

2015 ONSC 2449
Ontario Superior Court of Justice

Philippe v. Bertrand

2015 CarswellOnt 7509, 2015 ONSC 2449, [2015] W.D.F.L. 3867, 253 A.C.W.S. (3d) 633

**Stephane Joseph Edouard Philippe, Applicant and Carmen Marie Louise
Bertrand, Respondent**

Kane J.

Judgment: May 21, 2015
Docket: FC-12-2884

Proceedings: additional reasons to *Philippe v. Bertrand* (2015), 2015 CarswellOnt 255, 2015 ONSC 235, Kane J. (Ont. S.C.J.); additional reasons at *Philippe v. Bertrand* (2015), 2015 CarswellOnt 363, 2015 ONSC 360, Kane J. (Ont. S.C.J.)

Counsel: Jack E. Pantalone, for Applicant
Respondent, for herself

Subject: Civil Practice and Procedure; Family; Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

XX Costs

XX.1 In family law proceedings generally

XX.1.g Factors considered

XX.1.g.vi Multiple factors considered

Headnote

Family law --- Costs — In family law proceedings generally — Factors considered — Multiple factors considered

Parties began living together in 1994, were married in 2002, and separated in 2011 — Trial was held regarding child support, spousal support, and division of family property — Wife was entitled to child and spousal support, and to receive equalization payment from division of family property — Parties made submissions regarding costs — Husband was awarded partial indemnity costs fixed at \$31,000 — Husband's offer to settle did not attract costs consequences under r. 18(14)(5) Family Law Rules, but could be considered in discretionary award of costs — Wife was unsuccessful in number of positions she took during trial — Issues were numerous but were of average complexity — Wife's conduct increased length of trial and costs — However, wife suffered from ADHD and effects of that health condition were intertwined with conduct complained of — Relying on wife's conduct to justify higher costs award risked penalizing her financially for health condition — Therefore, wife's health prevented award in excess of partial indemnity costs — Hourly rate of lawyer set at \$400 was appropriate given his year of call and length of experience, but there were some deductions in hours claimed.

Table of Authorities

Cases considered by *Kane J.*:

Bojarski v. Bray (2015), 2015 CarswellOnt 1701, 2015 ONSC 902 (Ont. S.C.J.) — referred to

Fong v. Chan (1999), 1999 CarswellOnt 3955, 181 D.L.R. (4th) 614, 128 O.A.C. 2, 46 O.R. (3d) 330 (Ont. C.A.) — referred to

Goodwin v. Goodwin (2011), 2011 ONSC 2402, 2011 CarswellOnt 2590, 2 R.F.L. (7th) 393 (Ont. S.C.J.) — considered

Misner v. Misner (2011), 2011 ONSC 4811, 2011 CarswellOnt 8134, 5 R.F.L. (7th) 200 (Ont. S.C.J.) — referred to

Murphy v. Murphy (2010), 96 R.F.L. (6th) 135, 2010 CarswellOnt 8616, 2010 ONSC 6204 (Ont. S.C.J.) — referred to

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

Stephens v. Stephens (2014), 2014 ONSC 837, 2014 CarswellOnt 1394 (Ont. S.C.J.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Rules considered:

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

R. 18(14) ¶ 5 — considered

R. 18(16) — considered

R. 24 — considered

R. 24(5) — considered

R. 24(8) — considered

ADDITIONAL REASONS relating to costs of judgement reported at *Philippe v. Bertrand* (2015), 2015 ONSC 235, 2015 CarswellOnt 255 (Ont. S.C.J.).

Kane J.:

Relief Sought

1 The applicant seeks:

(a) A cost award against the respondent in the amount of \$48,000 payable:

(i) By the release to the applicant of the respondent's \$20,000 from her share of the net proceeds of sale of the matrimonial home presently held in trust;

(ii) By 56 consecutive monthly deductions each in the amount of \$500, from the future monthly spousal support payable to the respondent, regardless of any future variation of spousal support payable to the respondent;

(iii) An order that the above \$500 deductions shall be deemed support by FRO;

(b) A declaration that such 56, \$500 deductions shall under the *Income Tax Act* be income received by the respondent and deductible as support paid by the applicant; and

(c) An order authorizing the release to the applicant of \$20,000 retained in trust from his share of the net proceeds of sale of the matrimonial home.

