**TAB 5**

# Costs for Family Lawyers

Barbara J. Thompson
*Steinberg, Thompson, D'Artois, Rockman, Summers*

# After the Cost Grid - What's Next

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## BACKGROUND

The *Family Law Rules* have been in effect in the Ontario Court of Justice since September 1999, in the *Superior* Court of Justice, Family Court, in the areas of the province which have a Family Court, since the fall of 1999 and province-wide in the Superior Court of Justice since July 1, 2004. Therefore, effective July 1, 2004, all family cases in Ontario are subject to the *Family Law Rules.*

Courts have discretion to determine costs by virtue of s 131 of the *Courts of Justice Act* which reads:

> *131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.*

The family rule which governs the issue of costs and is largely analogous to Rule 49 of the *Rules of Civil Procedure* is Rule 24. The *Family Law Rules* establish an entirely new framework for establishing and determining costs which is distinct from the *Rules of Civil Procedure: Pirner-Moser v. Pirner,* 2003 CarswellOnt 5447 (Ont. C.A.). They have circumscribed the broad discretion granted by s. 131(1) of the *Courts of Justice Act*, but have not completely removed the trial judge's discretion: *M.(C.A.) V. M.(D.)* (2003), 43 R.F.L. (5th) 149 (Ont. C.A.).

While the *Family Law Rules* have established a new and comprehensive framework for the court process for all family cases in Ontario, it is possible to reference the *Rules of Civil Procedure* in certain circumstances. If a matter is not adequately covered under the *Family Law Rules* then, pursuant to Rule 1(7), the practice shall be determined by the court by analogy to the *Family Law Rules*, by reference to the *Courts of Justice Act* and the Act governing the case and, if the court considers it appropriate, by reference to the Rules of *Civil Procedure* Rule. As a result, for example, where an order for payment into court was determined to not be adequately covered under the *Family Law Rules*, the court resolved the issue under the *Rules of Civil Procedure* and also applied the *Rules of Civil Procedure* to the costs determination on the motion: *Giang v. Le,* 2004 CarswellOnt 592 (Ont.S.C.)

Several decisions have held that the *Family Law Rules* are consistent with the policy statements set out in the Ontario Court of Appeal case of *Fong v. Chan,* (1999) 46 O.R. (3d) 330 (Ont. C.A.). The purpose of the modern costs rules are designed to foster three fundamental purposes:

1. to indemnify the successful litigant for the costs of litigation;
2. to encourage settlements; and
3. To discourage and sanction inappropriate behaviour by litigants.

See *Osmar v. Osmar* (2000), 8 R.F.L. (5th) 387 (Ont. S.C.J.) and *Powers v. Powers* (2004), 11 R.F.L. (6th) 393 (Ont. C.A.).

## ENTITLEMENT TO COSTS UNDER THE FAMILY LAW RULES

The *Family Law Rules* are a significant departure from the *Rules of Civil Procedure* with respect to determining and establishing costs.

### The starting point

The starting point in an analysis of costs under the *Family Law Rules* is Rule 24(10), which reads as follows:

> *(10) COSTS TO BE DECIDED AT EACH STEP - Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.*

A judge is therefore required under Rule 24(10) to consider, at each step,

1. whether a party is entitled to costs
2. if the party is entitled to costs to fix an amount
3. at each step.

The requirement that the judge must decide costs at each step and to set the amount of costs is consistent with the general policy in the Rules, which encourages litigants to take responsibility for their case, to take reasonable positions and to encourage dispute resolution at an early stage in the case: *Britt v. Britt,* 2000 CarswellOnt 6215 (Ont. S.C.J.).

### Step 1: Whether a Party is Entitled to Costs

### The Presumption

The consideration of success is the starting point in determining costs: *Sims-Howarth v Bilcliffe* (2000), 6 R.F.L.(5th) 430 (Ont. S.C.J.).

Rule 24(1) reads as follows:

> *(1)SUCCESSFUL PARTY PRESUMED ENTITLED TO COSTS - There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.*

There is, therefore a presumption, under Rule 24(1), that the successful party is entitled to costs. Success is the pre-eminent factor. See, for example, *Wylie v. Leclair* (2003), 38 R.F.L. 5th 227 (Ont.C.A.); *Osmar v Osmar, supra, Biant v Sagoo*(2001),20 R.F.L.(5th) 284 (Ont. S.C.J.) and *Britt v. Britt,* 2000 CarswellOnt 6215 (Ont. S.C.J.). In *Wylie v. Leclair, supra,* the Ontario Court of Appeal held that the failure to award costs to a successful party, absent unreasonable behaviour, is an error in law.

**Is the Presumption a Change?**

The presumption of the successful party's entitlement to costs is a significant change in costs, particularly in family law cases.

