Costs

Ability to Pay –Must consider this in awarding costs. MacDonald v. Magel. (2003) 67 O.R. (3d) 181. In Murray 2005 CanLII 46626 (ON C.A.), the court found that a costs award would have a devastating effect on the mother and it would likely destroy whatever chance she may have to achieve financial self-sufficiency. No costs were ordered. Followed in Chouinard 2009 CanLII 64817 (ON S.C.).

A parent is not absolved from a costs disposition simply because he or she is the custodial parent, particularly where the court is not persuaded that the child's best interests would be negatively affected. In this case, the fact that the husband was a custodial parent was a relevant factor. However, the impact of a costs disposition on the children would be, at most, minimal in light of their circumstances. *Cassidy v. McNeil*, 2010 ONCA 218 (CanLII).

A party's limited financial circumstances will not be used as a shield against *any* liability for costs but will be taken into account regarding the quantum of costs, particularly when they have acted unreasonably and are the author of their own misfortune. *Snih v. Snih,* 2007 Canlii 20774 (Ont. SCJ pars. 7-13). In the case of *Takis v. Takis*, [2003] O.J. No. 4059 (S.C.J.) the court found that the respondent's lack of income and assets, though a relevant consideration, could not be used as a shield in unnecessary litigation.

Ability to pay alone cannot, nor should it, over-ride the other factors in Rule 24(11): *Peers v. Poupore*, 2008 ONCJ 615 (CanLII).

Must also consider the impact on the payor's child support obligations. Brusch [2007] O.J. No. 3349. In *Van Rassel v. Van Rassel*, 2008 CanLII 56939 (ON S.C.), [2008] O.J. No. 4410, 61 R.F.L. (6th) 364 (S.C.J.) at para. 9 Mossip J. concluded that the court should also consider the financial means of the unsuccessful party including the issue of the impact on the child of the paying party of a large costs order. Note that in *Spears v. Spears 2010* ONSC 4882, the court made a sizeable costs order against a mother on social assistance. The court considered that she earned cash income from babysitting and received gifts of $2000 per month.

From: *Balsmeier v Balsmeier*, 2016 ONSC 3485:

> I adopt the comments of McGee J. in Mohr v. Sweeney 2016 ONSC 3238 (CanLII), 2016 CarswellOnt 7716, at para. 17, citing Balaban v. Balaban, 2007 CanLII 7990 (ON SC), 2007 CarswellOnt 1518, at para. 7: "[T]hose who can least afford to litigate should be most motivated to seriously pursue settlement, and avoid unnecessary proceedings."

Bad Faith – 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. The court can determine that there shall be full indemnity for only the piece of the litigation where bad faith was demonstrated. S.(C.) v. S. (M.) (2007), 38 R.F.L. (6th) 315 (Ont. SC). Where, as here, a party adopts a catch-me-if-you-can approach to financial disclosure,

thereby demonstrating bad faith, that fact overshadows everything else such that full-recovery costs should follow. Not every failure by a party to disclose information in a timely fashion constitutes bad faith within the meaning of subrule 24(8). The non-disclosure must relate to a fact material to the litigation with the intention of deceiving a party or the court on this material issue. *Montrichard v. Mangoni*, 2010 ONCJ 408 (CanLII).

Deliberate non-disclosure is not merely unreasonable conduct, it is an example of bad faith….One of the most significant contributors to lengthy and costly litigation is untimely and inaccurate disclosure. All too often, one party makes every effort to thrust economic havoc on the other when this game of litigation hide and seek forms a part of their litigation strategy. This cannot be permitted by the court. *Stevens v. Stevens*, 2012 CarswellOnt 15385 (ON SC), per Harper J., at paras 22 and 23, Aff'd, [2013] O.J. No. 1912 (ON CA).

Where a party is found to have committed perjury this is bad faith, and the ability to pay provisions (MacDonald v. Magel) do not have the same applicability. *Achakzad v. Zemaryalai*, 2011 ONCJ 721 (CanLII).

Where there is a finding of bad faith, full indemnity costs is the starting point. However, other factors could impact on the decision. *Izyuk v. Bilousov*, 2011 ONSC 7476 (CanLII).

Persistent refusal by a party to make accurate financial disclosure and reveal their true income may rise to the level of bad faith. See: *DePace v. Michienzi* 2000 CanLII 22460 (ONSC); *Kardaras v. Kardaras,* 2008 ONCJ 616 (CanLII); *Jones v. Hugo*, [2012] ONCJ 381 Canlii;

In *Liu v. Meng*, 2017 ONCJ 650, bad faith found where father attempted to misrepresent his income, failed to disclose large sums of cash he kept in his safe at home, couldn't explain his lifestyle, had chosen not to work, gambling daily with friends and had selfishly failed to support his child. A clear message needs to be sent to payors who act in this manner that such behaviour is unacceptable. It is critical to the integrity of the family law system that such behaviour be met with meaningful costs consequences. This behaviour went beyond the threshold of unreasonable behaviour to an attempt by the respondent to deceive the court about his income. See: *S. (C.) v. S. (M.)* 38 R.F.L. (6th) 315 (Ont. S.C.J.); *Ayow v. James*, 2013 ONCJ 563.

In *Scipione v. Del Sordo*, 2015 CarswellOnt 14971 (Ont. S.C.) Pazaratz J. reviewed the law of bad faith,

> 96. Bad faith is not synonymous with bad judgment or negligence; rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation: *Children's Aid Society of the Region of Peel v. F. (I.J.)*, 2009 ONCJ 252 (CanLII), [2009] O.J. No. 2348 (OCJ); *Biddle v. Biddle*, 2005 CanLII 7660 (ON SC), 2005 CanLII 7660, [2005] O.J. No. 1056 (SCJ); *Leonardo v. Meloche*, 2003 CanLII 74500 (ON SC),[2003] O.J. No. 1969 (SCJ); *Hendry v. Martins*, [2001] O.J. No. 1098 (SCJ).
> 97. 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. The court can determine that there shall be full indemnity for only the piece of the litigation where bad faith was demonstrated. *Stewart v. McKeown*, 2012 ONCJ 644 (CanLII), 2012 ONCJ 644 (OCJ); *F.D.M. v. K.O.W*. 2015 ONCJ 94 (OCJ).
> 98. To establish bad faith the court must find some element of malice or intent to harm. *Harrison v. Harrison* 2015 ONSC 2002 (CanLII).
> 99. Rule 24 (8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. *S.(C.) v. S.(C.) (supra)*; *Piskor v. Piskor*, 2004 CanLII 5023 (ON SC), [2004] O.J. No. 796 (SCJ); *Cozzi v. Smith* 2015 ONSC 3626 (CanLII), 2015 ONSC 3626 (SCJ).

Jackson v. Mayerle, 2016 ONSC 1556:

- Even where the "full recovery" provisions of the Rules are triggered -- either by an offer which meets Rule 18(14) requirements, or by a finding of bad faith -- quantification of costs still requires an overall sense of reasonableness and fairness. *Goryn v. Neisner* 2015 ONCJ 318 (OCJ). The Rules do not require the court to allow the successful party to demand a blank cheque for their costs. *Slongo v Slongo* 2015 ONSC 3327 (SCJ). The court retains a residual discretion to make costs awards which are proportional, fair and reasonable in all the circumstances. *M.(C.A.) v. M.(D.)* [2003] O.J. No. 3707(supra); *Scipione v Scipione* [2015] O.J. No. 5130 (supra).

