COURT FILE NO. D57519/12
DATE: 2012-11-19
Citation: *Sambasivam v. Pulendrarajah*, 2012 ONCJ 711

ONTARIO COURT OF JUSTICE
TORONTO NORTH FAMILY COURT

B E T W E E N:	)	
	)	
HEMA SAMBASIVAM	)	**ARTHUR BROWN, DUTY COUNSEL, assisting the APPLICANT**
	)	
	)	
APPLICANT	)	
	)	
- and -	)	
	)	
	)	
KANTHARUBAN PULENDRARAJAH		**RACHEL HEALEY, for the RESPONDENT**
RESPONDENT		
	)	
- and -	)	
	)	
ROCCO ACHAMPONG	)	**DUMOLUHLE SIZIBA, for ROCCO ACHAMPONG, person affected by request for costs**
PERSON AFFECTED BY REQUEST FOR COSTS		
	)	
	)	
	)	
	)	**HEARD: NOVEMBER 15, 2012**

JUSTICE S.B. SHERR

ENDORSEMENT

Part One – Introduction

[1] The respondent (the father) issued an application in this court on October 9, 2012 seeking custody of his two-year-old child (the child). He also served and filed a motion returnable on October 16, 2012 for temporary custody of the child. On October 12, 2012, the applicant (the mother) issued an application for divorce and other corollary relief in the Superior Court of Justice and on the same day obtained an order without notice that the child be returned to her care, together with police enforcement and a restraining order against the father. Rocco Achampong was the mother's lawyer at that time.

[2] By operation of law, this court proceeding was stayed once the mother issued her application for divorce. The parties advised this court on October 16, 2012 that the matter would continue in the Superior Court of Justice, with the father preserving his right to seek his costs for this court case against both the mother and Mr. Achampong personally.

[3] The father subsequently served a notice of motion seeking costs against both the mother and Mr. Achampong. He submitted a bill of costs of $6,135 and asked for a full indemnification award against them.

[4] The mother filed a Notice of Intention to Act in Person and was assisted by duty counsel on the return of this motion. She asked that any costs award be made only against Mr. Achampong.

[5] Mr. Achampong was represented by counsel on this motion. He filed an affidavit in response to the father's notice of motion. The court also permitted him, at his request, to address the court, in addition to the submissions made by his counsel. He argued that no costs should be ordered and if any costs were ordered, they should be payable only by the mother.

Part Two – The facts

[6] The parties were married in 2009 and separated for the first time on June 29, 2012.

[7] The mother issued an application in this court on September 19, 2012, seeking custody of the child and child support. She brought a motion without notice the same day for temporary custody of the child. Justice Carolyn Jones made a temporary order that the Toronto Police Services, locate, apprehend and deliver the child to the mother and that the temporary primary residence and custody of the child be with the mother. Justice Jones adjourned the balance of the motion until September 28, 2012.

[8] The father was served with the mother's court documents and brought a cross-motion for temporary custody of the child. The parties decided to attempt reconciliation. On September 28, 2012, on consent, the case was dismissed without costs. The temporary order made by Justice Jones on September 19, 2012 was terminated.

[9] The reconciliation did not last long. The police were called after an altercation between the parties on October 5, 2012 and the father left the matrimonial home. The mother stayed in the home with the child.

[10] The father deposed that there was an oral agreement that he and the mother would share time with the child until the matter returned to court, but that the mother then refused to let him see the child.

[11] On October 9, 2012, the father issued his application in this court. The father also picked up the child that day from her daycare and did not return her to the mother.

[12] The father's counsel, John Schuman, and the mother's counsel, Mr. Achampong, corresponded frequently over the next few days. Mr. Achampong consistently asked for the return of the child to the mother in his correspondence.

[13] Mr. Schuman advised Mr. Achampong on Tuesday, October 9, 2012 that his client had taken the child out of concern for her safety, that he was issuing an application in this court and was attempting to obtain an early motion date for Friday, October 12, 2012. He advised Mr. Achampong that the Children's Aid Society of Toronto was investigating the matter.