Before the *Family Law Rules*, costs were often not awarded in family matters where parties acted in good faith. This was particularly so if the dispute was in the area of custody: *Osmar v. Osmar* (2000), 8 R.F.L. (5th) 387 (Ont. S.C.J.).

Cases dealing with costs in family law and which were decided before the *Family Law Rules* were in effect must now be approached with caution. In determining whether the "new" Rules were in effect when a case was heard, it is helpful to know that the *Family Law Rules* have been in effect for all family law cases throughout the province since July 2004. They applied to the Ontario Court of Justice and the Superior Court of Justice Family Court site in London effective September 15, 1999 and to the other existing and designated expansion sites for the Superior Court of Justice, Family Court effective November 15, 1999. Those municipalities are: St. Catharines, York Region (Newmarket), Durham Region (Whitby/Oshawa), Peterborough, Cobourg, Lindsay, Muskoka County, Ottawa-Carleton, L'Orignal, Cornwall, Brockville, Perth, Hamilton-Wentworth, Simcoe County, Kingston and Napanee.

**Custody**

Before the *Family Law Rules*, the general principles regarding costs in custody cases followed the reasoning of the Ontario Court of Appeal in *Talsky v. Talsky* (1973),11 R.F.L. 226 (Ont. C.A.) (reversed on other grounds at 21 R.F.L. 27 (S.C.C.)):

> *"In any event, however, since the paramount consideration in a custody matter is that of the children, the participation of the adversaries is not that in ordinary litigation, so that, except in very exceptional cases, costs should not follow the event. For that reason I would allow the appellant no costs of the custody proceedings either here or below but would allow him the costs of the cross appeal and his costs below in the actions for divorce and alimony."*

The general reasoning was the general rule in virtually all custody litigation: *Weaver v. Tate* (1990), 24 R.F.L. (3d) 372 (Ont. H.C.) where Justice Granger held that costs in custody actions should only be awarded if a party did not act in good faith or made a frivolous claim.

This good faith distinction for the awarding of costs carried through some of the earlier cases under the *Family Law Rules*. See, for example, *Forrester v. Saliba* (2000,) 10 R.F.L. (5th) 34 (Ont. C.J.), where the applicant's acute depression and diminished ability to make decisions in the child's best interests resulted in the court finding that it was not unreasonable for the unsuccessful respondent to commence the proceeding. No costs were awarded against the respondent.

In general, however, the bulk of the case law under the *Family Law Rules* has followed the presumption in Rule 24(1) of the *Family Law Rules* concerning entitlement to costs:

> *The fact that the subject matter of this litigation involves issues of custody and access of children should have no bearing on the awarding of costs. There is no general rule any longer, as perhaps existed historically in the jurisprudence, that no costs should be awarded in cases of this kind.- Imanura v. Remus* 2005 CarswellOnt 1067 (Ont. S.C.J.) at para. 1

For the most part, subject only to the factors which would mitigate against the presumption in Rule 24(1), which are reviewed later in the paper, the bulk of the case law is firmly of the view that Rule 24(1) displaces the previous notion that costs were not awarded in custody actions as long as good faith was shown. For other examples, see *Biant v. Sagoo* (2001) 20 R.F.L. (5th) 284 (Ont. S.C.J.), *Kappler v. Beaudoin,* 2000 CarswellOnt 3940 (Ont. S.C.J.) and *Pike v. Cook,* 2005 CarswellOnt 1103 (Ont. S.C.J.)

In the case of *Neill v. Egan,* 2000 CarswellOnt. 1516 (Ont. S.C.), costs were awarded on a full recovery basis based on the length of time the trial was lengthened by the father's unreasonable behaviour. Justice Mackinnon held that litigants need to make a reasonable assessment of the chance of success and of the potential costs as part of the decision making process with respect to custody cases.

In applying the presumption of entitlement to costs based on success custody and access cases, the likelihood that virtually the same custodial issues would be considered on an interim basis at a motion and again on a final basis at trial, did not impact on the court's obligation to determine costs at each step. See *Britt v. Britt,* supra, where Mackinnon, J. rejected the father's submission that costs should not be awarded at the motion because it was possible that the full hearing at trial could lead to a different result.

If a judge determines that he or she will not follow the presumption that a successful party is entitled to costs, that judge must set out the factors relied in rejecting the presumption: *Wylie v. Leclair, supra.*

While the presumption is clear and most courts appear to be applying it equally to custody cases, there may, however be some creative softening of the presumption specific to custody cases:

1. It appears that the best interests of the child may be a factor in determining and fixing costs. As an example, see *M.(C.A.) v. M.(D.)*(2003), 43 R.F.L. (5th) 149 (Ont. C.A.),at para.42, where, in determining costs, the financial situation of the parties was taken into account as a "relevant matter", particularly, in the case of an unsuccessful custodial parent:

   > *In fixing costs, the court should have regard to the best interests of the child and cannot ignore the impact of a cost award against a custodial parent that would seriously affect the interests of the child.*

2. Another consideration of the children's best interests and the effect of costs is in *N(M) v. B(M),* 2000 CarswellOnt 2433 (Ont. S.C.J.) where Justice Mackinnon held that an award of costs against the unsuccessful mother would affect her ability to exercise access to the children. Because an award of costs could have a negative impact on access, there was no award of costs against the mother.