Bar to Proceeding – It is an error to bar a parent from seeking access on the sole ground of unpaid costs without considering the amount of costs, the reasons they were unpaid, and the parent's ability to pay. *Pepper v. Frankum*, 2007 ONCA 429 (CA**).** *Trudel v. Trudel,* 2010 ONSC 5177 (CanLII).

Bill of Costs - From *Snelgrove v. Kelly*, 2017 ONSC 4625:

In determining the appropriate quantum of costs, the court has an obligation to review the specifics of the costs claim to assess the reasonableness of the amounts requested and whether items claimed are properly the subject of a costs award. *Donnelly v. Donnelly,* 2004 CarswellOnt 2076 (S.C.J.). The court must also consider whether the hours spent can be reasonably justified. *Pagnotta v. Brown,* [2002] O.J. No. 3033 (S.C.J.); *Murphy v. Murphy,* 2010 ONSC 7204 (S.C.J.);However, this analysis should be undertaken in a global fashion. The court is not required to embark upon a painstaking, line-by-line analysis of Bills of Costs and second guess every hour and item claimed, unless there are clear concerns about excessive claims and overreaching. *Docherty v. Catherwood,* 2016 ONSC 2140 (S.C.J.), at para. 50.

From: *Nguyen v. Khookrathok*, 2017 ONCJ 783:

Counsel should always have a Bill of Costs prepared if they plan to seek costs at any stage of a case – whether it is at the end of a trial or at the end of a motion. Without a Bill of Costs, it becomes very difficult for the court to assess what work was done before and after an offer to settle is made. This is important, as subrule 18 (14) sets out different

scales of costs for pre-offer and post-offer work claimed. It also becomes difficult for the court to assess what work was attributable to this step in the case. The trial judge should not deal with requests for costs that were addressed or should have been addressed at these prior steps in the case. See: *Islam v. Rahman* 2007 ONCA 622. Lastly, it becomes very difficult for the court to assess what work wasn't attributable to a step in the case. A party is entitled to claim time spent for meetings with the client and reviewing and preparing pleadings and financial statements as this is time not attributable to any one step in the case. See: *Czirjak v. Iskandar*, 2010 ONSC 3778 (CanLII).

Child Protection –

Hastings Children's Aid Society v. J.L., 2012 ONCJ 362 (CanLII)

The essential test for the appropriateness of an award of costs against a Society is whether the Society should be perceived by ordinary persons as having acting fairly. See: *Children's Aid Society of Niagara Region v W.D.* (2004) 1 R.F.L. (6th) 117 (Ont Div Ct) -

Courts should be very cautious about awarding costs against parents in CAS matters – *Kenora- Patricia v. A.M.* 2005 O.J. 5305.

The case law supports the proposition that parents should be entitled to vigorously oppose and defend themselves in a child protection proceeding without the fear of cost sanctions. However, parents will not be insulated from a claim of costs if they act in bad faith, are unreasonable or act in a manner that is disproportionate to the issues involved. *Children's Aid Society of Halton Region v. J.S.*, 2014 ONCJ 38 (CanLII).

Children's Aid Society of Hamilton v. K.L., [2014] O.J. No. 2860 (SCJ- Family Division): This case contains an excellent review of the case law concerning costs in a child protection case. Justice Deborah Chappel sets out that the court must consider the following:

1. Child protection agencies do not enjoy immunity from a costs award.

2. The starting point in analyzing a claim for costs against a child protection agency is that child welfare professionals should not be penalized for carrying out their statutory obligation to protect children.

3. The approach to costs as against child welfare agencies must balance the importance of encouraging child protection professionals to err on the side of protecting children and the need to ensure that those professionals exercise good faith, due diligence and reason in carrying out their statutory mandate.

4. The high threshold of "bad faith" is not the standard by which to determine a claim for costs against a child protection agency.

5. Costs will generally only be awarded against a Children's Aid Society in circumstances where the public at large would perceive that the Society has acted in a patently unfair and indefensible manner.

6. A Society should not be sanctioned through costs for an error in judgment, or in cases where the nature of the case makes it very difficult to weigh and balance the evidence and predict the legal outcome.

7. Important factors to consider in deciding whether costs against a Society are appropriate include the following:

    i. Has the Society conducted a thorough investigation of the issues in question?

    ii. Has the Society remained open minded about possible versions of relevant events?

    iii. Has the Society reassessed its position as more information became available?

    iv. Has the Society been respectful of the rights and dignity of the children and parents involved in the case?

    v. In cases involving procedural impropriety on the part of a Society, the level of protection from costs may be lower if the irregularity is not clearly attributable to the Society's efforts to diligently carry out its statutory mandate of protecting children.

A Society has the following obligations:

1. Conduct a thorough investigation before acting.
2. Consider alternative measures for the protection of children before proceeding to court.
3. Continue its investigation up until the time of a final court determination in a vigorous, professional manner.
4.Treat all clients fairly and equally and with as much dignity as possible.
5.Reassess its position as more information becomes available.
6.Ensure that its workers are skilled in the performance of their roles.

B.(C.) v. Alberta (Director of Child Welfare), 2008 CarswellAlta 341 (Alta.QB).

Costs between parties in child protection case:
Children's Aid Society of Halton Region v. J.S., 2014 ONCJ 38 (CanLII). The case law supports the proposition that parents should be entitled to vigorously oppose and defend themselves in a child protection proceeding without the fear of cost sanctions. However, parents will not be insulated from a claim of costs if they act in bad faith, are unreasonable or act in a manner that is disproportionate to the issues involved.

Costs for non-parties in child protection case:

There is precedent for the court ordering costs to a non-party in a child protection proceeding. In the case of *Children's Aid Society of London and Middlesex v. TANB,* [2010] O.J. No. 6369 (SCJ Family), the court granted costs to the foster parents. The foster parents had been granted expanded participation rights and advanced a position contrary to the society in a 10 day trial.

Where it was unnecessary for the foster parents to retain counsel for the trial since their position mirrored the society's, the court found there was no basis for the foster parents to claim costs against the OCL. *Children's Aid Society of Toronto v. C.J.W.,* 2017 ONCJ 341.

Children's Lawyer – Possible to order costs if unreasonable position and if they unnecessarily prolong the case and waste time. See: *CAS of St. Thomas and Elgin County v. L.S.* (2004) 46 R.F.L. (5th) 330 (OCJ), but generally courts have been reluctant to make these orders. See: *Durham CAS v. E.C.G.* (2005) 6 R.F.L. (6th) 251 (Ont. Div. Ct.), *CAS of Peel Region v. K.J.F.*. 2009 ONCJ 252; *Children's Aid Society of Toronto v. C.J.W.,* 2017 ONCJ 341.

Eustace v. Eustace, 2016 CarswellOnt 21697 (Ont. S.C.J.) – costs ordered against Children's Lawyer when court found that counsel for the OCL took an adversarial position not only to the father, but also to the child. The court found that the OCL's involvement protracted the case and lengthened the trial and thus increased the costs by at least 20 per cent. It calculated what the costs should have been and required the OCL to pay 20 per cent of them.