[14] Counsel attempted to set up an all-parties meeting and discussed early mediation. Mr. Schuman wrote to Mr. Achampong on Wednesday, October 10, 2012:

> I will get one of my colleagues to assist tomorrow with a meeting tomorrow afternoon to discuss the temporary arrangements. I will work on trying to get things arranged for the morning, as I understand that you might want to start getting ready for your trip. In light of how things have unfolded to date, any agreement will have to be converted to a court order. We will be able to accomplish that as there are court proceedings started. However we do need to serve your client and we would prefer not to do that at the meeting tomorrow or in any way that would otherwise be upsetting to her, so I would like to hear whether you will accept service.
>
> We had originally proposed bringing that motion on Friday, but unless we get the motion served and filed by two o'clock today, it will not happen on Friday. I understand that Friday is not a good day for you anyway, so let me know when you are available. Perhaps we can arrange for an early case conference instead to keep things on the proper path and the tensions down.

[15] Mr. Schuman informed Mr. Archampong later on October 10, 2012 that they had coordinated an early motion date for Tuesday, October 16, 2012 in this court.

[16] Mr. Achampong agreed to accept service of the documents but no one was present at his office when service was attempted. On Thursday, October 11, 2012, the court documents in this case were served on the mother. Mr. Achampong wrote to Mr. Schuman that afternoon:

> It's a hazard of sole proprietorship for one not to be in the office when one is in court. I am further informed that the date is December 3, 2012 when you advised it would be October 16th… respectfully Mr. Schuman, I think mother has been the only one operating in good faith. Her daughter is sick and your client cuts off communication. This requires a remedy and will be pursued in short order. A response from you is not required. Take care.

[17] Mr. Schuman responded to this email within ten minutes clarifying that the motion was in fact booked for Tuesday, October 16, 2012, and the latter date was for the case conference (it actually was the first appearance court date). He wrote:

> You have not asked for any communication with the daughter. What would your client like? The CAS was worried about unsupervised direct contact. Of course we could get this resolved very quickly using a psychologist/mediator.

[18] On Friday, October 12, 2012, at 1:28 p.m., Mr. Achampong wrote to Mr. Schuman stating that:

> We would agree to mediation on all the issues subject to a quick availability….Further to that, mother would like to speak to daughter immediately, and see her. All this will be in the best interest of Ahana. I note the prospect of alienation that inures in such circumstances, facilitating contact with mother as soon as possible will be in everyone's, especially Ahana's best interest.

[19] At 2:12 p.m., Mr. Schuman responded to Mr. Achampong:

> I am out of the office at court today. However we are checking on the availability of Dr. Morris and other mediators. Should we be adjourning the motion?

[20] At 2:21 p.m., Mr. Schuman's assistant wrote to Mr. Achampong;

> My name is Brooke and I work for John Schuman. John has asked me to contact you to ascertain your availability for parenting mediation on an urgent basis….. I would appreciate it if you could let me know when your first availability would be to meet with this family.

[21] Mr. Achampong attended later that afternoon at the Superior Court of Justice and obtained an order, without notice, for the police to locate, apprehend and deliver the child to his client's custody. He also obtained a temporary restraining order against the father. The mother also asked for an order for interim exclusive possession of the matrimonial home. This request was adjourned together with the balance of his motion until October 18, 2012.

[22] Mr. Achampong did not notify Mr. Schuman or anyone in his office that he was bringing this motion.

[23] In reviewing the material filed in support of the mother's motion in the Superior Court of Justice there is no mention of the current application in this court or of the motion date of October 16, 2012.

[24] In his affidavit filed in answer to the father's motion, Mr. Achampong deposes at paragraph 22:

> Perkins J. of the Superior Court of Ontario was informed of the lower court proceedings, counsels of record (which were indicated on materials filed and crossed out by Perkins J. as there was no evidence that the firm was retained for Superior Court proceedings), the history of the proceeds (sic) including the September 18th 2012 Application filed by mother for custody and access, and in joinder to the above information of identified counsels, the names specifically of John Schuman and Rachel Healey were mentioned.

[25] In this affidavit, Mr. Achampong makes no reference to advising the Superior Court of Justice about the new proceeding in the Ontario Court of Justice started on October 9, 2012, the court date scheduled for October 16, 2012 in this court or his ongoing communication with Mr. Schuman, including that very same day. No transcript of the appearance in front of Justice Perkins was provided on this motion.

[26] Mr. Achampong advised this court that he acted on the instructions of his client to bring the proceeding in the Superior Court of Justice. He admitted that his client did not instruct him to do this without notifying Mr. Schuman.

[27] Mr. Achompong attended with his client and the police at the father's home that evening to apprehend the child and place her in his client's care pursuant to the Superior Court of Justice order obtained that day.

[28] Mr. Schuman was clearly outraged by Mr. Achampong's conduct and sent him an email to that effect later that evening, copying the Law Society of Upper Canada.

