2001 CarswellOnt 1692
Ontario Superior Court of Justice

R. (C.) v. A. (I.)

2001 CarswellOnt 1692, [2001] O.J. No. 1793, 105 A.C.W.S. (3d) 445

C.R. v. I.A.

Blishen J.

Judgment: May 8, 2001
Docket: 97-FL-435A

Proceedings: additional reasons to *R. (C.) v. A. (I.)* (2001), 2001 CarswellOnt 1143 (Ont. S.C.J.)

Counsel: *Jack Pantalone*, for Applicant
Doug Smith, for Respondent

Subject: Family

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

Family law

IV Support
IV.3 Child support under federal and provincial guidelines
IV.3.c Determination of spouse's annual income
IV.3.c.iii Imputed income
IV.3.c.iii.A Deliberately unemployed or under-employed

Family law

IX Custody and access
IX.2 Factors to be considered in custody award
IX.2.i Miscellaneous

Family law

XX Costs
XX.1 In family law proceedings generally
XX.1.k Offer to settle

Family law

XX Costs
XX.5 Custody and access

Family law

XX Costs
XX.6 Support

Headnote

Family law --- Costs — In family law proceedings generally — Offer to settle

Family law --- Costs — Custody and access

Family law --- Costs — Support

Table of Authorities

Cases considered by *Blishen J.*:

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

Osmar v. Osmar (2000), 8 R.F.L. (5th) 387 (Ont. S.C.J.) — followed

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to

R. 18(14) — considered

R. 18(16) — considered

R. 24(1) — considered

R. 24(4) — considered

R. 24(5) — considered

R. 24(8) — considered

R. 24(10) — considered

R. 24(11) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — considered

Regulations considered:

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

Generally

ADDITIONAL REASONS in respect of costs to judgment reported at 2001 CarswellOnt 1143, [2001] O.J. No. 1053 (Ont. S.C.J.), resolving certain outstanding matrimonial issues as between parties.

***Blishen J.*:**

1 In Mr. R.'s amended application filed September 30, 1999, he sought:

(a) sole custody or in the alternative joint custody of In. R., and

(b) child support pursuant to the *Child Support Guidelines*.

2 On the first day of trial, Mr. R. withdrew his claim for joint custody and indicated he was only pursuing a claim for sole custody.

3 Ms. A.'s position was that the existing temporary order for joint custody, made October 12, 1999, should continue. That order granted shared physical custody with educational decisions being made by Mr. R. and medical decisions being made by Ms. A. Ms. A. further argued that she should be awarded child support based on an income imputed to Mr. R. of not less than $80,000.

4 Although the new *Family Law Rules* are in some respects a marked departure from the *Rules of Civil Procedure* or the rules which previously governed family law proceedings, they are, in my view, consistent with the Ontario Court of Appeal's decision in *Fong v. Chan* (1999), 46 O.R. (3d) 330 (Ont. C.A.). In *Fong* , *supra* the court indicated that modern costs rules are designed to foster three fundamental purposes (para. 22):

1. to indemnify successful litigants for the cost of litigation;

2. to encourage settlements; and,

3. to discourage and sanction inappropriate behaviour by litigants.

5 Rule 24(1) of the *Family Law Rules* states:

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.

6 Therefore, in any determination of costs, "success" is the starting point. There are, however, other factors which must be carefully considered in view of the fundamental purposes outlined in *Fong* , *supra*, in particular, efforts to settle and conduct of the parties.

Efforts to Settle

7 Offers to settle are significant in determining costs. Rule 18(14) reads as follows:

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.

8 Further, R. 18(16) indicates that, even if subrule (14) does not apply, the court may take into consideration any written offer to settle, the date it was made and its terms in deciding the issue of costs. Therefore, any offers to settle, even if they do not fall within the criteria outlined in R. 18(14), should be considered. Rule 24(5) further invites consideration of offers to settle in deciding whether a party has behaved reasonably or unreasonably. The *Rules* clearly encourage offers to settle. As Mr. Justice Aston stated in a recent endorsement on costs:

> Offers to settle become the yardstick by which to measure "success" and are significant in considering both liability for costs and the amount of the those costs. (*Osmar v. Osmar* [(2000), 8 R.F.L. (5th) 387 (Ont. S.C.J.)] (16 June 2000), London F1701/98).

9 During the course of this litigation, Mr. R. made eight offers to settle, all of which proposed some form of joint custody. Some of the offers were made with respect to interlocutory proceedings and either expired or were withdrawn. Mr. R. did make a detailed offer of joint custody on November 23, 1999. That offer was to expire five minutes after the commencement of the hearing unless withdrawn in writing before that date and time. As previously indicated, on the first day of trial, Ms. A.'s position was that there should be an order of joint custody. At that point, she was prepared to accept at least a portion of Mr. R.'s offer. Mr. R. made it clear that he was no longer prepared to consider an order of joint custody and wished to pursue an application for sole custody. Therefore, although the November 23, 1999 offer was not formally withdrawn, I do not find that it strictly complies with R. 18(14). Nevertheless, this offer, along with all the other offers made by Mr. R., should be taken into account pursuant to R. 18(16) in awarding costs.

Success

Custody and Access

10 Mr. R. was successful in obtaining an order that he be the sole, major decision-maker with respect to In. He was not successful in obtaining sole, physical custody of the child. However, it is important to note that Mr. R. did obtain an order which was very close to his offer of November 23, 1999 and was, in fact, more successful than other offers wherein he was proposing both shared decision-making and physical custody.