**Exceptions To The Presumption**

Rule 24(2) provides that the presumption that the successful party is entitled to costs does not apply in a child protection case or to a party that is a government agency. By virtue of Rule 24(3), the court has discretion to determine costs to or against a government agency, whether it is successful or unsuccessful.

The general rule is that costs will not be awarded in child protection matters, particularly concerning substantive issues. Costs have occasionally been awarded against a Children's Aid Society, particularly in cases where the society has increased costs through procedural delays and lack of disclosure. Costs are rarely awarded against parents, and, again, rarely relating to substantive issues. An excellent summary of the law as it relates to child protection cases is in the annotation under Rule 24 in *Ontario Family Law Rules Annotated 2005:* McLeod, Aston, Vogelsang and Siegel (*Thomson-Carswell, annual).*

A non-party litigant, such as a government agency, may be accountable for costs. An example is *Noel v. Callahan,* 2004 CarswellOnt 2003 (Ont. C.J.) where, in a paternity matter, the municipality was held liable for costs of blood tests. In this paternity case the child's mother was a welfare recipient and the court held that the municipality was in fact the true applicant because, through the family support worker, the municipality instigated and controlled the conduct of the proceeding and was the directing mind of the litigation. The test relied on in *Noel v. Callahan* was drawn from the case of *Television Real Estate Ltd. and Rogers Cable Television Ltd.* (1997) 34 O.R. (3d) 291 (Ont. C.A.) where the court determined the appropriate test was:

   1. that the applicant must establish that the city (the non-party) had the status

to bring the application;

2. proof that the non-party is the "true plaintiff". This will depend on the specific facts of the case; and,
3. the applicant must establish that the nominal plaintiff was effectively a straw man, put forward to protect the city from liability for costs.

In *Noel v. Callahan,* the court drew an inference, absent direct evidence on the issue, that the city commenced the application in the applicant's name, rather than its own, precisely to insulate itself from costs.

In *Westendorp v. Westendorp,* 2000 CarswellOnt. 2047 (Ont. S.C.J.), costs were awarded to the Crown in the husband's application to strike out part of the *Family Responsibility and Support Arrears Enforcement Act* as contrary to the Charter. The court determined that the wife was entitled to costs, based on the presumption in the Family Law Rules 24(1). In addition, the claim for costs by the "Ontario respondent" (the Family Responsibility Office and the Attorney General) was allowed based on the deficiency in the Notice of Constitutional Question, the fact that sections 7 and 11 of the Charter were argued but not pleaded and because the argument under section 15 of the Charter did not disclose an enumerated or analogous ground of discrimination. The court considered the general discretion under Rule 24(3) and Rule 24(7), (which provides that if a party is not properly prepared, the court shall award costs unless ordered otherwise in the interest of justice). The determinative factors were the husband's unreasonable behaviour, the deficiencies in his materials and his awareness that costs would be claimed by the Ontario Respondent if the matter proceeded to court. The court noted, at para. 9:

> *I am aware that in public interest litigation where a legal issue of significant interest to the general public is raised and litigated by a private citizen, that costs are often not awarded against that individual, even if unsuccessful, and are sometimes awarded to an unsuccessful private litigant who nonetheless brought a deficiency to the attention to Parliament which was then remedied. See for example, Schachter v. Canada, [1992] 2 S.C.R. 679 (S.C.C.) at 792.*
>
> *Such cases recognize that every citizen should have access to the courts to make important, constitutional decisions of general application. In my view, the Applicant here, while he raised an important issue, proceeded in a desultory and unprepared fashion which negates any notion of his having provided a service to the public. In this case, especially having regard to the correspondence from the Ontario Respondent pointing out the deficiencies, the particulars required and the applicable case law, the opposite is the case.*

**Bad Behaviour and (Un)Reasonableness**

In addition to litigants to whom Rule 24(2) applies and so are not subject to the presumption, there are circumstances that the court can consider in determining whether or not the presumption is rebutted. Rule 24(4) reads as follows:

> *(4) SUCCESSFUL PARTY WHO HAS BEHAVED UNREASONABLY - Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs.*

There is a regulatory guideline on determining whether a party has behaved unreasonably. Rule 24(5) provides:

> *(5) DECISION ON REASONABLENESS - 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.*

The test for reasonableness is restricted to behaviour in the case. See, for example, *Fappiano v. Campbell,* 2002 CarswellOnt 570 (Ont. S.C.J.), where the court determined that the behaviour referred to in subrule 24(4) is in reference to how each party conducts him or herself in the case before the court, as opposed to how he or she behaves within the family relationship.