[29] The return of the mother's motion in the Superior Court of Justice was heard on October 18, 2012. Justice Thea Herman made a temporary nesting order, where the child remains in the matrimonial home and the parties move in and out of the home sharing parenting time with her. Justice Herman endorsed that the father was withdrawing his claim for personal costs against Mr. Achampong in that court. She set a timeline for written costs submissions with respect to the motion before her.

[30] Neither party made costs submissions in the Superior Court of Justice. The father's counsel advised this court that the father chose not to make costs submissions in the Superior Court of Justice since he had still been hoping to reconcile with the mother and didn't want to upset this opportunity.

[31] The parties have not reconciled.

Part Three – Positions of the parties

[32] The father argues that this court should order full indemnity costs against both the mother and Mr. Achampong. He submits that they both acted in bad faith in this case and

in particular, Mr. Achampong acted in bad faith by moving without notice in the Superior Court of Justice while counsel for the parties were actively corresponding with one another and a court appearance was scheduled in this court for October 16, 2012.

[33] Duty Counsel submitted on the mother's behalf that Mr. Achampong acted inappropriately by bringing the motion without notice in the Superior Court of Justice, when there was already a motion returnable in the Ontario Court of Justice a few days later. He submitted that Mr. Achampong's failure to notify father's counsel about the motion without notice in the Superior Court of Justice was a misstep on his part. He submitted that the mother was just following her counsel's direction and that Mr. Achampong should be responsible for any costs awarded. He submitted that the father suffered minor costs consequences in this court.

[34] Mr. Achampong's position was that no costs should be payable. It was evident from his affidavit that he felt that he had acted appropriately. He submitted that he was entitled to bring his case in the Superior Court of Justice and that the father's refusal to return the child to the mother dictated that he had to move quickly and not wait until the motion date scheduled for the following Tuesday in the Ontario Court of Justice. He argued that any costs award should have been dealt with at the Superior Court of Justice. Lastly, he submitted that if costs should be awarded, he was acting at the direction of his client and should not be held personally responsible for them.

Part Four – Legal considerations

[35] The Ontario Court of Justice has jurisdiction to rule on costs in respect of proceedings that predated the stay of the case by operation of law. *Husein v. Chatoor* [2005], O.J. No. 5715 (OCJ), per Justice Robert J. Spence.

[36] The Ontario Court of Appeal in *Serra v. Serra,* [2009] O.J. 1905 (CA) confirmed that modern costs rules are designed to foster three fundamental purposes, namely, to partially indemnify successful litigants for the cost of litigation, to encourage settlement and to discourage and sanction inappropriate behaviour by litigants bearing in mind that the awards should reflect what the court views is a fair and reasonable amount that should be paid by the unsuccessful party.

[37] Subrule 2 (2) of the *Family Law Rules* (the rules) adds a fourth fundamental purpose for costs: to ensure that the primary objective of the rules is met – that cases are dealt with justly. This provision needs to be read in conjunction with rule 24 of the rules.

[38] The traditional purpose of an award of costs was to indemnify the successful party in respect of the expenses sustained. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs. This change in the common

law was an incremental one when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant. The traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently and in a just manner. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.); *Rodriguez v. Singh*, 2011 ONCJ 728 (CanLII), per Justice Carole Curtis.

[39] Subrule 24 (8) of the rules deals with the costs consequences for acting in bad faith. It reads as follows:

> **BAD FAITH**
>
> (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.

[40] Clause 24 (11) (b) and subrule 24 (5) of the rules address the factor of unreasonable behavior in awarding costs. They read as follows:

> **FACTORS IN COSTS**
>
> (11) A person setting the amount of costs shall consider,
>
> . . . . .
>
> (b) the reasonableness or unreasonableness of each party's behaviour in the case;
>
> **DECISION ON REASONABLENESS**
>
> (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.

[41] There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. *S.(C.) v. S. (M.)* (2007), 38 R.F.L. (6^{th}) 315 (Ont. SCJ).

[42] The father's claim for costs against Mr. Achampong is framed under subrule 24 (9) of the rules. It reads as follows:

> **COSTS CAUSED BY FAULT OF LAWYER OR AGENT**
>
> (9) If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,

(a) order that the lawyer or agent shall not charge the client fees or disbursements for work specified in the order, and order the lawyer or agent to repay money that the client has already paid toward costs;

(b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;

(c) order the lawyer or agent personally to pay the costs of any party; and

(d) order that a copy of an order under this subrule be given to the client.

