Litigators Beware: The Law of Costs in Ontario Family Court Proceedings

by Ken Nathens*

Family law litigation is complicated and expensive. A typical family court case, if it is to proceed to trial, may take upwards of two to three years from beginning to end and will cost thousands if not tens of thousands of dollars. Those who are not represented by counsel face an uphill battle of confusing court rules and unfamiliar legal issues. Those who are represented by counsel face mounting legal bills that seem as if they will never end. For these reasons most family law cases settle prior to trial. The law of costs related to family court proceedings assist in promoting early settlement of contested legal proceedings.

Rule 24 (1) of the Ontario *Family Law Rules* provides:

> "There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal."

The amount of costs that a successful party may be entitled to depends on such factors as the importance or complexity of the case, the reasonableness of each party's behaviour in the case, the lawyer's rates, and the time properly spent on the case. Therefore a party who is deemed to be the more successful party at the conclusion of a litigation proceeding may still be denied some or all of the costs expended if the Judge deems that party's behaviour during the litigation process to be unreasonable. Examples of unreasonable behaviour include failing to provide necessary financial disclosure, prolonging the trial or increasing costs unnecessarily, or taking an unreasonable position on legal issues. Similarly, the less successful party will face a cost award that will likely be compounded if he or she is deemed to have acted unreasonably.

Rule 18 of the *Family Law Rules* promotes early settlement by providing cost incentives to a party who makes a reasonable and early offer to settle some or all issues. According to Rule 18(14), 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

costs from that date, if the offer is not accepted and the party who made the offer obtains an order that is as favourable as or more favourable than the offer. Therefore, the relative success of a party for the purpose of assessing costs is judged by how close his or her offer to settle matches the actual decision of the court.

Even the most experienced family law lawyers have difficult predicting with certainty the outcome of a court proceeding and how all the issues will be resolved by a Judge. Judicial decisions on many, if not most, family law issues are notoriously difficult to predict in advance. These includes issues such as mobility rights, how much income may or may not be imputed on a self- employed party, the duration of spousal support, etc. Different judges decide issues differently, depending on the Judge's own interpretation of the law and evidence presented. Most parties and lawyers prefer a negotiated settlement when possible to avoid the inherent uncertainties of court proceedings and the risks of costs.

In practice this means that a well prepared, conscientious lawyer has a duty to advise his or her client of the importance of early offers to settle pursuant to the *Family Law Rules* and to encourage that client to make the most reasonable offer he or she can stomach in order to promote early settlement and reduce potential cost exposure. To go into a contested litigation proceeding without first making an offer and attempting early settlement is a risky and potentially expensive litigation error.

*Ken Nathens is a partner with Nathens, Siegel, a Toronto and Mississauga law firm devoted solely to family law.