City- Social Services – Can order them to pay blood test results when they are the real litigant. *D.N.* 2004 (OCJ- Justice Cohen). See contra *Bristow v. Keats*, 2006 ONCJ 14. Detailed test now set out in *Elliott v. Dalbergs*, 2010 ONSC 7072 (Ont. SCJ).

Costs of Costs – Separate submissions can be made for costs of a costs submission. *Berman v. Berman*, 2017 ONSC 4966. To the contrary see, *K.D.C. v. M.C.C.,* 2007 ONCJ 210.

Counsel – Personal costs

Jurisdiction to order personal costs against a lawyer is set out in subsection 24 (9) of the *Family Law Rules.* Complete review of law in *F. (V.) v. F. (J.)*, 2016 CarswellOnt 21166 (Ont. C.J.). The court wrote:

> 12 To be clear, and contrary to the submission of Mr. Fogelman, *misconduct is not a prerequisite for the application of sub-rule 24(9) if counsel has caused the other side to incur wasted or unnecessary costs*. As Justice Rene M. Pomerance of the Superior Court of Justice ("SCJ") succinctly put it in *D. (M.) v. Windsor-Essex Children's Aid Society*: "*Compensation may be appropriate even if discipline is not.*" (my emphasis)

This is a two-part test. First, did counsel cause costs to be unnecessarily incurred, and secondly, should the court exercise its discretion to impose costs against counsel?

All of the cases agree that the court must use extreme caution before doing so.

In *Rand Estate v Lenton* (2009 ONCA 251) at para. 5, the Ontario Court of Appeal found that the determination of costs against counsel requires a holistic and contextual approach to the entirety of the solicitor's behaviour.

In *Galganov v. Russell (Township)*, 2012 CarswellOnt 7400 (Ont. C.A.), the court set out the following factors to consider:

> a. The first step is to determine whether the conduct of the lawyer comes within the rule; this is, whether his or her conduct caused costs to be incurred unnecessarily. To do so, the court must consider the facts of the case and the particular conduct attributed to the lawyer.
>
> b. The rule allowing costs against a lawyer is not intended as punishment for professional misconduct. Rather, it is as indemnity for the time wasted and expenses unnecessarily expended as a result of the conduct of a lawyer.
>
> c. Neither negligence nor bad faith is a requirement for imposing costs against a lawyer.
>
> d. Mere negligence or conduct that does not meet the level of negligence may be sufficient to attract costs against a lawyer.
>
> e. The costs rule is intended to apply " . . . only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court . . . "
>
> f. In determining whether the rule applies, the court must examine "the entire course of the litigation that went on before the application judge". This requires a "holistic examination of the lawyer's conduct" in order to provide an "accurate tempered assessment". But a general observation of the lawyer's conduct is not sufficient. Instead, the court must look at the specific incidents of conduct that are subject to complaint.

Divided success – From *Jackson v. Mayerle*, 2016 ONSC 1556
This does not make equal success. It requires a comparative analysis. Most family cases have multiple issues. They are not equally important, time-consuming or expensive to determine. Comparative success can also be assessed globally in relation to the whole of the case, asking:

i. How many issues were there?
ii. How did the issues compare in terms of importance, complexity and time expended?
iii. Was either party predominantly successful on more of the issues?
iv. Was either party more responsible for unnecessary legal costs being incurred?

It is appropriate to award costs to the Respondent, given [his] greater success on the major issue, and to make an appropriate adjustment to account for the divided success on the less dominate issues. *Firth v. Allerton*, 2013 ONSC 5434

Draft orders
There is a significant difference between a formal offer to settle and a draft order. They have different purposes. The court ordered that draft orders be exchanged and filed at the outset of the trial pursuant to clause 1 (7.2) (m) of the rules. This order was made to

promote the primary objective of the rules – to deal with cases justly. A draft order specifically sets out a party's trial position – not their settlement position. It forces the party to clearly consider the relief he or she is seeking. It provides clarity about what relief is being sought and the court with context in assessing the evidence. The draft order helps to avoid a common problem where a party will fail to clearly articulate his or her position at the outset of the case and shifts his or her position during the trial.

The offer to settle, on the other hand, is a settlement position and is confidential between the parties. It is not to be disclosed to the trial judge until after he or she has dealt with all the issues in dispute except costs. See: Subrule 18 (8). An offer to settle, unlike a draft order, will attract costs consequences pursuant to subrules 18 (14) and (16).

From: *L.W.-A. v. J.C.,* 2017 ONCJ 825

Family Responsibility Office Clause: The entire amount of costs may be enforced as an incident of support by the Family Responsibility Office. The clause should say "payable as support". The advantages of an order under this provision are that the costs award is enforceable by the Family Responsibility Office and the order is not discharged in a bankruptcy by virtue of s. 178(1)(c) of the *Bankruptcy Act.* "It seems to me to be both impractical and inappropriate to suggest that this court should attempt to dissect cost awards in order to determine which part of the award relates to the support aspect of the proceedings." *Wildman* 2006 Canlii (OCA).

The court has discretion to allocate what portion of the costs are attributable to support. *Sordi v. Sordi* 2011 ONCA 665 Canlii.

Full recovery costs –

In *Biant v. Sagoo* (2001), 20 R.F.L. (5th) 284 (Ont. S.C.), the court wrote at paragraph 20:

> The preferable approach in family law cases is to have costs recovery generally approach full recovery, so long as the successful party has behaved reasonably and the costs claimed are proportional to the issues and the result. There remains, I believe, a discretion under r. 24(1) to award the amount of costs that appears just in all the circumstances, while giving effect to the rules' preeminent presumption, and subject always to the rules that require full recovery or that require or suggest a reduction or an apportionment.

This case was cited with approval in *Forrester v. Dennis,* 2016 ONCA 918, subject to the factors listed in subrule 24(11), the directions set out under subrule 24(8) (bad faith) and subrule 18 (14) (offers to settle), and the reasonableness of the costs sought by the successful party.

Note that in *Berta v. Berta*, 2015 ONCA 918**,** the court relied on Biant, but limited the presumption to a presumptive recovery of costs (not necessarily full recovery) subject to the factors listed in subrule 24(11), the directions set out under subrule 24(8) (bad faith) and subrule 18 (14) (offers to settle), and the reasonableness of the costs sought by the successful party.

As articulated in *Sordi v. Sordi*, 2011 ONCA 665, 283 O.A.C. 287, at para. 21, "In the context of family law disputes, a court need not find special circumstances to make a costs award approaching substantial indemnity" (citation omitted). Therefore the award of substantial indemnity costs is not an improper exercise of discretion.

To trigger full recovery costs a party must do as well or better than *all* the terms of any offer (or a severable section of an offer). *Paranavitana v. Nanayakkara*, [2010] O.J. No. 1566 (SCJ); *Rebiere v Rebiere* , 2015 ONSC 2129 (SCJ); *Scipione v Scipione ,* 2015 ONSC 5982 (SCJ). The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order (*Sepiashvili v. Sepiashvili,* 2001 CarswellOnt 3459, additional reasons to 2001 CarswellOnt 3316 (SCJ); *Wilson v Kovalev* ,2016 ONSC 163 (SCJ).