[43] Subrule 2 (4) of the rules states that counsel have a positive obligation to help the court to promote the primary objective under the family law rules. Clauses 2 (3) (a) and (b) of the rules set out that dealing with a case justly includes ensuring that the procedure is fair to all parties and saving time and expense.

[44] Clause 1.03 (1) (a) of the Rules of Professional Conduct published by the Law Society of Upper Canada states that a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other members of the profession honourably and with integrity.

[45] Subsection 6.03 (3) of the Rules of Professional Conduct provides that a lawyer has a duty not to engage in sharp practice and subsection 6.03 (1) provides that a lawyer shall be courteous, civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her own practice.

[46] A costs order against a lawyer is not restricted to a situation where the lawyer has acted in bad faith. *Covriga v. Covriga*, 2010 ONSC 3030 Canlii. However, the court should exercise extreme caution before ordering costs against a solicitor. *Rand Estate v. Lenton,* [2009] O.J. No. 1173 (C.A.).

[47] In *Provenzano v. Provenzano* (2004) CarswellOnt 322 (SCJ), costs were awarded against a lawyer who brought a motion without notice without informing the court that the two parties were actively communicating about the dispute.

[48] In controlling its own process, it may be necessary to sanction unacceptable conduct through the mechanism of costs, in part as a deterrent to others so as to maintain the integrity of the unspoken underpinnings of the processes that are so commonplace we may sometimes take them for granted. *Weening v. Weening* 2004 Canlii 45888 (Ont. SCJ).

Part Five - Analysis

5.1 Entitlement to costs

[49] Toronto does not have a Unified Family Court. The result is that the Ontario Court of Justice and Superior Court of Justice have concurrent jurisdiction on originating issues of custody and access under the *Children's Law Reform Act* and child and spousal support under the *Family Law Act*. The Superior Court of Justice has exclusive jurisdiction to make custody, access and support orders under the *Divorce Act* and to make property-related orders, including orders for exclusive possession of the matrimonial home under the *Family Law Act*. The Ontario Court of Justice has exclusive jurisdiction to hear originating protection applications under the *Child and Family Services Act*. This is just the starting point in discussing the various jurisdictional issues between the two courts.

[50] This jurisdictional jigsaw often creates confusion and additional costs for counsel and litigants. It also means that counsel and litigants must give serious consideration to what court they will start their case in.

[51] One of the factors that must be considered by a party before a case is started in the Ontario Court of Justice is that the other party may issue an application for divorce in the Superior Court of Justice seeking similar or additional relief. Under both section 27 of the *Children's Law Reform Act and* section 36 of the *Family Law Act*, the commencement of the divorce application stays any proceeding in the Ontario Court of Justice that has not yet been determined, unless on motion, a judge in the Ontario Court of Justice lifts that stay.

[52] There are often good reasons to start a case in the Superior Court of Justice in the face of proceedings started in the Ontario Court of Justice. There may be issues of property or exclusive possession of the matrimonial home that the Ontario Court of Justice has no jurisdiction to deal with. Issues of support and property may be intertwined. In such cases, it will make sense not to split the case and to have one court decide all of the issues.

[53] The reality is that sometimes the decision to start a case in the Superior Court of Justice case while there is an ongoing case in the Ontario Court of Justice has more to do with tactics. It can be done to frustrate the case in the Ontario Court of Justice when a litigant is unhappy with orders being made against them. It is sometimes done merely to frustrate the other party and cause them additional costs. In such cases, the litigant acting in this manner runs the risk of the judge in the Ontario Court of Justice lifting the automatic stay and continuing the case or ordering costs against them. The longer the case has been going on in the Ontario Court of Justice, the greater the risk to such a litigant. See: *Hudson v. Hudson*, [2006] O.J. No. 3520 (OCJ), per Justice Robert J. Spence.

[54] Here, it was understandable why the father chose to issue his application in the Ontario Court of Justice. After all, this was the court in which the mother had chosen to

start her court case just three weeks before. Relevant affidavits setting out the history of the case were already filed in the continuing motion record.

[55] However, the mother was entitled to choose to litigate the case in the Superior Court of Justice instead. She has asked for an order for exclusive possession of the matrimonial home in that court. She has tied that request to an alleged history of violence by the father and has also asked for a restraining order. If her evidence is ultimately accepted, she has a reasonable legal basis to ask for that relief.