Further, the court is mandated to award costs against an absent or unprepared party: Rule 24(7):

> *(7) ABSENT OR UNPREPARED PARTY - If a party does not appear at a step in the case, or appears but is not properly prepared to deal with the issues at that step, the court* ***shall*** *award costs against the party unless the court orders otherwise in the interests of justice.* (emphasis added)

Therefore, if a party is successful, but has behaved unreasonably, that party may be deprived of some or all of his or her costs or even have costs awarded against him or her. This is clearly one area where the presumption in paragraph 24(1) can be rebutted. It can also be rebutted for lack of preparation or not appearing in court for a step in the preceding. In addition, bad faith behaviour can result in a determination of costs on a full recovery basis.
Rule 24(8) provides:

> *(8) BAD FAITH - 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.* (emphasis added)

The definition of bad faith was considered in the case of *Piskor v. Piskor,* 2004 CarswellOnt 5313 (Ont. S.C.J.), where Justice Blishen considered the case law and determined that bad faith

a. was established by conduct that is intended to deceive or mislead and
b. that bad faith can be established by the intentional failure to fulfill an agreement in order to achieve an ulterior motive or
c. an intentional breach of a court order with a view to achieving another purpose.

Therefore, in *Piskor,* noncompliance with an order, combined with failure to take available steps to stay that order, could be sufficient to attract an award of full recovery costs.

In *Hendry v. Martins,* 2001 [O.J.] No. 1098 (S.C.J.) Justice Campbell relied on *Black's Law Dictionary* in defining bad faith as follows:

> *Bad faith is not simply bad judgement or negligence but rather it implies the conscious doing of a wrong because a dishonest purpose or moral obliquity...it contemplates a state of mind affirmatively operating with a furtive design or ill will.*

**Financial Disclosure and Bad Faith**

Financial disclosure is a lynch pin of the *Family Law Rules.* The recent case of *Debora v. Debora* (2005), 14 R.F.L. (6th) 245 (Ont. S.C.J.) sets out the factors, including disclosure deficiencies, considered by Justice Backhouse in determining costs based on the husband's bad faith:

> *In summary, the husband failed to make financial disclosure which persisted to the end of the trial. He understated his assets and income by millions of dollars. He moved assets off-shore to frustrate the wife's claims. He was deliberately untruthful both on discovery and at trial. He produced previously undisclosed documents at trial which the wife had been seeking for a long time because he thought these would help his cause. He filed incomplete and/or misleading affidavits of documents. He failed to fulfill undertakings and provided numerous conflicting answers. After refusing to answer questions on discovery, he sought to adduce evidence at trial on the same issues, because he thought it would help him.* (at para. 11)

See also *Dababneh v. Dababneh,* 2004 CarswellOnt 654 (Ont. S.C.J.), where Justice Campbell found that the husband's evidence was clearly intended to mislead the court as to the extent of his significant landholdings and that the timing of his acquisitions and disposition of those holdings clearly established bad faith as defined in Rule 24(8).

Bad faith behaviour was considered in *Giguere v. Giguere,* 2004 CarswellOnt 571 (Ont. S.C.J.), where both parties had been slow in making disclosure. Justice Aitken made no order for costs regarding the property matters. The wife did however receive costs relating to the custody issue on close to a full recovery basis, based on her offers and her behaviour at trial. She was also awarded costs on a partial recovery basis on the spousal support issues based on the offers exchanged. Costs were, however, fixed on a full recovery basis on the child support issues, based on the husband's behaviour in refusing to pay child support as ordered by the court and his reluctance to provide information about his income. Mr. Giguere's unreasonable behaviour, in delaying making full and frank financial disclosure, delaying to advise Ms. Giguere of increases to his income in a timely fashion, of allowing child support obligations to fall into arrears and failing to make any offers to settle the litigation until within a few weeks of trial, constitued unreasonable behaviour. The result was negative cost consequences against him, regardless of his relative success on the property and spousal support issues at trial.

A party who fails to make timely disclosure, to abide by disclosure orders and unreasonably refuses to pay support may face a finding of bad faith and therefore full recovery costs against him or her.

## WHEN ARE COSTS DETERMINED

### Step 2: At Each Step

Rule 24(10) provides that costs must be fixed at each step of a proceeding. This requirement cannot be met by leaving costs the discretion of another judge at a later step including trial.

Because costs are to be fixed at each stage of the litigation, where awards for costs have not been made at an earlier step in the case, they cannot be revisited at a later time: *Debora v. Debora* (2005), 14 R.F.L. (6th) 244 (Ont. S.C.J.) and *Cabral v. Cabral,* 2005 CarswellOnt 2504 (Ont. S.C.J.).