Good Faith – Where both parties litigate issues in good faith out of genuine love for the child and the result is far from certain (here mobility to Fiji) no costs awarded. *Reid v. Mulder* [2006] 29 RFL 120.

A misguided, but genuine intent to achieve the ostensible goal of the activity, without proof of intent to inflict harm, to conceal relevant information or to deceive, saves the activity from being found to be in bad faith. If they should know by their actions that they are running up legal costs and causing the other party financial ruin without justification, that is bad faith. S.(C.) v. S.(M.)38 RFL 6th 315 (SCJ).

Hague Convention – Costs of Return – Article 26

From: *Lawrence v. Lawrence*, 2017 ONCJ 431

70. Article 26 of the Hague Convention gives the court jurisdiction to order the respondent parent (the move away parent) “to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child”.

71. The discretion granted in Article 26 is broad. It allows the court to order costs under the following categories:

- to pay necessary expenses incurred by or on behalf of the applicant;
- to pay travel expenses,
- to pay any costs incurred or payments made for locating the child;
- to pay the costs of legal representation of the applicant; and,
- to pay those of returning the child.

72.Article 26 of the Hague Convention has three objectives:

a) to compensate the left behind parent for costs incurred in locating and recovering the abducted child;

b) to punish an abducting parent; and

c) to deter other parents from attempting to abduct their children.

*Beatty v. Schatz***,** 2009 CarswellBC 1555, 2009 BCSC 769 (CanLII), [2009] B.C.W.L.D. 4963, [2009] W.D.F.L. 3180, 178 A.C.W.S. (3d) 995, 69 R.F.L. (6th) 102, 70 C.P.C. (6th) 285 (B.C.S.C.), para 16.

73.The objectives of the *Hague Convention* would be defeated if the left behind parent were required to fund the process of locating the abducted child and obtaining that child's return: *Beatty v. Schatz***,** 2009, B.C.S.C., *supra*, para 16.

74.The *Convention* anticipates that all necessary expenses incurred to secure the children's return will be shifted to the abductor, both to restore the applicant to the financial position he would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place: *Dalmasso v. Dalmasso*, 9 P.3d 551 (U.S. Kan. S.C. 2000); *Beatty v. Schatz***,** 2009, B.C.S.C., *supra*, para 17; *Solem v. Solem***,** 2013 CarswellOnt 8639, 2013 ONSC 4318 (CanLII), [2013] W.D.F.L. 3211, [2013] W.D.F.L. 3326, [2013] W.D.F.L. 3329, [2013] W.D.F.L. 3331, [2013] O.J. No. 2960, 229 A.C.W.S. (3d) 457, 33 R.F.L. (7th) 120 (Ont. Sup. Ct.), para 10.

75.Article 26 gives the Court authority to order legal costs beyond those ordinarily provided for in family law cases by the rules of court. The legal costs provided for in the rules are generally only a portion of the actual legal costs incurred: *Beatty v. Schatz***,** 2009, B.C.S.C., *supra*, para 20.

Hourly Rate – *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3D) 161 (Ont. C.A.) Costs awards should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. Cited in Thompson v. Thompson (2006) 22 RFL (6^{th}) 54 (Sup) court says that it is not appropriate to simply take the number of hours spent by counsel on a particular matter and multiply those hours by a determined hourly or per diem rate.

Court should look at the bill of the lawyer of the party challenging that the other side is charging too much. *Goryn v. Neisner*, 2015 CarswellOnt 8562 (Ont. C.J.).

Hourly Rate – Costs grid – From: *Ganie v Ganie*, 2015 ONSC 2997 (CanLII).

[34] In determining the appropriate hourly rates to be assigned to the lawyers involved in the motion, the court follows the approach taken by Aitkin J. in *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041 (CanLII), paras. 7 and 11 to 16. That is, the starting point is the successor of the Costs Grid, namely, the "Information for the Profession" bulletin from the Costs Sub-Committee of the Rules Committee (the "Costs Bulletin"), which can be found immediately before Rule 57 in the Carthy or Watson & McGowan editions of the *Rules,* sets out maximum partial indemnity hourly rates for counsel of various levels of experience.

[35] The Costs Bulletin suggests maximum hourly rates (on a partial indemnity scale) of $80.00 for law clerks, $225.00 for lawyers of less than 10 years' experience, $300.00 for lawyers of between 10 and 20 years' experience, and $350.00 for lawyers with 20 years' experience or more. The upper limits in the Costs Bulletin are generally intended for the most complex and important of cases. Having regard to the

complexity of the motion, Mr. Farooq, who was senior counsel at the hearing, is entitled to the maximum hourly rate for a lawyer of between 10 and 20 years' experience.

[36] The Costs Bulletin, published in 2005, is now dated. Aitkin J. considered adjusting the Costs Subcommittee's hourly rates for inflation, as Smith J. did in *First Capital (Canholdings) Corp. v. North American Property Group*, 2012 ONSC 1359 (S.C.J.), but the unadjusted rates of the lawyers in her case were only slightly less than the actual fees they charged, so she elected to use their unadjusted rates. Normally, however, it is appropriate to adjust the hourly rates in the Costs Bulletin to account for inflation since 2005.

[37] Based on the Bank of Canada Inflation Calculator, available online at http://www.bankofcanada.ca/rates/related/inflation-calculator/, the current (2014) equivalent of the hourly rates in the Costs Bulletin are $93.52 for law clerks, $263.03 for lawyers of under 10 years' experience, which I would round up to $265, $350.71 for lawyers of between 10 and 20 years' experience, which I would round down to $350, and $409.16 for lawyers of over 20 years' experience, which I would round up to $410.

[38] The court is guided by the rates in the Costs Bulletin, not the actual hourly rates charged. The actual rates charged are relevant only as a limiting factor, in preventing the costs awarded from exceeding the actual fees charged. The Costs Subcommittee's rates apply to all lawyers and all cases, so everyone of the same level of experience starts at the same rate.

Interim Costs and Disbursements: Rogers J. summarized some of the themes in the case law in *Stuart v. Stuart* [2001] O.J. No. 5172 (Ont. S.C.) at paragraph [8]:

1) The ordering of interim disbursements is discretionary: *Airst v. Airst*, [1995] O.J. No. 3005 (Ont. Gen. Div.); *Hill v. Hill* (1988, 63 O.R. (2d) 618 (Ont. H. C.) and *Lossing v. Dmuchowski*, [2000] O.J. No. 837 (Ont. S.C.J.).

2) A claimant must demonstrate that absent the advance of funds for interim disbursements, the claimant cannot present or analyse settlement offers or pursue entitlement: *Hill v. Hill*, (1988), 63 O. R. (2d) 618 (Ont. H.C.) and *Airst v. Airst*, [1995] O.J. No. 3005 (Ont. Gen. Div.).

3) It must be shown that the particular expenses are necessary: *Lossing v. Dmuchowski*, [2000] O.J. No. 837 (Ont. S.C.J.).

4) Is the claim being advanced meritorious? *Lynch v. Lynch*, (1999), 1 R.F.L. (5^{th}) 309 (Ont. S.C.J.) and *Randle v. Randle* 1999 ABQB 954 (CanLII), (1999), 3 R.F.L. (5^{th}) 139 (Alta. Q.B.).

5) The exercise of discretion should be limited to exceptional cases: *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.).

