandparents, Mr. Malecki and Mrs. Malecka, fixed in the amount of $8,000. This amount is inclusive of fees, disbursements, and HST. Said amount is to be paid to the respondent grandparents at the rate of $250 per month, commencing July 1, 2018 and continuing on the first day of each month thereafter until paid in full;

(2) The applicant father shall pay costs of the May 11, 2017 motions and the February 9, 2018 summary judgment motion, to the respondent maternal aunt and uncle, Mr. and Mrs. Knight, fixed in the amount of $7,000. This amount is inclusive of fees, disbursements, and HST. Said amount is to be paid to the respondent maternal aunt and uncle at the rate of $77 per month, commencing July 1, 2018 and continuing on the first day of each month thereafter until paid in full;

(3) In the event that the applicant father is required, by court order or agreement, to pay child support for the two subject children, this change shall constitute a material change in circumstance and he may seek to vary the payment terms set out in this order but not the total amount of costs awarded.

(4) The Judicial Secretary is requested to send a copy of this endorsement to both counsel and the applicant father.

55 Matter concluded.

Costs awarded.

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