In *Kappler v. Beaudoin,* 2000 CarswellOnt 3940 (Ont. S.C.J.), the mother's unreasonable allegations that the father sexually abused the children did not constitute a reason for depriving her of costs of the application. Costs had already been assessed against her on the motion, based on her unreasonable conduct, being the allegations, at that stage of the litigation. In this case, Justice Rutherford held that both parties had been unreasonable in their bitter dispute over how to raise the children. The successful mother's conduct was, however, a factor in determining the quantum of the costs on a party-party basis.

It is important to remember, however, that costs are discretionary and so, as in so many general rules governing the area of costs, there appear to be limited exceptions to the rule that costs must be set at each step.

In *Giang v. Le, supra*, Justice Mendes da Costa held, in considering costs on a motion, that the proper and just disposition of costs would be to await the development of the parties' cases and the resolution at trial. Costs in this case were determined under the *Rules of Civil Procedure.* While the case was not decided under the *Family Law Rules,* his Honour specifically stated that his disposition would have been the same under the *Family Law Rules.* He based that determination on the primary objective of the Rules, being to enable the court to deal with cases justly and the requirement of the court to promote that objective, as set out in subrules 2(2) and (4),

The jurisdiction to defer costs to a later step in the proceeding was also considered in *Britt v. Britt,* 2000 CarswellOnt 6215 (Ont. S.C.J.). In *Britt v. Britt*, Mackinnon J. rejected the father's request that costs be fixed in the cause. Justice Mackinnon reviewed the possible types of orders which defer costs, using the "*parlance of civil practice*", but determined that deferring costs must, under the *Family Law Rules,* be the exception rather than the rule:

> *Special circumstances should be required before such an award is made, and the presumption that the successful party is entitled to costs must be rebutted. The court should be slow to defer payment of costs, given the policy objectives set out above. The court should also exercise caution in making an award of costs conditional on future success, because in a family case, success at the conclusion of the case can often be divided. It would, in these circumstances, be difficult to interpret the earlier award of costs.* at paragraph 7.

**QUANTUM**

**Step 3: And Set The Amount Of Costs**

In determining the amount of costs, the Rules set out the factors which are to be considered:

> Rule 24(11) *FACTORS IN COSTS - A person setting the amount of costs shall consider,*
>
> *(a) the importance, complexity or difficulty of the issues;*
>
> *(b) the reasonableness or unreasonableness of each party's behaviour in the case;*
>
> *(c) the lawyer's rates;*
>
> *(d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;*

*(e) expenses properly paid or payable; and*

*(f) any other relevant matter.*

There are a few considerations which should be noted:

- Ability to pay is not an enumerated factor. I will deal with some of the case law which considers ability to pay below, but it is not one of the factors referred to in Rule 24(11).

- There is no provision for assessment and no tariff under the *Family Law Rules.* Some of the cases which state this proposition are *Osmar v. Osmar* (2000), 8 R.F.L.(5th) 387 (Ont.S.C.J.); *Coady v. Boyle,* 2004 CarswellOnt 938 (Ont. S.C.J.) and *Sims-Howarth v. Bilcliffe* (2000) 6 R.F.L.(5th) 403 (Ont. S.C.J.) . Costs are to The former cost grid was, however, considered in some family law cases, see for example *Coady v. Boyle,* 2004 CarswellOnt 938 (S.C.J.) and *Piskor v. Piskor, supra*.

- The *Family Law Rules* themselves do not provide a guideline as to what the actual amount of costs awarded should be, only the factors to be considered. The amount awarded as costs will be somewhere between a nominal amount and full recovery costs: *Sims-Howarth v.Bilcliffe,supra.* The *Family Law Rules* dispense with the two traditional scales of costs and require the judge fixing the costs to consider the range between nominal and full recovery costs: *Osmar v. Osmar, supra.*

- While Rule 24(1) does not mandate full recovery costs, costs should generally approach full recovery if the behaviour of a litigant seeking costs has been reasonable and the costs claimed are proportional to the issues and the result: *Biant v. Sagoo* ( 2001), 20 R.F.L.(5th) 284 (Ont.S.C.J.), following Aston, J., in *Sims-Howarth v. Bilcliffe, supra.*

- Full recovery costs means full recovery in the context of the litigation. It does not mean complete indemnity or recovery of the full amount billed to the client: *Piskor v. Piskor, supra*.

- Some cases have suggested that, in determining the amount of costs, the court will have regard to what the losing party might expect to pay: *Labon v. Labon* 2003 CarswellOnt 5234 (Ont. S.C.J.); *Zeleny v. Zeleny* (2004), 1 R.F.L. (6th) 455 (Ont.S.C.J.). In *Piskor v. Piskor ,supra,* Justice Blishen determined that the costs award should reflect what the court views a fair and reasonable amount that should be paid by unsuccessful party rather than the exact measure of the actual costs of the successful litigant. She relied on *Zesta Engineering Ltd v. Cloutier,* [2002] O.J. No.4494 (C.A.) which she held applied in family law cases.