2 The applicant's Bill of Costs records:

(a) 126.1 hours docketed by applicant's counsel;

(b) An hourly rate of \$400 which totals:

(i) \$56,997, including HST, which constitutes full recovery, plus disbursements in the amount of \$371,

(ii) Resulting in a cost award of \$48,000, being 85% of actual fees or substantial indemnity, plus disbursements, for a total of \$48,819.

3 The respondent did not respond to the applicant's claim of costs as provided in the trial decision.

Regulatory Framework

4 The relevant regulatory considerations as to the award of costs are the discretion contained in s. 131 (1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rules 18 and 24 of the *Family Law Rules*, O. Reg. 114/99, as. am.

5 In seeking costs at a substantial scale of 85%, the applicant relies upon:

(a) His success in this proceeding;

(b) His written offer of settlement dated September 15, 2014;

(c) The respondent's bad faith pursuant to R. 24(8), or

(d) In the alternative, the unreasonable conduct of the respondent pursuant to R. 24(5) and 24(8).

Offer of Settlement

- 6 To attract the cost consequences, offers under R. 18 must be:
- (a) Written;
 - (b) Served seven days before the start of trial;
 - (c) Remain open for acceptance until the commencement of the trial;
 - (d) Not be accepted; and
 - (e) Contain terms which equal or exceed the results obtained in the trial decision.
- 7 The applicant's offer does not meet the requirements of R. 18 (14)(5) because the offer provides that:
- (a) The respondent's annual income was \$48,000; versus the trial determination of \$40,340;
 - (b) Equalization due to the respondent was \$97,073; versus the trial determination of \$98,404;
 - (c) Spousal support arrears owing to the respondent was \$11,716; versus the court's determination of \$19,850;
 - (d) Spousal support payable monthly to the respondent was \$1,412; versus the \$1,650 awarded; and
 - (e) Spousal support totalling \$31,064, was to terminate in 22 months, plus a lump sum support award of \$110,000; versus the nine years support awarded at \$1,650, equalling \$178,200.
- 8 The applicant's offer does not equal or exceed the award. That offer may however be considered in the discretionary award of costs pursuant to R. 18(16).
- 9 The applicant's position at trial was less than his settlement offer. His position at trial was that:
- (a) His Line 150 annual income was \$117,000; versus the \$120,000 determined by the court.
 - (b) Spousal support should be \$1,000 monthly versus the \$1,650 awarded;
 - (c) Spousal support arrears totalled \$6,411 versus the \$19,800 arrears determined; and
 - (d) He owed an equalization payment to the respondent of \$97,000 versus the \$98,404 determined by the court.
- 10 The respondent was unsuccessful in a number of positions she took during the trial. She claimed:
- (a) An equalization payment of \$240,000;
 - (b) Her net annual income during the previous three years averaged only \$11,600;
 - (c) Spousal support of between \$2,200 to \$3,000 monthly; and
 - (d) \$140,000 annual income should be imputed to the applicant

Complexity of the Issues

- 11 The issues were numerous but of average complexity.

12 Determining the respondent's income for support calculations was complex due to the way she and Ms. Parent had structured their daycare relationship and contracts, calculated their expenses and reported their income for tax purposes. Specifically, the court determined that structuring and reporting understated the respondent's income for support calculation.

Unreasonable Conduct in the Case

13 This and the allegation of the respondent's bad faith are troublesome.

14 Considered in isolation, the applicant is correct that the respondent's positions increased the length of the trial and costs, including:

- (a) The respondent's reliance upon the applicant's prior use of alcohol and non-prescription drugs versus her consent to an order awarding him full parenting rights at the start of trial and then relinquished all parenting to him at the conclusion of trial;
- (b) The respondent did not serve any offer of settlement;
- (c) The respondent's late and incomplete disclosure of relevant financial documents;
- (d) The respondent's under reporting of income and overstatement of expenses related to the daycare center; and
- (e) The respondent's conduct during the trial including her non-compliance with an order excluding witnesses which prohibited her subsequent pre-testimony meetings with Ms. Parent.

