2016 ONSC 6939
Ontario Superior Court of Justice

Wang v. Grenier

2016 CarswellOnt 17647, 2016 ONSC 6939, [2016] W.D.F.L. 6388, [2016] W.D.F.L. 6399, 272 A.C.W.S. (3d) 781

BEI WANG (Applicant) and FREDERICK GRENIER (Respondent)

Robert N. Beaudoin J.

Heard: July 27, 2016
Judgment: November 9, 2016
Docket: FC-15-1278

Proceedings: additional reasons to *Wang v. Grenier* (2016), 2016 ONSC 5356, 2016 CarswellOnt 13513, Robert N. Beaudoin J. (Ont. S.C.J.)

Counsel: Tanya Davies, for Applicant
Jack E. Pantalone, for Respondent

Subject: Civil Practice and Procedure; Family

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

Family law

XX Costs
XX.5 Custody and access

Headnote

Family law --- Costs — Custody and access

Parties separated after two years of marriage and one child — Mother brought motion to immediately implement recommendation arising from custody and access assessment — Master ruled that matter was not emergency and placed motion on regular motions list — Mother's motion was dismissed — Father awarded costs of $20,000 — Emergency motion was triggered by recommendation by custody and access assessor that time-sharing arrangements be immediately changed such that child would reside primarily with mother — Affidavit evidence filed by child's maternal grandparents was doubtful, given their inability to speak to assessor without interpreter — Mother argued that parenting regime was detrimental to child's health, but her preoccupation with child's health predated separation and parenting arrangement she was seeking to set aside — Father's offer to settle was very close to result obtained and as such, cost consequences of R. 18 of Family Law Rules applied — While it was not entirely unreasonable for mother to seek to implement assessor's recommendations on interim basis, nothing justified her intensified and escalated attacks on father once she was unsuccessful — Assessor's recommendation for urgent change in parenting arrangement fuelled antagonism that existed between parties — Mother's conduct of litigation was reprehensible — On evidence, she would have used order changing parenting arrangement in her favour to support her claims for sole custody at trial — Mother's vicious attacks on father left no doubt that she was never prepared to consider eventual return to shared parenting arrangement — Father was entitled to his costs for his appearance before master and costs approaching full recovery thereafter — Costs fixed at $3,000 for emergency motion and $17,000 thereafter, for total of $20,000 including HST and disbursements.

Table of Authorities

Cases considered by *Robert N. Beaudoin J.*:

Davies v. Clarington (Municipality) (2009), 2009 ONCA 722, 2009 CarswellOnt 6185, 77 C.P.C. (6th) 1, 254 O.A.C. 356, (sub nom. *Davies v. Clarington (Municipality)*) 312 D.L.R. (4th) 278, 100 O.R. (3d) 66 (Ont. C.A.) — followed

Jackson v. Mayerle (2016), 2016 ONSC 1556, 2016 CarswellOnt 3329, 73 R.F.L. (7th) 278, 130 O.R. (3d) 683 (Ont. S.C.J.) — considered

Serra v. Serra (2009), 2009 ONCA 395, 2009 CarswellOnt 2475, 66 R.F.L. (6th) 40 (Ont. C.A.) — followed

Rules considered:

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

R. 24(1) — considered

R. 24(8) — considered

R. 24(11) — considered

R. 24(11)(a) — considered

R. 24(11)(b) — referred to

ADDITIONAL REASONS on costs to judgment reported at *Wang v. Grenier* (2016), 2016 ONSC 5356, 2016 CarswellOnt 13513 (Ont. S.C.J.), dismissing mother's motion to immediately implement recommendation arising from custody and access assessment.

***Robert N. Beaudoin J.*:**

1 The Applicant, Bei Wang, ("Wang") brought a motion seeking to immediately implement the parenting recommendations that were contained in a clinical assessment by Sally Bleecker released in March, 2016. The parties first appeared before Master MacLeod (as he then was) on April 19, 2016 who ruled that the matter was not an emergency and placed the motion on a regular motions list for June 30, 2016. Given the volume of material, Justice Doyle agreed with the Respondent's counsel that the matter should be adjourned to a full day motion which I heard on July 27, 2016. Both Master MacLeod (as he then was) and Justice Doyle ordered that the costs of the appearances before them were to be addressed by the judge who heard the motion.

2 The Respondent, Frederick Grenier ("Grenier") was successful on the motion and now seeks his costs.

Respondent's Position

3 The emergency motion was triggered by a recommendation by Ms. Bleecker that the time-sharing arrangements be immediately changed such that the couple's child, Maxime, would reside primarily with Wang. This was one of many recommendations contained in Ms. Bleecker's report.

4 In denying Wang's request that her motion be heard as a matter of urgency, Master MacLeod (as he then was) reviewed the contents of Miss Bleecker's reports and considered the case law with regard to the interim implementation of assessor's recommendations. He noted that the case law recognized that interim implementation of assessors recommendations should not be routine and that the parties had fixated on the recommendation relating to parenting time without considering the myriad of other recommendations made by the assessor.