- Costs of negotiations, for example, may not be considered an appropriate component in fixing the amount of costs: *Mackinnon v. Mackinnon, supra,* where Justice Marshman also held that it was also not appropriate to order the husband to pay the full cost of valuing the wife's pension as it was not technically a legal disbursement, but an expense which would have to be borne in any event before the parties could settle their affairs. Justice Marshman included one-half of the costs of the pension valuation in quantifying the costs to be paid by the husband.

- The court is directed to analyse the accounts and determine the appropriate amount having regard to the reasonableness of the amounts claimed in costs : *M.(C.A.) v. M.(D.)* (2003), 43 R.F.L.(5th) 149 (Ont.C.A.); *Debora v. Debora, supra* and *Guiguere v. Guiguere,* 2004 CarswellOnt 273 (Ont. S.C.J.). [note: There are two 2004 cases with the Guiguere family name].

- A premium may be allowed based on the exceptional complexity and difficulty of the case, the large sums involved, the extraordinary skill of counsel and the exceptional result. See *Debora v. Debora, supra,* where costs were fixed at $2,250,000.00 and included a $150,000.00 premium. A premium will be allowed where the total fee is fair and reasonable, in all of the circumstances, and where full recovery is the basis of the award, particularly where full recovery is based on bad faith or misconduct. The amount should not, however, be fixed in the abstract. The court must examine the entire bill of costs including the premium.

- The court has jurisdiction to award interim disbursements and costs under Rule 24(12). This included an income valuation report and payment of ongoing legal costs: *Agresti v. Hatcher* [2004] O.J. No. 910 (Ont. S.C.J.).

**Financial Circumstances**

The financial circumstances of the litigants are generally not considered a factor in awarding costs under the *Family Law Rules: Coady v. Boyle supra*. In that case, R. Smith, J. held that a litigant cannot use her limited financial resources as a shield against unreasonable conduct.

There are some exceptions, largely in the area of custody and access litigation, to the rule that a litigant's financial resources will not be considered. See for example *N.(M.) v. B.(M.),* 2000 CarswellOnt 2433 (Ont. S.C.J.) where the successful party was not entitled to costs because an award of costs against the mother could have a negative impact on her ability to exercise access. See also *Imamura v. Remus,* 2005 CarswellOnt 1067 (Ont.S.C.J.), where the mother did better at trial than in her offer, her bill of costs was held to be not unreasonable but because the father's financial resources were limited and substantial costs would impact on his ability to exercise access, costs were reduced. In *Belchler v.Belcher*, 2004 CarswellOnt 2731 Ont. S.C.J.), Sachs, J. awarded reduced costs against the father, even though the result was more favourable to the mother than her offer. The

father did not have the ability to pay the costs claimed, which were the full amount billed to her by her counsel. Justice Sachs balance the need to discourage ill-conceived custody litigation against the husband's financial circumstances and the impact an award would have on the children, and awarded the mother costs at about 24% of the amount claimed, payable in monthly installments.

**Divided Success and Apportioning Costs**

Rule 24(*(6):*

> *(6) DIVIDED SUCCESS - If success in a step in a case is divided, the court may apportion costs as appropriate.*

The court may therefore consider the amount of trial time spent on an issue and the success of issues having regard to offers and unreasonable behaviour in allocating an amount of costs to each specific issue at trial: *Guiguere v. Guiguere,* 2004 CarswellOnt 571 (Ont. S.C.J.).

In *Likens v. Mackenzie,* 2004 CarswellOnt 2157 (Ont. S.C.J.), success was divided but not equally divided. In this case, where the respondent was successful to a significant extent, she was entitled to costs.

**Self-represented Litigants**

In appropriate cases, costs will be awarded against self-represented litigants, particularly having regard to their behaviour.

In *Neill v. Egan* 2000 CarswellOnt 1516 (Ont. S.C.J.), the court considered the self-represented husband's conduct, including conduct which lengthened the duration of the proceedings unnecessarily. While it was clear to the court that neither parent could readily afford the costs of the trial, Mackinnon,J, held:

> *A trial should not be undertaken lightly or against all odds, on the assumption that costs will not be ordered because one party has a better financial position than the other. This would encourage litigation and discourage reasonable settlements. It would be unfair to deny costs to Ms. Neill.....Litigants need to make a reasonable assessment of the chance of success and the potential costs involved as part of their decision making with respect to custody cases.* at para.7.