6) Interim costs in matrimonial cases may be granted to level the playing field: *Randle v. Randle* 1999 ABQB 954 (CanLII), (1999), 3 R.F.L. (5^{th}) 139 (Alta. Q.B.).

7) Monies might be advanced against an equalization payment: *Zagdanski v. Zagdanski*, 2001 Carswell Ont. 2517 (Ont. S.C.J.).

In *Ballanger v. Ballanger*, 2017 ONSC 6642, the court writes at paragraph 31:

> The party seeking a payment under rule 24(12) does not have to prove that exceptional circumstances exist. Instead, the respondent must satisfy the following factors (see *Stuart v. Stuart* (2001), 2001 CanLII 28261 (ON SC), 24 R.F.L. (5th) 188 at para. 8; *Ludmer* at paras.15-17; *Sadlier v. Carey*, 2015 ONSC 3537 (CanLII) at paras. 34-38 and *Turk v. Turk*, 2016 ONSC 4210 (CanLII) at paras. 4, 24; *McCain v. Melanson,* 2017 ONSC 916 (CanLII) at paras. 2 to 4):
>
> 1. On a balance of probabilities, the moving party's claim/defence has sufficient merit.
>
> 2. The legal fees are necessary and reasonable given the needs of the case and the funds available.
>
> 3. The moving party is incapable of funding the requested amount.

Legal Aid – The court is not restricted to ordering costs at a legal aid rate. *Ramcharitar v. Ramcharitar* (2002) 62 O.R. (3d) 107 (Ont. SCJ), *Holt v. Anderson* [2005] O.J. No. 5111 (Div. Ct.); *Loncar v. Pendlebury*, 2015 ONSC 4673 (CanLII); *S.G. v. A.S.,*2015 ONSC 1882 (CanLII). *Children's Aid Society of the Regional Municipality of Waterloo v. C.T.,* 2017 ONSC 3188, where the court writes at par. 75:

> Just as Rule 2 of the *Family Law Rules* charge the court to "deal with cases justly", (including controlling its own process, "saving expense and time" and "giving appropriate court resources to the case ...") I accept that as a societal institution, the court has an obligation and the authority to address how society's financial "resources" (i.e.: taxpayer funds entrusted to Agencies, institutions and through the Provincial Attorney General's office, the O.L.A.P.) are allocated and expended. In criminal cases, the Superior Court has the authority to order the government to fund an indigent accused's defence counsel at above the legal aid rate. As well, Rule 24(3) itself vests authority in the court to order costs payable to or by a government agency. I find that I have a responsibility and the authority to make such a costs order payable to O.L.A.P., a person or to another counsel.

It is clear that pursuant to subsection 46(1) of the *Legal Aid Services Act*, 1998, "the costs awarded in any order made in favour of an individual who has received legal aid services are recoverable in the same manner and to the same extent as though awarded to an individual who has not received legal aid services". A legally aided client "stands before the court in exactly the same position as any other litigant". See: *Baksh v. Baksh*, 2017 ONSC 3997 (CanLII), per Justice R.P. Kaufman.

In *Onuselgou v. Okeke*, 2011 ONCJ 431 (CanLII), the court fixed costs at a legal aid rate, primarily due to the payor's limited financial circumstances. Case distinguished in *F.K. v. T.R.,* 2016 ONCJ 339 (CanLII) and *J.J.G. v. J.D.S.*, 2017 ONCJ 699.

In *Silva v. Queiroz, [2016] O.J. No. 5243* (OCJ) the mother asked that the costs be paid directly to legal aid in trust. As set out in *F.D.M. v. K.O.W.*, [2015] O.J. No. 903 (OCJ) and *John v. Vincente*, 2016 ONCJ 78, the court prefers not to become involved in retainer arrangements and make such orders.

Legal Aid Settlement Conferences – The court has no jurisdiction to order costs for a party not attending a legal aid settlement conference. *Albrecht v. Emerson,* 2017 ONCJ 159.

Mediation - Costs associated with a voluntary mediation are not within the jurisdiction of the court to order: *Saltsov v. Rolnick* [2010] O.J. No. 5606 (Ont. Div. Ct.) and *Dostie v. Poapst* [2015] ONSC 1532 at 30.

Mobility Cases – When a moving party is successful on a mobility case, but has put the other party in the position of having little option but to contest the case, the court should be reluctant to grant costs. *Bridgeman v. Balfour*, 2009 CarswellOnt 7214 (Ont. S.C.J.): However, where the move was from one town to another within Niagara and the parent's relationship would not be affected with his child at all, Bridgeman was distinguished. See: *DeLuca v. DeLuca*, 2010 ONSC 6692 (CanLII).

Non-Parties – The test for awarding costs against non-parties is:
a) the non-party had status to bring the action;
b) the named plaintiff was not the real plaintiff;
c) the plaintiff was a "man of straw" put forward to protect the non-party from liability for costs – See: *Television Real Estate Ltd. V. Rogers Cable T.V. Ltd.* (1997) 34 O.R. (3d) 291 (Ont.CA).

Offers to Settle –
Offers to settle are the yardstick with which to measure success and are significant both in considering liability and quantum. *Osmar v. Osmar* (2000) 8 R.F.L. (5th) 387 (Ont. SCJ).

Even if the terms of subrule 18(14) are followed, the court still has the discretion not to order full recover costs. *C.A.M v. D.M.* [2003] (OCA).

Failure to make an offer to settle can be unreasonable behaviour. *Klinkhammer v. Dolan and Tulk*, 2009 ONCJ 774 (CanLII). This applies equally to motions. *H.F. v. M.H.*, 2014 ONCJ 526.

The failure to make an offer might be excused when the other side fails to provide meaningful financial disclosure upon which to base a financial offer. There would be a risk that the offer would be for less than the person was entitled to. If the person had made an offer (that was accepted) based on the lower income, without financial disclosure, this could lead to an unjust result. *Oduwole v. Moses, [2016] O.J. No. 5636* (OCJ).

The technical requirements of subrule 18 (4) must be met to attract the costs consequences in subrule 18 (14). In *Clancy v. Hansman*, 2013 ONCJ 702 when the offer expired 5 minutes before the hearing and the offer was served by email (not a proper form of service), 18 (14), couldn't be used. In *Sader v. Kekki*, 2014 ONCJ 41, the court said that an offer that does not comply with suburle 18 (4) also can't be considered under

subrule 18 (16). However, it can be considered when determining if behaviour was reasonable.

Close is not good enough to attract the costs consequences of 18 (14). The offer must be as good or more favourable than the trial result. The offer can be considered under 18 (16). *Gurley v. Gurley*, 2013 ONCJ 482 Canlii.

The onus of proving the offer is as or more favourable than the trial result is on the person making the offer. *Neilipovitz v. Neilipovitz* [2014] O.J. No. 3842.

To trigger full recovery costs a party must do as well or better than *all* the terms of any offer (or a severable section of an offer). *Paranavitana v. Nanayakkara*, [2010] O.J. No. 1566 (SCJ); *Rebiere v Rebiere* , 2015 ONSC 2129 (SCJ); *Scipione v Scipione ,* 2015 ONSC 5982 (SCJ). The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order. *Wilson v Kovalev* ,2016 ONSC 163 (SCJ).