5 Grenier seeks his cost of his appearance on all three dates. His counsel had indicated that the release of Ms. Bleecker's file was a prerequisite to the hearing of Wang's emergency motion. He argues that Wang did not consent to the release of the contents of Ms. Bleecker's file until the Thursday prior to the motion. As a result, he had to bring a motion for the release of the contents of Ms. Bleecker's file and bring a third party motion against Ms. Bleecker.

6 He maintains that he was totally successful at the emergency motion, and that his own motion for the release of Ms. Bleecker's file and questioning were resolved on consent. However, he notes that this consent was given within a few days of the motion and that he had to needlessly incur costs for the preparation of his own motion including preparation for service on Ms. Bleecker. He seeks costs, on a full recovery basis for the emergency motion in the amount of $7,747.31.

7 As for the adjournment of the June 30 motion, Grenier submits that he wrote to Wang's counsel and suggested that the matter be adjourned to a full day having regard to the voluminous materials and the anticipated length of oral submissions. Grenier was successful on his request for an adjournment. He seeks costs approaching full recovery for the preparation and attendance at the adjournment. He seeks costs in the amount of $13,817.94 relating to the adjournment of the motion and I note that these costs include a majority of the preparation time for the ultimate hearing of the motion.

8 With respect to the July 27 motion, Grenier claims complete success on the motion and he relies on his presumption of entitlement costs as set out in rule 24(1) of the *Family Law Rules*, O. Reg. 114/99.

9 He also argues that the Applicant behaved unreasonably and he relies on his offers to settle dated June 27, 2016 and June 28, 2016 and submits that these offers trigger the costs consequences of Rule 18. Grenier argues that Wang's conduct, including her litigation conduct, was inflammatory and antagonistic, intentionally engaging in conduct which was detrimental to the child's best interests and his relationship with his father.

10 Grenier relies on rule 24(8) (*Bad Faith*) and argues that Wang took the assessor's report and, rather than take steps to attempt to dissipate the conflict, she actively took steps to exacerbate it. She attempted to garner evidence alleging abuse by the Respondent at the time of pickup and drop-off, called the police, stayed overnight at a shelter in order to obtain a letter and called the CAS only to subsequently state in subsequent affidavits that the Respondent's behaviour at pickup and drop-off had improved. She delayed scheduling an appointment for both parents as requested by the child's family physician, Dr. Lyen, and without consultation with either Grenier or Dr. Lyen, she took Maxime to an appointment with the pediatrician.

11 Grenier argues that Wang fueled an already toxic environment and took steps in total disregard of the child's best interests. She filed voluminous affidavits, including unreliable affidavits from her parents and these affidavits were largely repetitive, aggressive and contained legal argument. He argues that her behaviour was, at least, egregious. In reliance on rule 24(11)(a), he submits that the issues before the Court were of importance to him in that Wang's claim to be seeking only interim relief, was in actuality a request for summary judgment on the time-sharing issues. Grenier submits that even if Wang's conduct has not amounted to bad faith, her conduct was so unreasonable (rule 24(11) (b)) as to warrant a costs award approaching full recovery.

12 In terms of his hourly rates, Grenier's counsel was called to the Bar in 1989, he has 25 years in practice exclusively in the area of Family Law and his hourly rate is $400 an hour. He claims costs of the motion in the amount of $6,188.05; or a total of 27,053.50 for all three appearances.

Applicant's Position

13 In response, Wang cites the list of factors found in rule 24(11) of the *Family Law Rules* and the Court of Appeal's decision in *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40 (Ont. C.A.), at para. 8 where that court held that costs rules are designed to foster three important principles:

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

2. to encourage settlement, and

3. to discourage and sanction inappropriate behaviour by litigants.

14 She also relies on appellate authority in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66 (Ont. C.A.) that held that "costs at an elevated level should only be awarded absent an applicable offer to settle, where the conduct of the party is to pay those costs that have been found to be reprehensible or egregious.

15 Wang concedes that she failed in her motion to ask the Court to follow the recommendations contained in the Bleecker assessment on an interim basis. She accepts that there will be cost consequences. She relies on the Court's discretion with respect to quantum.

16 She maintains that her motion was reasonable in the first place. She relied on an assessment carried out by an experienced assessor selected by the Respondent and agreed to by both parties. She relied on Ms. Bleecker's recommendation that a change in terms of primary care was required on an urgent basis.

17 Wang maintains that she accepted all of Ms. Bleecker's recommendations and had Grenier agreed to the assessment and recommendations, the parenting issues would have been settled. She maintains that it was not unreasonable for her to seek to implement the recommendations prior to trial which recommendations included a parenting change when Maxime turned four. She argues that her request was in the child's best interests.