[56] I disagree with the submission of the mother's duty counsel that Mr. Achampong should have argued the case in the Ontario Court of Justice scheduled for Tuesday, October 16, 2012. While it was one of her options, if the mother believed that the Superior Court of Justice was the appropriate court to deal with all of her issues, it was understandable that she would not have wanted to incur the costs of preparing court documentation for both courts. The court does not fault her for this choice, only her counsel's failure to advise the father in a timely basis of her intentions.

[57] Counsel for the father conceded that if the mother's counsel had advised them in a timely manner of his preference to go to Superior Court of Justice, it is highly unlikely that a costs order would be sought in this court.

[58] Counsel for the father also conceded that the costs incurred by the father to move to set aside the order without notice in the Superior Court of Justice can only be addressed in that court. The father had the opportunity to make those submissions and failed to do so.

[59] That all said, I find that the behavior of Mr. Achampong is also relevant in this case.

[60] It was clear from Mr. Achampong's statements to the court on this motion that the mother had instructed him to proceed in the Superior Court of Justice, perhaps as early as October 9, 2012. Despite several opportunities to advise Mr. Schuman of his plans to proceed in the Superior Court of Justice he chose not to do this.

[61] The correspondence between counsel shows that Mr. Schuman was actively informing Mr. Achampong of the status of the Ontario Court of Justice case, including his attempt to have the motion heard on Friday, October 12, 2012 and his subsequent ability to obtain an early return date the following Tuesday, October 16, 2012. Mr. Schuman expressed his view that a temporary settlement of the parenting issues at the proposed all-parties meeting could and should be quickly incorporated into an order in the Ontario Court of Justice. Mr. Achampong agreed to accept service of the court documents. Mr. Schuman prepared the necessary form to confirm the motion with this court.

[62] Mr. Achampong never advised Mr. Schuman that he was wasting his time in the Ontario Court of Justice since his intention was to have the case heard instead in the Superior Court of Justice. He had an obligation to do so. Even if his client instructed him to proceed in the Superior Court of Justice (likely the case) and not to immediately advise Mr. Schuman (this is unknown), he cannot hide behind the excuse of client instructions. It was his obligation to let Mr. Schuman know that he would be proceeding in a different court, so that Mr. Schuman did not prepare needlessly for a case that would be stayed.

[63] Mr. Achampong demonstrated poor judgment in exercising his professional obligations to Mr. Schuman on October 12, 2012. It is apparent from a review of the correspondence of counsel on that day that they were discussing urgent mediation to try and resolve the temporary issues. Mr. Schuman was taking steps to expedite this process. While Mr. Achampong asked for his client to be able to speak and see the child, there was no indication that he would be immediately going to court to obtain relief. It was certainly reasonable for Mr. Schuman to believe from the correspondence that the process would be mediation first, and if the case was not adjourned, that the temporary motions about parenting arrangements would be argued on Tuesday, October 16, 2012, in the Ontario Court of Justice.

[64] In colloquial terms, Mr. Schuman was sandbagged on October 12, 2012 by Mr. Achampong. Mr. Achampong may have been directed by his client to take steps that day to have the child returned, but he had a professional obligation to advise Mr. Schuman that he was doing this. No reason was put before this court (such as safety, flight risk, or risk of depleting assets if the father was given notice of the motion), that would justify the decision not to advise Mr. Schuman of this motion. The decision not to advise Mr. Schuman about this court appearance was Mr. Achampong's.

[65] Mr. Achampong did not meet his obligation under subrule 2 (4) of the rules. He did not promote the primary objective of dealing with cases justly. He did not help the court to ensure that the procedure was fair to all parties or to save expense or time.

[66] I find that the father is entitled to costs against Mr. Achampong pursuant to subrule 24 (9) of the rules.

[67] I find that the father is not entitled to costs against the mother. She was entitled to bring her case in the Superior Court of Justice. She wasn't seeing the child and was understandably upset and frustrated. She was entitled to seek a temporary order in that court. To the extent that her motion may have lacked merit, or should have been brought with more notice, or was based on an alleged failure of Mr. Achampong to advise that court about the existing court action in the Ontario Court of Justice, was a costs issue for the Superior Court of Justice, not this court, to determine.

5.2 Quantum of costs

[68] The costs thrown away due to the behavior of Mr. Achampong were not high. Most of the costs claimed related to the preparation of the court material in the Ontario Court of Justice. I find that the father is not entitled to those costs, since the mother was entitled to start her case in the Superior Court of Justice. Unfortunately, this is a risk that any litigant who starts a case in the Ontario Court of Justice, when there are potential similar or additional issues under the jurisdiction of the Superior Court of Justice, faces. Further, most of the father's court material from the case in this court could be and probably was replicated for the case in the Superior Court of Justice.