Just because the father served more offers to settle does not mean that he was being more reasonable or trying harder to settle the case. More does not mean better. If the father had accepted the mother's offer to settle the trial would not have been necessary and both parties would have saved considerable legal fees. *Livisianos v. Liadis,* 2016 ONCJ 465 (CanLII).

Offers to settle - Compromise -
In the context of a civil proceeding, the Court of Appeal, in *Celanese Canada Inc. v. Canadian National Railway*, [2005] O.J. No. 1122 (Ont. C.A.), held that for a plaintiff to be entitled to the presumptive award of costs on a substantial indemnity basis, the offer to settle had to reflect a real element of compromise (at paras. 36-37). A similar conclusion was reached by Rutherford J. in a family law case: *Kappler v. Beaudoin*, [2000] O.J. No. 4121 (Ont. S.C.J.) at para. 7. Parties in family law proceedings are encouraged and expected to exchange offers to settle in advance of the hearing of motions and, of course, trials. If it were sufficient for a party to serve an offer simply providing that an entire motion be dismissed with costs to be fixed by the court, in my view that would usually not reflect a serious attempt to resolve a matter. In this case the Applicant's offer reflected the fact that there was really no way to compromise to settle the motion. From: *Murphy v. Murphy*, 2010 ONSC 6204.

Where an offer to settle offered little compromise it was given no weight in a costs determination. *Gonsalves v. Scrymgeour*, 2017 ONCA 630.

Offers in Settlement Conference Briefs - Subrule 17(23) of the *Family Law Rules* is clear that no brief, evidence or statement made at a settlement conference is to be disclosed unless in an agreement reached at a settlement conference or an order. There is no exception for the offers to settle in a settlement conference brief to be disclosed in

submissions for costs. See *Entwistle v. MacArthur*, 2007 CanLII 17375, 157 (SCJ - Ont. Fam. Ct.).

From Epstein newsletter – February 29, 2016:

> *Owen-Lytle v. Lytle*, 2015 CarswellOnt 18683 (Ont. S.C.J.), Family Court - Woodley, J. This interesting but brief decision of Madam Justice Woodley confirms what Justice Pazaratz had to say in *Entwistle v. MacArthur*, 2007 CarswellOnt 3149 (Ont. S.C.J.); additional reasons *Entwistle v. MacArthur*, 2007 CarswellOnt 516 (Ont. S.C.J.), which is that an offer to settle contained in a settlement conference brief does not constitute an offer made under Rule 18 of the Family Law Rules, but the offer to settle contained in a settlement conference brief is governed by the law of contract. Thus, the rules about acceptance of an offer to settle do not apply to an offer to settle in a conference brief, and where an offer in a settlement conference brief has been implicitly withdrawn by subsequent offers in writing less favourable to the applicant, then the offer cannot be subsequently accepted.

Thus, an offer to settle in a settlement conference brief could be accepted before it is withdrawn under the law of contract. Since settlement conferences are mandatory, as judges frequently want to see offers to settle contained in briefs, parties should be very careful about how they frame such offers and whether to leave them outstanding after a case conference has ended.

Offers to settle – severable offers

In paragraphs 36-39 of *J.C.M. v. K.C.M.*, 2016 ONCJ 551 (CanLII), the court reviewed the importance of severable offers as follows:

> **36** Several courts have discussed the value of severable offers.
>
> **37** In *Lawson v. Lawson,* 2004 CanLII 6219 (ON SC), [2004] O.J. No. 3206 (SCJ), Quinn J., wrote at paragraphs 25 and 26:
>
> > **25** The wife's offer to settle of 28 April 2004 was a non-severable, all-or-nothing offer. This is apparent from the manner in which it was to be accepted. As such, I do not think much is to be gained by examining its provisions paragraph by paragraph except, perhaps, to gauge its general, overall reasonableness. It is difficult to prove that an order made is more favourable to a party than, or equal to, a non-severable offer.
> >
> > **26** I would discourage the making of all-or-nothing offers. The severable variety allows for the prospect that some of the outstanding issues might be settled, thereby reducing the length and expense of the motion or trial, as the case may be. All-or-nothing offers sometimes have a heavy-handed air about them and certainly they possess a much lower chance of being accepted than severable offers.
>
> **38** In *Paranavitana v. Nanayakkara* [2010] O.J. No. 1566 (SCJ) Wildman J. writes at paragraphs 13 and 14 as follows:
>
> > **13** Unfortunately, this offer was not severable. There would have been no disadvantage to the wife in making the custody offer, in particular, severable from the financial and property terms. Severable offers are an underused tool that can confer considerable settlement and cost advantages. Because of the full recovery provisions of Rule 18(14), they can provide much more flexibility to the court to award full recovery for at least a

> portion of the overall costs, if the party is successful on only some of the issues. Had the custody terms of the wife's offer been severable from the other terms, I would have been prepared to consider ordering full recovery costs on the custody issue from the date of the offer forward. As this was the majority of the trial time,that would have been a significant cost advantage to the wife.
>
> **14** However, as the offer was not severable, the wife would have to do as well or better than **all** the terms of the offer, in order to take advantage of the full recovery cost provisions of Rule 18(14). Since the husband got an additional week of access, as well as an order that spousal support would reduce from $1000 in three years, Ms. Nanayakkara did not do as well as or better than her offer in its totality. Rule 18(14) does not apply but I can take this offer into account in determining costs under Rule 24, along with any other offers that have been made (Rule 18(16)).

39 In Paragraph 35 of *Jackson v. Mayerle,* 2016 ONSC 1556 (CanLII), Pazaratz J. writes:

> Offers to settle are to be encouraged, and severable offers (or offers on specific issues) are particularly helpful to the settlement process.

Proportionate /Reasonable Expectation: Costs must be proportionate to the amount at stake. Gentle 2007CarswellOnt 4362 (S.C.)

The court must step back and exercise a judgment, having regard to all the circumstances as to what a fair and reasonable amount should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant is. See ***Boucher v. Public Accountants Council for the Province of Ontario*** 2004 CanLII 14579 (ON C.A.), (2004) 71 O.R. (3d) 291. Cited with approval in Serra v. Serra, 2009 ONCA 395 (CanLII).

The costs determination must reflect proportionality to the issues argued. There should be a correlation between legal fees incurred (for which reimbursement is sought) and the importance or monetary value of the issues at stake. The rules do not require the court to allow the successful party to demand a blank cheque for their costs. See: *O'Brien v. O'Brien,* 2017 ONSC 402 (CanLII). Here, the amounts in dispute did not justify the time expended on the case.

One of the considerations in an assessment of costs is to fix costs in an amount that is "fair and reasonable" for the unsuccessful party to pay in a particular proceeding: *Farjad-Tehrani v. Karimpour* 2009 CarswellOnt 2186 (S.C.J.) at para. 32, aff'd 2010 O.N.C.A. 326 at para. 4.

Purposes – Modern cost rules reflect a variety of purposes:

1. Indemnity
2. Controlling behaviour by discouraging frivolous suits or meritorious defences,
3. To promote and encourage settlements.

Fong v. Chan [1999] O.J. No. 4600 (ont. CA)

Also: The ONCA in *Serra v. Serra*, [2009] O.J. 1905 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.

Sub-rule 2 (2) of 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. See: *Sambasivam v. Pulendrarajah*, [2012] O.J. No. 5404 (Ont. C.J.).

Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2002, S.C.C., *supra*, paragraph 25. When awarded on a full recovery scale, costs can serve to express the court's disapproval of unreasonable conduct during the litigation. See: *Sabo v. Sabo,* 2013 ONCJ 545 (CanLII), per Justice Carole Curtis.

A costs order balances two conflicting principles:

a) A blameless litigant who is successful in a proceeding should not be required to bear the costs of prosecuting or defending the proceeding.

b) Citizens should not be made to feel unduly hesitant to assert or defend their rights in court by the prospect that, if unsuccessful, they will be required to bear all the costs of their opponent.

The Supreme Court has held that the ultimate objective in balancing these principles is to ensure that the justice system works fairly and efficiently. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, at paras. 25-26 [*Okanagan*].

Relevant Matters – 24 (11) (f): Subrule 18 (16) (offers to settle) can be considered here as a cross-reference. It not only goes to entitlement, but also to quantum. *Osmar v. Osmar* [2000] O.J. No. 2504 (SCJ).

Responsibility for Behaviour - Family law litigants are responsible for and accountable for the positions they take in the litigation: *Heuss v. Surkos*, 2004 CarswellOnt 3317, 2004 ONCJ 141. Surreptitiously taping conversations can be unreasonable behaviour. *Sheidaei-Gandovani v. Makramati*, 2014 ONCJ 82 (CanLII).

Rule 2 - 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. 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. *Sambasivam v. Pulendrarajah*, 2012 ONCJ 711 (CanLII).

Scale of Costs – A party is not generally entitled to full recovery costs unless there has been bad faith or Rule 18 applies. Substantial indemnity costs have been defined as about 80% of total costs; partial indemnity costs at 60%. *Kimpton v. Ghoura*, 2007 CarswellOnt 1927 (SCJ); *Biant v. Sagoo* 2011 CarswellOnt 3315 (SCJ); *Burke v. Burke*, 2011 CarswellOnt 3051 (SCJ). Partial indemnity costs should be the norm. *Patton-Casse v. Casse*, 2011 CarswellOnt 7090 (SCJ); *Blustein v. Kronby*, 2010 CarswellOnt 1985 (SCJ).

Civil Rules Tariff (as of 2012): law clerks – max $80 per hr., student-at-law-$60, under 10 year lawyer- $225, 10-20 year lawyer - $300 per hr., and plus 20 lawyer - $350 per hr. The maximum rate may be considered and slightly reduced where counsel was experienced, but the case was not complicated enough to warrant the highest rate. Al v. Lawson, 2010 CarswellOnt 7807 (SCJ).

These rates were generally intended for the most complex and important of cases. *Chan v. Town,* 2014 ONSC 2217 (CanLII)

Second Counsel – Usually not recoverable for two counsel at trial. *Sepiashvili v. Sepiashhviili*, 2001 CarswellOnt 3459 (SCJ).

Security for costs –

Subrules 24(13) to (17) of the *Family Law Rules* set out the court's jurisdiction to order security for costs.

From: *Izyuk v Bilousov*, 2015 ONSC 3684:

The purpose of an order for security of costs is to protect a party from nuisance or irresponsible litigation, conducted without regard to the merits of the case or the costs likely to be incurred.

The court must apply the following analysis:

a. The initial onus is on the party seeking security for costs to show that the other party falls within one of the enumerated grounds.
b. If the onus is met, the court has discretion to grant or refuse an order for security.
c. If the court orders security, it has wide discretion as to the quantum and means of payment of the order. *Clark v Clark* 2014 ONCA 175 (CanLII).
d. The order must be "just" and be based on one or more of the factors listed in subrule 24(13). *Hodgins v Buddhu* [2013] O.J. No. 1261 (OCJ).

Security for costs is not intended as a roadblock for a person who has a genuine claim. In most instances the merits of a case should not be determined by a party's inability to post

security for costs. *Bragg v. Bruyere* ,2007 ONCJ 515. But litigants should not be permitted to use the court as a playground. Court proceedings are expensive, time consuming, and disruptive. They should not be launched frivolously or without due regard to the impact on the responding party. *McGraw v Samra*, [2004] O.J. No. 3610 (OCJ).

A self-represented litigant is entitled to seek an order for security for costs. *O'Brien v O'Brien* (2003) 37 R.F.L. (5) 409. But since costs awards in favour of self-represented parties are generally less than if the successful party had retained counsel, the lower potential costs exposure will generally suggest a lower level of security for costs.

Self-represented litigants

Jordan v. Stewart, 2013 ONSC 5037 Canlii:

a) A self-represented litigant does not have an automatic right to recover costs. The matter remains fully within the discretion of the trial judge. Moreover, self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity;

b) Parties who litigate against a self-represented person should not be able to ignore the potential for costs. The court retains the discretion to fashion an award of costs that is fair and reasonable in the circumstances of the case before it;

c) Where one party is represented by a lawyer and the other is not, the hourly rate that the represented litigant's lawyer is entitled to claim on an assessment of costs should inform the reasonable expectations of both parties as to the costs that they will likely be required to pay if unsuccessful. Otherwise, litigants represented by lawyers would be less circumspect with regard to their conduct and their response to the opposing party's efforts to settle because that party is a self-represented litigant.

d) It is near impossible to come up with an objective way of fixing an in-person party's hourly rate or the amount of time they spent, not at the court, doing what we might otherwise consider lawyer's work.

e) Ultimately, the overriding principle in fixing costs is "reasonableness".

f) Courts addressing costs should consider Bills of Costs certified by lawyers who have provided assistance, even if not on the record throughout the case.

In *Jahn-Cartwright* 2010 91 R.F.L. (6th) 301 (SCJ), the successful self-represented mother was awarded fees of $9,038.00 (plus HST) ,together with disbursements totaling $616.56. An hourly rate of $200.00 was applied, which was approximately two-thirds of what the husband's lawyer would have been entitled to claim, even on a partial indemnity scale.

In *Izyuk v. Bilousov*, 2011 ONSC 7476 (CanLII), the court fixed the hourly rate at $100 per hour.

The Court of Appeal recently endorsed the following statement from *Fong v. Chan*, 46 O.R. (3d) 330 (C.A.) in *Pirani v. Esmail*, 2014 ONCA 279 (CanLII).

> Self-represented litigants, however, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. … Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity.

Set-off –The Court of Appeal upheld a trial judge who ordered costs setoff against child support arising out of a contempt motion. The trial judge had weighed any disadvantage to the child against the benefit to the child of creating a disincentive to a parent's obstruction of access. *Rego v. Santos,* 2015 ONCA 540. This approach was also taken in *Peers v. Poupore* 2008 ONCJ 615 (OCJ).

Settlements-

If the parties have reached a negotiated resolution of the issues in their case, costs can nonetheless be ordered if the court determines that one party was more successful overall than the other party. *Johanns v. Fulford,* [2011] O.J. No. 4071 (SCJ); *Snelgrove v. Kelly*, 2017 ONSC 4625.