18 Wang notes that she had not brought any prior motions prior to the Court. Both parties filed extensive materials. She argues that Grenier's claim for costs in the amount of $27,000 for the motion is excessive and disproportionate. She further maintains there is no justification for full indemnity costs. She argues that the bill of costs should be reduced by 40% and notes that her own costs were $15,000, which she submits are a more reasonable amount for a motion of this kind.

Disposition

19 In my Additional Written Reasons, released on August 25, 2016, I made these observations about the affidavits filed by the Applicant. The affidavits filed by the maternal grandparents were in the English language, and their input was doubtful given their inability to speak to the assessor without an interpreter. I gave those affidavits no weight. Wang's affidavits contained argument and opinion often phrased in bold or capitalized letters, the written equivalent of shouting to the Court. I was struck by the fact that many statement in Wang's affidavits were contradicted by the very exhibits that she had filed in support of her allegations.

20 At paragraph 19 of my decision I noted:

> Having not been initially successful before Master MacLeod, Ms. Wang has escalated her attacks on the father in an attempt to paint a picture of an abusive individual; adding unreliable affidavits from her parents. She attempted to register Maxime in counselling for children who witnessed abuse. Ms. Wang claimed she had to stay in a shelter for one evening in June, 2016, but it is not clear why she was not safe in her own home with her parents. She stayed at the shelter for one night and then flew out the next date on a business trip. She has gone to the police and then to the CAS to bolster her claims. This is in contrast to her description of Mr. Grenier to Ms. Bleecker as being "very nice" before the separation. There were no allegations of abuse in her original application to the Court .

21 She argued that Grenier had prevented Maxime from getting much needed counselling from Dr. Goldstein when it was clear that Dr. Goldstein was to provide services to both the Applicant and the Respondent in order to "help them communicate and cooperate better in the parenting process so that they could parent well together and focus on Maxime's well-being."

22 While Wang argued that the parenting regime was detrimental to Maxime's health, the evidence discloses that the mother's preoccupations with Maxime's health predated the separation and the parenting arrangement she was seeking to set aside.

23 In summary, Ms. Bleecker's recommendation that there be an urgent change in the parenting arrangement fuelled the antagonism that existed between the parties and it is regrettable that Ms. Bleecker, a respected and experienced assessor, did not anticipate the effect that this recommendation would have on these parties given "the huge tense wall of suspicion and distrust between the parents" that she noted in her report. While she may have believed that her recommendation was in Maxime's best interests, it only made matters worse.

24 While it is difficult to make a finding of bad faith against the Applicant, I'm satisfied that her conduct of the litigation was reprehensible. She escalated her attacks against the Respondent and went so far as to accuse him of suffering from a personality disorder while she attempted to create a picture that he was an abusive individual and an unfit father.

25 I reject her argument that she was fully prepared to accept all of Ms. Bleecker's recommendations and I am satisfied on the evidence before me that she would have used an order changing the parenting arrangement in her favor in order to support her claims for sole custody at trial. Her vicious attacks on the Respondent, where she describes him as a "sick, mean person" leave no doubt that she was never prepared to consider an eventual return to the shared parenting arrangement with him once Maxime turned four.

26 As Justice Pazaratz said in *Jackson v. Mayerle*, 2016 ONSC 1556, 130 O.R. (3d) 683 (Ont. S.C.J.) at para. 64:

> 64. But even where behaviour falls short of being bad faith, where unfounded allegations significantly complicate a case or lengthen the trial process, this constitutes unreasonable behaviour relevant to the costs determination. Family law litigants are responsible and accountable for the positions they take during litigation. *Hackett v. Leung* (2005) 2005 CanLII 42254 (ON SC), 2005 CanLII 42254, 22 R.F.L. (6th) 314 (SCJ); *Katarzynski v. Katarzynski*, 2012 ONCJ 393 (CanLII), 2012 ONCJ 393 (SCJ); *Toscano v. Toscano*, 2015 ONSC 5499 (CanLII), 2015 ONSC 5499 (SCJ). *Scipione v. Scipione* (*supra*).

27 In that same decision, the court noted at para. 47:

> 47. 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 (CanLII), 2015 ONSC 2129 (SCJ); *Scipione v. Scipione*, 2015 ONSC 5982 (CanLII), 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 (CanLII).

28 I find that Grenier's offer to settle dated June 28, 2016 was very close to the result obtained before me, and as such, the costs consequences of Rule 18 are applicable.

29 I conclude that while it was not entirely unreasonable for Wang to seek to implement Ms. Bleecker's recommendations on an interim basis, nothing justified her intensified and escalated attacks on Grenier once she was unsuccessful at that fits appearance. After every appearance, she sought to further inflame the situation. Her affidavits were textbook examples of what should be avoided in family law litigation.

30 I conclude that Grenier is entitled to his costs for his appearance before Master MacLeod (as he then was) and costs approaching full recovery thereafter. I fix his costs as follows: $3,000 for the emergency motion of April 19, 2016, and $17,000 for the appearance before Justice Doyle and the argument of the motion before me. This results in a total of $20,000 including HST and disbursements which sum is payable within 90 days.

Order accordingly.