Other cases dealing with self-represented litigants are *Coady v. Boyle, supra, Powers v. Powers* (2004),11 R.F.L.(6th) 393 (Ont. S.C.J.) and *Grantier v. Drapeau,* 2000 CarswellOnt 2048 (Ont. S.C.J.).

## OFFERS

Perhaps the most important cross-connecting rule to the Rule 24 dealing with costs is Rule 18 which governs the procedure relating to offers.

Rule 18 is roughly analogous to Rule 49 of the *Rules of Civil Procedure*. Rule 18(14) sets out the costs consequences of failure to accept an offer:

> *(14) COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER - A party who makes an offer is , unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:*
>
> 1. *If the offer relates to a motion, it is made at least one day before the motion date.*
>
> 2. *If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.*
>
> 3. *The offer does not expire and is not withdrawn before the hearing starts.*
>
> 4. *The offer is not accepted.*
>
> 5. *The party who made the offer obtains an order that is as favourable as or more favourable than the offer.*

This Rule is essentially the same as Rule 49.10, except for Rule 18(14)(1) detailing the specific time-line regarding a motion.

Like the *Rules of Civil Procedure*, the *Family Law Rules* provide that the burden of proving an order is as or more favourable than the offer is on the party who is claiming the benefit of the cost consequences of the offer. The *Family Law Rules* do not distinguish between plaintiff's and defendant's offers.

Another distinction between the civil and family rules is the effect of an offer which is silent as to the disposition of costs. Rule 49.07(5) sets out the automatic consequences of accepting an offer if costs are not otherwise dealt with in the offer. In contrast, Rule 18(11) states:

> *(11) COSTS NOT DEALT WITH IN OFFER - If an accepted offer does not deal with costs, either party is entitled to ask the court for costs.*

Rule 18(16) of the *Family Law Rules* states:

> *(16) COSTS - DISCRETION OF COURT - When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.*

This is roughly similar to civil rule 49.13. Thus, if an offer has been revoked or is not otherwise within the framework of Rule 18(14), the offer may be considered for the purposes of costs.

A significant change from the *Rules of Civil Procedure* is Rule 18(2) which provides:

> *(2) APPLICATION - This rule applies to an offer made at any time, even before the case is started.*

Thus, the costs consequences of Rule 18(14) can therefore apply to an offer which is made before the commencement of litigation.

Rule 18(16) therefore invites consideration of any and all offers to settle, as does Rule 24(5). In *Osmar v. Osmar* (2000) 8 R.F.L. (5th) 387, at para. 7, Justice Aston confirmed the importance of offers as follows:

> *Offers to settle become the yardstick by which to measure "success" and are significant in considering both liability for costs and the amount of those costs.*

In order to trigger the costs consequences of Rule 18(14), the requirements set out in that rule will be strictly adhered to. Family law cases will often deal with a number of issues, for example, equalization, spousal and child support, custody and so the application of an offer to Rule 18(14) can become more difficult if success on the ultimate order is divided: *Coscarella v. Coscarella,* 2000 CarswellOnt 146 (Ont. S.C.J.). As a result, litigants and counsel would be well advised to consider dividing an offer to parts with each part being capable of acceptance separately and therefore the costs consequences of Rule 18(14) could apply to each distinct part .

While I do not, in this paper intend to review the laws of costs in great detail, there are a few points that I would like to make:

- Failure to make an offer may be disturbing to the court. Even where the case appears intractable, an offer may serve to settle some issues or narrow issues: *Neill v. Egan, supra.*

- There is a definite interplay between Rule 24 and Rule 18. See for example *Mackinnon v. Mackinnon* (2004), 7 R.F.L. (6th) 121 (Ont. S.C.J.), where the presumption that the successful litigant would be entitled to costs applied even though the offers that were made were much higher (and so would have been more favourable to the claimant) than the amount awarded. The court did not award full recovery costs, however, because the offers were not

more favourable than the result.

- An offer must be signed by the party and the lawyer, in accordance with Rule 18(4). There is conflicting case law on this requirement. *Deelstra v. Van Osch,* 2002 CarswellOnt 4594 (Ont. S.C.J.) and 2003 CarswellOnt 204 (Ont. S.C.J.) held that the requirement of the lawyer's signature was a mere technicality, however *Riss v. Greenough* (2002), 29 R.F.L. (5th) 405 (Ont. S.C.J.) held that the absence of a lawyer's signature was fatal in applying the consequences of Rule 18(14).

- Offers should be made early. The fact that the husband made an offer only on the eve of trial was a consideration in determining the costs award to the wife: *Giguere v. Giguere,* 2004 CarswellOnt 571 (Ont. S.C.J.).