The fact that the parties have settled all or some of the issues in the case will also be relevant to the determination of costs liability and the quantum of any costs ordered. Settlement is often a by-product of reasonable behaviour and litigation expectations. Accordingly, the court should be hesitant to order costs when the parties have reached a resolution of their dispute, unless there are compelling reasons to do so. *Talbot v. Talbot,* 2016 ONSC 1351 (SCJ); *Snelgrove v. Kelly*, 2017 ONSC 4625.

Where everything but costs are settled - in *O'Brien v. O'Brien* 2009 CarswellOnt 7194 (Ont. S.C.J.) court held that in considering the issue of costs in the context of a case that has settled, the most important factor in determining both entitlement and quantum of costs is the reasonableness and timeliness of the parties' respective offers to settle. It is not appropriate to go behind the freely negotiated terms of settlement and engage in an exercise of determining which party's position on each issue would have been accepted by the trial judge if the matter had proceeded to trial and that the reasonableness of the conduct of the parties in a consideration but not the most important one. Cited with approval in *Atkinson v. Houpt*, 2017 ONCJ 316.

Courts should be cautious in ordering costs in these circumstances. See: *Witherspoon v Witherspoon*, 2015 ONSC 6378, where the court writes:

> … experience has shown that parties to matrimonial litigation frequently decide to compromise and accept a settlement, effectively abandoning certain pre-settlement claims and defences without pressing them to trial, not because the party concedes in any way that positions previously held in the litigation have no objective merit, but because the party is simply tired of the ongoing acrimony, and/or feels unable to incur the expense of litigating the matter through to a final conclusion after trial. Given such realities, it seems to me that permitting post-settlement claims for costs, in which negotiated settlements are used after the fact as supposed benchmarks by which the objective reasonableness of pre-settlement positions should be measured, runs counter to public policy. Endorsing such an approach would actively discourage parties from making any compromises in order to achieve settlement.
>
> Moreover, attempts to address such cost issues in a post-settlement context are unlikely to promote judicial economy. Again, application of the cost rules presupposes that the court is in a position to rely on factual or other objective findings that either support or detract from the parties' respective submissions. However, that self-evidently will not be the case where the parties rely on matters and considerations that have never been the subject of any judicial fact finding, or corresponding judicial determination on issues or reasonableness, unreasonableness, or alleged misconduct……However, an exercise that effectively encourages and requires the parties and the court to revisit and essentially litigate such issues, which supposedly have been resolved by a substantive settlement, seems entirely and inappropriately retrograde in nature.
>
> For such reasons, our courts have held that, "where parties make a settlement as between themselves, the court … should be very slow to make an award of costs against one of the parties", and "unless there are compelling reasons to do so, costs in the circumstances of a settlement between parties ought not to be awarded by the court". See: *Anishinaabe Child and Family Services Inc. v. CBC*, [1997] M.J. No. 181 (Q.B.);

Settlement Conferences- No reference should be made to what was said at either a settlement conference or a case conference. *Bordynuik*, 2008CarswellOnt 4617 (SCJ).Scott J. Under rule 17, impermeable cloak of confidentiality shrouds communications made and materials filed at settlement conference and this includes any offer to settle contained in settlement conference brief — Thus, offer to settle in settlement conference brief may not be disclosed and may not be considered, not even at final costs stage of case. Entwistle v. MacArthur, 2007 CanLII 17375 (ON S.C.).

Solicitor Rate- level of experience - The "Information for the Profession", which is part of rule 57 of the *Rules of Civil Procedure* sets out guidelines for partial indemnity rates in general civil proceedings. They are helpful here in determining a reasonable hourly rate on a full recovery basis. For lawyers with less than ten years' experience, the maximum to be charged on a *partial indemnity* basis is $225 per hour. Partial indemnity rates are generally about two thirds to three quarters of substantial indemnity rates (which are not full recovery). *Bardouniotis v. Trypis*, 2010 ONSC 6586 (CanLII).

Step – Must be requested at each step. The court lacks jurisdiction to deal with costs for prior steps. It should be dealt with at each stage. *Biant v. Sagoo and Sagoo* (2001) 20 R.F.L. (5th) 284 and now the Court of Appeal in Islam v. Rahman 2007 ONCA 622. Costs accrued from activity not specifically related to the step (not requiring judicial intervention should be dealt with at the end and not by the motions judge. *Houston v. Houston*, 2012 ONSC 233; *Walts v. Walts*, 2014 ONSC 98.

Czirjak v. Iskandar, 2010 ONSC 3778 (CanLII) – In allowing additional costs at trial:

The father is correct in submitting that the mother is not entitled now to claim costs for any step along the way for which costs could have been claimed and awarded at the time. These would include conferences, motions and consent orders. See rule 24 (10) of the *Family Law Rules*,; *Islam v. Rahman*, 2007 ONCA 622 (CanLII). However, there are a number of steps for which costs cannot be recovered until the final adjudication or settlement of the case. These include initial interviews, meetings and settlement discussions before filing the application, the application document itself, the reply, financial statements (not prepared for motions or conferences), questioning (in relation to issues for trial) and settlement meetings relating to issues for trial. The mother is entitled to have these costs considered now.

Likewise in *Houston v. Houston* 2012Canlii 233, the court wrote:

> The Court of Appeal in *Islam v. Rahmon*, accepted that there should be excluded from an award of costs at trial amounts claimed for steps taken in the course of the litigation where no order was made as to costs or where there was silence on the issue of costs. However, it is important to understand that the rule and the decision of the Court of Appeal speak to costs applicable to *steps in a case which are addressed by a judge*, such as motions and conferences. Surely the rule was not meant to extend to steps which do not require any form of judicial intervention, such as preparation of pleadings and financial statements, property evaluations, document production, attendance at questioning, review of transcripts, compliance with undertakings, and preparation for trial, to name but a few.

In *Kardaras v. Kardaras*, 2008 ONCJ 493 (CanLII) the court set out that some legal work is not attributable to any step in a case and some legal work has hybrid characteristics- it can apply to more than one step. If counsel can show what portion is attributable to the trial step, it can be claimed.

The court should take a liberal view of what constitutes a step. For instance, a case conference might require several appearances. *McSwain v. McSwain* 2010 ONCJ 539.

Substantial indemnity - Substantial indemnity costs have been defined as "about 80%" of the total costs. *Hogarth v Hogarth*, 2016 ONSC 5131.

Successful Party - To determine whether a party has been "successful" the Court must take into account how what was ordered compares to any settlement offers that were made. Lawson, [2008] O.J. No. 1978 (OSC).

Consideration of success is the starting point in determining costs (*Sims-Howarth v. Bilcliffe* [2000] O.J. No. 330 (SCJ – Family Court). And the rules apply equally to custody cases (*Kappler v. Beaudoin* [2000] O.J. No. 4121).

Where there are a number of issues before the court, it can have regard to the dominant issue at trial in light of those offers to settle: *Firth v. Allerton*, [2013] O.J. No. 3992 (S.C.J.); *Mondino v. Mondino*, 2014 ONSC 1102 (CanLII).

Unreasonable Behaviour

In the context of a custody and access dispute, a pattern of conduct which shows lack of respect for the letter and spirit of court orders or the relationship between a parent and child is the type of behaviour which should cause the court to seriously question the appropriateness of a costs award in favour of the successful party in a proceeding involving the child. *Horne v.Crowder,* 2015 ONSC 1041 (SCJ); *Snelgrove v. Kelly*, 2017 ONSC 4625.