Child Support

11 At trial, it was Mr. R.'s position that he should be awarded sole, physical custody of Ingira and that Ms. A. should pay him child support. In his offer of November 23, 1999, he did propose that he pay child support on the basis of his current income and that this be set off by the amount payable by Ms. A. based on her current income. Mr. R. never proposed, in either his offers or at trial, that income should be imputed to him. I find that Ms. A. was successful on the child support issue, although the income imputed to Mr. R. was less than she claimed in her Answer.

Conduct of the Parties

12 Despite the fact that a successful party is presumed to be entitled to costs, pursuant to R. 24(4),

> ...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.

13 Rule 24(5) outlines the factors that the court must examine in order to make a determination on reasonableness as follows:

> (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.

14 As previously stated, Mr. R. made numerous offers to settle and, in particular, the offer made on November 23, 1999 was very reasonable. In fact, it is very close to what the court ordered in this case. Ms. A. made no offers and failed to accept any offer made by Mr. R. In addition, there were eight attempts to resolve the outstanding issues by way of mediation, settlement meetings with counsel and the Director of Legal Aid and three settlement conferences through the court. Ms. A. failed to attend the final settlement conference immediately before the trial and costs were offered against her in the amount of $400. The evidence supports a finding that Ms. A. failed to take a reasonable and conciliatory approach towards the issues throughout the litigation. Her unreasonable behaviour culminated in a letter being written by Dr. David McLean, Director of the Family Court Clinic, on March 30, 2000. Dr. McLean finds that Ms. A.

> ...seems to get caught up over small issues and also tends to reverse her opinion on issues I thought we had already reached agreement on.

He advises that he has terminated his mediation sessions with the parties. I find that Ms. A.'s unreasonable attitude and inability to compromise fueled the conflict and prevented settlement.

15 I also have concerns regarding Mr. R.'s conduct during the course of the trial. The majority of the evidence called by Mr. R. dealt with Ms. A.'s past conduct which he argues was relevant to her ability to act as In.'s parent. A great deal of trial time was spent dealing with Mr. R.'s allegations that Ms. A. had sexually and physically abused Ingira and that she had been a neglectful mother who provided inappropriate medical care for the child. None of these allegations were proven on a balance of probabilities. It is to be noted that Dr. McLean carefully considered the issues of physical and sexual abuse in his Family Court Clinic Assessment dated June 22, 1999, and found no information to substantiate past physical or sexual abuse. Despite these findings, Mr. R. chose to pursue these issues at trial. As stated in my judgment, the vast majority of Mr. R.'s evidence focused on the past and the conflict between the parties. He offered very little evidence as to what had occurred with Ingira since the October 1999 interim joint custody order. There was no evidence provided from Ingira's teachers, doctor, daycare provider, Sunday School teacher or any other objective third party. In reviewing my notes, it would appear that approximately one-third of the nine day trial was spent dealing with Mr. R.'s unsubstantiated allegations regarding Ms. A.'s past conduct.

16 In summary, I find that Mr. R. was more successful on the custody issue, in particular when considering his offers to settle, while Ms. A. was successful on the child support issue. I further find that both parties have acted unreasonably during the course of litigation.

Quantifying Costs

17 Under the new *Family Law Rules*, there is no distinction drawn between "solicitor-client" and "party-and-party" costs, although R. 24(8) provides:

> **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.

18 On the basis of the evidence before me at trial, I am not prepared to find that either party acted in bad faith.

19 Under R. 24(10), the court must, after each step in the proceeding, determine who is entitled to costs and fix the amount of costs which, in my view, can be somewhere between a nominal figure and full recovery. The factors under R. 24(11) must be considered in quantifying costs. I have considered those factors and find as follows:

1. Mr. R. was largely successful on the issue of custody and access. This was the most significant, complex and difficult issue and took most of the trial time, approximately seven out of the nine days. Mr. R.'s numerous offers to settle must also be considered in determining the quantification of costs. Ms. A. was successful on the issue of child support and in having income imputed to Mr. R. This was a less complex issue which took approximately two days of trial time.

2. As previously indicated both parties behaved unreasonably during the course of litigation. Ms. A.'s failure to accept any of Mr. R.'s offers to settle or to cooperate with a view to resolution of any of the issues was unreasonable. Mr. R.'s preoccupation with Ms. A.'s past conduct and in particular the allegations of physical abuse, sexual abuse and neglect unduly protracted the trial.

3. The lawyers' rates; the time spent on the case; and, expenses properly paid or payable were not outlined in any detail by either lawyer. Counsel for Mr. R. argued that his client was successful on the custody issue and partially successful on the child support issue. He requested costs in the amount of $20,000. Counsel for Ms. A. acknowledged that Mr. R. was partially successful and requested costs in the amount of $11,500 out of his total costs for trial and trial preparation of between $22,000 and $25,000.

20 Taking into consideration all of the factors and circumstances outlined above, I find both parties entitled to costs and therefore, an apportionment of costs and a set off will be necessary.

21 Based on the submissions of both counsel and the circumstances of this case, I find $20,000 to be a reasonable amount for trial time and associated trial preparation. Taking into consideration Mr. R.'s offers to settle and his significant if not total success on the more difficult custody/access issue, I find him entitled to two-thirds of the $20,000 total cost or an amount of $13,300. Ms. A. was successful on the less significant and less time consuming issue of child support and I would award costs to her in the amount of $6,700. Mr. R.'s costs should be reduced by $3,000 for the three days of trial time taken, by him, in attempting to prove allegations of Ms. A.'s past conduct. This leaves Mr. R. with a total of $10,300. Ms. A.'s costs should be reduced by a similar amount for her unreasonable conduct during the course of litigation, leaving her with costs in the amount of $3,700.

22 Therefore, Ms. A. is to pay Mr. R. costs fixed in the amount of $6,600 inclusive of disbursements and GST.

Order accordingly.