15 The principles cited and relied upon by the applicant include:

- (a) Unreasonable conduct during the trial and failure to present an offer or clearly defined positions on issues, lengthens a trial: *Misner v. Misner*, 2011 ONSC 4811, 5 R.F.L. (7th) 200 (Ont. S.C.J.), paras. 19, 32, 37, 48, 50;
- (b) Proportionality should not result in reduced costs where the unsuccessful party has forced a long and expensive trial: *Murphy v. Murphy*, 2010 ONSC 6204, 96 R.F.L. (6th) 135 (Ont. S.C.J.), para. 75;
- (c) Bad faith litigation conduct is such that the offending party must know he or she is causing the other party major financial harm without justification: *S. (C.) v. S. (M.)*, 2007 CarswellOnt 3485, 38 R.F.L. (6th) 315 (Ont. S.C.J.) at para. 17;
- (d) Costs rules are designed to: (i) indemnify successful litigants for the cost of litigation; (ii) encourage settlement; and (iii) discourage and sanction inappropriate behaviour: *Fong v. Chan* (1999), 46 O.R. (3d) 330 (Ont. C.A.), at para. 22; and
- (e) Costs are used to reward as well as sanction conduct of parties: *Bojarski v. Bray*, 2015 ONSC 902 (Ont. S.C.J.), para. 7.

16 The above principles must however be considered in light of apparent health impairment of a party.

17 The respondent testified she has ADHD. She works with a counsellor as to the issues that illness presents in her life, including relationships with other people.

18 Although very intelligent, the respondent at times during the trial appeared to be emotionally upset and defiant. She on occasion was disjointed in her testimony, her examination of witnesses and in her use of documentation.

19 Upon the conclusion of the trial, the respondent unilaterally vacated the matrimonial home, thereby closing her daycare business from which she earned her living.

20 At the end of trial, the respondent directed the applicant to assume all parenting of their daughter, for at least the next five months. Parenting was settled on the eve of trial. The respondent however had denied access to the applicant for several months earlier in the proceeding.

21 The respondent's conduct lengthened the trial. That lengthening by itself increases the cost award.

22 The health condition of the respondent and its effects are intertwined with her conduct complained of. This health condition also compounded the common disadvantage and lower focus of an unrepresented litigant in a ten day trial.

23 Relying on the respondent's conduct to justify a higher cost award risks penalizing her financially for a health condition.

24 The respondent's health prevents an award in excess of the scale of partial indemnity. This court disagrees with the increased costs ordered notwithstanding health limitations in *Stephens v. Stephens*, 2014 ONSC 837 (Ont. S.C.J.) and *Goodwin v. Goodwin*, 2011 ONSC 2402 (Ont. S.C.J.).

Lawyer's Rates

25 The hourly rate of \$400 is appropriate given counsel's year of call and length of experience in this field.

Hours Claimed

26 The first two accounts contain fee amounts of \$1,920 and \$7,060. They include the trial management conference as well as offers and settlement negotiations at that conference of the issues of the custody and access which were successful and reduced trial length and costs. Cost as to those matters could have been dealt with then and therefore should be deducted from the costs claimed. The need to amend that order at the end of trial due to the respondent's withdrawal from parenting is billed in the later accounts.

27 The fees and disbursements of the first two accounts accordingly are deducted.

28 The hours otherwise appear appropriate.

Appropriateness of Disbursements

29 The disbursements are appropriate.

Conclusion

30 The applicant is awarded costs on a partial indemnity scale. The amount thereof, considering 104 hours at a partial hourly rate of \$260, plus disbursements of \$254, and HST, are fixed at \$31,000.

Sale Proceeds Trust Money

31 As real estate lawyer of the parties on their sale of the matrimonial home, Marc Nadon is hereby directed to pay to the applicant:

- (a) The \$20,000 presently held in trust for the applicant; and
- (b) The \$20,000 presently held in trust for the respondent.

32 The payment of the remaining cost award of \$11,000 owing to the applicant shall occur on the following terms:

- (a) By 22 consecutive monthly deductions each in the amount of \$500, from the future monthly spousal support payable to the respondent, regardless of any future variation of spousal support payable to the respondent;
- (b) A declaration that such twenty-two (22) \$500 deductions shall: i) under the *Income Tax Act* be income received by the respondent and deductible as support paid by the applicant; and ii) be deemed support paid to the respondent by FRO.

Order accordingly.

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