- Disclosure remains key to the operation of the *Family Law Rules.* Failure to make full and complete financial disclosure may be fatal to an award of costs. This is in part because the opposing party may be unable to assess and respond to the offer in the absence of disclosure: *Bautista v. Bautista,* 2002 CarswellOnt 2630 (Ont. S.C.J.) where the husband did better than his offer but did not get costs because of inadequate *"....speedy and complete financial disclosure."*

- Where neither party achieved a result at trial that was more favourable than their respective offers to settle, the court may award costs to the wife where the ultimate order was more favourable to her than husband's offer to settle: *Roseneck v. Gowling* (2002) 38 R.F.L. (5th) 180 (Ont. C.A.).

- The importance of reasonable offers have a great significant in the determination of costs. Bad faith is not a condition precedent in determining full recovery costs: *Kearney v.Kearney* , 2001 CarswellOnt 2791 (Ont.C.J.).

- The court has jurisdiction, after consideration, to not award costs: *Pepin v. Jung,* (2003) 47 R.F.L.(5th) 370 (Ont.S.C.J.).

**Other Interconnections**

It is important, in considering costs to also consider the interconnecting aspects of the *Family Law Rules*:

1. Rules 12(3) and 12(4) deal with the withdrawal of an application, answer or reply. There is a presumption, absent agreement or court order, that the litigant withdrawing will pay costs.

2. Rule 13(16), as part of the financial disclosure rule, provides:

*(16) ORDER TO FILE STATEMENT - If a party has not served and filed a financial statement or net family property statement or information as required by this rule or an Act, the court may, on motion without notice, order the party to serve and file the document or information and, if it makes that order, shall also order the party to pay costs.*

3. Rule 14(23)(c) , relating to motions for temporary orders, provides:

*(23) FAILURE TO OBEY ORDER MADE ON MOTION- A party who does not obey an order that was made on motion is not entitled to any further order from the court unless the court orders that this subrule does not apply, and the court may on motion, in addition to any other remedy allowed under these rules,*

*(c) make any other order that is appropriate , including an order for costs.*

4. Rule 16(10), dealing with motions for summary judgment, provides:

*(10) COSTS OF UNSUCCESSFUL MOTION - If the party who made the motion has no success on the motion, the court shall decide the amount of the other party's costs of the motion on a full recovery basis and other the party who made the motion to pay them immediately, unless the motion was justified, although unsuccessful.*

5. Rule 16(11), also relating to motions for summary judgment, provides:

*(11) COSTS - BAD FAITH - If a party has acted in bad faith, the court shall decides the costs of the motion on a full recovery basis and shall order the party to pay them immediately.*

6. Rule 17 governs the procedure for conferences. Rule 17(18) provides:

*(18) COSTS OF ADJOURNED CONFERENCE - If a conference is adjourned because a party is not prepared, has not served the required brief, has not made the required disclosure or has otherwise not followed these rules, the judge shall,*

*(a) order the party to pay the costs of the conference immediately;*

*(b) decide the amount of the costs; and*

*(c) give any directions that are needed.*

7. Rule 19(10)(5), regarding document disclosure, states:

> *(10) FAILURE TO FOLLOW RULE OR OBEY ORDER - If a party does not follow this rule or obey an order made under this rule, the court may, on motion, do one or more of the following:*
>
> *(5) Order the party to pay the other party's costs for the steps taken under this rule, and decide the amount of the costs.*

8. Rule 26(7) deals with the enforcement of orders. The director of the Family Responsibility Office or the recipient of an outstanding order is entitled to costs of the steps taken unless the court orders otherwise.

## CASES IN TRANSITION BETWEEN THE RULES

There is conflicting case law as to whether the *Family Law Rules* apply to steps in a proceeding which predate the Rules coming into force.

In the case of *Miranda v. Bossio*, 2000 CarswellOnt 3761 (Ont. C.J.), Wolder,J. determined that the Rules did not have any retrospective effect because they made substantive and not just procedural changes. Other cases, however, have determined that costs could be properly characterized as procedural. The purpose of costs is to enable the machinery of the court to work effectively. As a result, the costs provisions of the *Family Law Rules* can therefore have a retroactive effect: *Giang v. Le,* 2004 CarswellOnt 592 (Ont.S.C.J.). In *Sommers v. Fournier,* 2002 CarswellOnt 2600 (Ont. C.A.), costs were determined to be procedural and not substantive rights. Generally, procedural changes are applied retrospectively.

## CONCLUSION

The introduction of the Family *Law Rules* in Ontario has changed many of the previous assumptions regarding the costs consequences of family litigation. Any lawyer representing clients in family law proceeding must have a clear knowledge of the impact of the Rules and the developing case law. While there is still some discretion regarding the determination of costs in family law cases, that discretion is severely restricted, even in custody cases, by the presumption that the successful party is entitled to costs. Further, the fact that the court is directed to determine and fix costs at each step of the legal proceeding means that the average litigant is far more likely to have costs fixed against him or her at some step of a contested hearing.

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