[69] However, costs were incurred by the father when Mr. Schuman was lulled by Mr. Achampong into thinking that the case would be proceeding in the Ontario Court of Justice. This included correspondence between counsel, communication with the client, obtaining the early motion date, attempted service and service of the court documents and confirmation of the motion.

[70] The court also has to consider the third purpose of modern cost rules set out by the Ontario Court of Appeal in *Serra, supra*, – to prevent unreasonable behavior.

[71] It is this court's observation that the overwhelming majority of family law lawyers conduct themselves with integrity, collegiality and professionalism. They do so in the midst of highly-charged emotional situations. Mr. Schuman's conduct in this case is an example of what lawyers are supposed to do in difficult cases. He kept Mr. Achampong informed about the status of the case in the Ontario Court of Justice. He tried to arrange early resolution. He tried to facilitate service of the court documents promptly, in a manner sensitive to the mother. He was trying to arrange an orderly process for resolution of the temporary parenting issues.

[72] It is disappointing when the court sees counsel engage in sharp practice. It only feeds into the skewed perception that the public has of family law lawyers. It undermines the good work that family lawyers do. Family law cannot be practised this way and it is incumbent on the court to show its disapproval.

[73] I initially had sympathy for Mr. Achampong's position. This was a difficult case. His client was undoubtedly anxious and pressing him to do something immediately to have her child returned to her. He was not satisfied with Mr. Schuman's response to his requests to have the child returned to his client. He demonstrated in his correspondence a desire to resolve the matter without litigation. He showed considerable commitment to his client by cancelling a trip to Bavaria to deal with this matter.

[74] I had less sympathy for Mr. Achampong after he asked to make direct submissions in court. He attempted to minimize and rationalize his conduct. He argued, (in an attempt to justify his actions) that he had intimated to Mr. Schuman in one email that he would be taking court action. Somehow, Mr. Schuman was supposed to infer from this email that the mother might be moving without notice in the Superior Court of Justice. This was a specious argument. Mr. Achampong never indicated to Mr. Schuman

that he was going to bring a proceeding in the Superior Court of Justice, let alone a motion without notice. This could not be inferred from the email exchanges.

[75] Mr. Achampong stated that it would "only be a courtesy" to let Mr. Schuman know that he is going to court and that he had no obligation to let Mr. Schuman know about this. He is wrong, especially, in the facts of this case. He had a professional obligation to let Mr. Schuman know what he was going to do that day.

[76] Mr. Achampong also argued that it didn't matter that he didn't advise Mr. Schuman that he was going to the Superior Court of Justice that afternoon as he knew from Mr. Schuman's email that he was not available to attend on his motion (as Mr. Schuman was in another court). This was another astonishing argument. This was no reason not to inform Mr. Schuman about what he was planning on doing. Mr. Schuman could have rearranged his schedule. He has other family lawyers at his firm who could have attended on his behalf or he could have arranged for an agent to attend at court on his behalf that day and seek an adjournment.

[77] Lastly, Mr. Achampong argued that he was bound by client instructions. However, when asked, he conceded that he didn't receive instructions not to inform Mr. Schuman about his intention to attend at the Superior Court of Justice on October 12, 2012. That decision was his.

[78] This court would be much more sympathetic to Mr. Achampong if he had just said that he had made a mistake in judgment in the heat of emotional litigation.

[79] The arguments submitted by Mr. Achampong informed the court that at a very fundamental level he doesn't appreciate that what he did was wrong.

[80] The objective of this exercise is not to punish Mr. Achampong and I regret any embarrassment the publication of this decision may cause him, but it is important to send a specific message to Mr. Achampong and a general message to the public that this is not the way family law is to be conducted, and in the rare cases where counsel act this way, the court will voice its disapproval and impose costs consequences. It is essential that family law litigants and counsel have confidence that they will be treated fairly during a difficult process.

[81] Lastly, it was argued that the father should be disentitled to costs because of his unreasonable behavior. Both the mother and the father acted unilaterally in withholding the child after their separation on October 5, 2012. I have considered this in assessing the quantum of costs.

Part Six – The order

[82] Taking into account all of the considerations set out above, this court orders that Mr. Achampong shall personally pay the father costs in the sum of $1,200, inclusive of fees, disbursements and H.S.T. This sum shall be payable within 30 days. The father's claim for costs against the mother is dismissed.

Justice S.B. Sherr

Released: November 19, 2012