

CITATION: Lenihan v. Shankar, 2021 ONSC 1537
COURT FILE NO.: FS-19-141
DATE: 2021 03 01

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Kevin William Lenihan, Applicant

AND

Indira Shankar, Respondent

BEFORE: The Honourable Justice McGee

COUNSEL: A. Chris and J. Hunt-Jones, for the Applicant

COSTS ENDORSEMENT

Decision

1. On January 14, 2021, I released my additional reasons on this four-week parenting Trial that was decided in Oral reasons delivered December 10, 2020. In my oral decision, I granted the father custody/decision making for the parties' young daughter after the mother's sudden departure from the jurisdiction over the weekend following the first week of Trial.
2. In the additional reasons, I made multiple findings that the mother had spoofed emails and social media, falsified documents and actively sabotaged the father's parenting time. I found that the father was child focussed and reasonable at every stage of the proceeding.
3. The father was successful at Trial. He asks for a full recovery of his costs in the rounded amount of \$450,000 for the whole of the proceeding, exclusive of steps for which costs have already been ordered. Alternatively, he asks for costs in the reduced amount of \$415,000 which reflect a full recovery of his costs only from the time after delivery of his October 9, 2019 Offer to Settle. Family law rules provide for a full recovery of costs when a party has beat an Offer to Settle, behaved unreasonably or acted in bad faith.
4. For the reasons set out below I grant a full recovery of the father's costs for the whole of the proceeding on two bases: having done better at Trial than proposed in his October 9, 2019 Offer to Settle, and on my findings that the mother acted in bad faith throughout the proceeding.
5. The father is awarded costs of \$438,188.77 being \$375,000 in fees, \$48,750 in HST thereon, and \$14,438.77 in disbursements inclusive of HST.

The Respondent's Costs Submissions

6. Indira remains in India. She did not directly respond to Kevin's request for costs. Instead, she emailed 65 expansive, repetitive pages with alternating font, mostly single spaced.

7. Her submissions rebrand her as a poor, uneducated, helpless woman who has been preyed upon by a wealthy and powerful family. She retells her experience of the past years from that perspective – which was not her evidence at Trial. She writes of new supporters who agree with her. She tells a false narrative of the Trial. She blames her lawyers, Kevin, his lawyers and me. She is preoccupied with her daughter being wrongfully taken across the Canadian border and says that she is engaging new counsel and resources to address criminal acts.

8. I have carefully read through her submissions to identify the statements relevant to a claim for costs. In the order in which they are presented, she states:

- a. she and her family came up with the \$15,000 to pay for her second last lawyer, Ms. P, before Trial, and she must now repay legal aid \$172,000 for the costs of various lawyers. Legal Aid has asked her to pay \$500 a month for the next 5 years as a repayment;
- b. she incurred \$265,000 in costs and \$25,000 in transcripts and is paying back legal aid monthly;
- c. she has \$315,000 to pay back;
- d. she spent \$345,000 in lawyer fees and \$35,000 on therapists and the psychological evaluation;
- e. she has \$375,000 to pay back and her net worth is negative;
- f. [Post Trial] Kevin “has trafficked the child for which I have incurred criminal lawyer fees for 20,000 and I have hired a lawyer in USA which as of now has cost me 20,000 USD.”
- g. she is in the process of completing a bankruptcy application for debts of \$415,000 and some creditors have already accepted her proposal;
- h. she does not yet know how much she owes Legal Aid because they are assessing the bills of two former counsels, including Ms. P, before releasing the account;
- i. she has incurred costs of babysitting during the court hearing dates, Uber expenses, printing and notary expenses and loss of pay from work;
- j. she spent \$250,000 in legal fees and is paying it off;

- k. she is willing to work as a maid to June Lenihan [Kevin's mother] until the \$450,000 is paid off, if not, she will have to file for bankruptcy;
- l. her debts total \$455,000 and she is back on social assistance;
- m. she was on Ontario Works throughout and Kevin is worth 50 billion dollars;
- n. Legal Aid has conducted a detailed search of her assets and are satisfied that she is worth nothing;
- o. she started bankruptcy proceedings in 2019 and Mr. Chris stated at that time that he would not seek costs; and
- p. "the billionaire father had made an informed decision in 2019 not to ask for costs from the mother [and] if he had said in 2019 that he will pursue the costs then I would have taken a different decision to make it more amicable. It was his show, he wanted the Trial to be his show, display of wealth, power, his capability to buy the law using the billion-dollar wealth and connections. I was kind enough to be his door mat and help him achieve his ego requirements by being the recipient and let everyone walk over me."

9. A plain reading of Indira's costs submission might worry the reader that she is unwell. Indeed, I am concerned for her health, and fully appreciate that she has suffered a terrible shock. It is clear from her emails to Kevin leading up to the Trial that she believed her possession of their daughter to be unassailable.

10. At the same time, Indira does not make any suggestion that she is unable to appreciate the claim for costs. She has made a lengthy submission in which she recognizes or mirrors the range of costs incurred by Kevin. She has been a skilled and vigorous litigant throughout these proceedings. She had the assistance of ten lawyers and a number of agents.

11. I see no alternative but to determine costs on the record before me. Parties are responsible for the positions that they take in litigation.

Success and Reasonableness

12. A successful party is presumptively entitled to costs. As emphasized by the Court of Appeal in *Mattina v. Mattina* 2018 ONCA 867, the purposes of a costs award are to indemnify successful litigants, to encourage settlement, to discourage and sanction inappropriate behaviour by litigants and to ensure that cases are dealt with justly.

13. Rule 24(12) of the *Family Law Rules* lists the factors to be considered when setting an amount of costs, including "the reasonableness and proportionately of each of the following factors

as it relates to the importance and complexity of the issues”: the parties’ behaviour, time spent, written offers to settle, legal fees (including the number of lawyers and their rates), expert witness fees, and other expenses properly paid or payable; and any other relevant matter.

14. There is no question that this was a case of immense importance to the future well-being of the parties’ daughter. But for the Application, it is unlikely that A would ever have known her father. The complexity of the litigation arises from that same premise: that this was not about measuring out the best parenting schedule for a child of geographically distant parents but about whether A would have any relationship at all with her father or his extended family.

15. The issues became uniquely complex as a result of Indira’s move to Ontario under the false pretense of seeking an extension of her U.S. Visa, resulting in A being born and spending the early years of her life in a foreign jurisdiction where Kevin had no immigration status. Further complicating the litigation were Indira’s shifting positions throughout the proceeding as to paternity and parenting. Specialized evidence was required to address the very real concerns arising from A’s craniosynostosis.

16. These complex issues were then made almost intractable as a result of Indira serving several forged and manipulated documents in the names of multiple third parties, requiring Kevin to spend Court time and resources calling the third parties as witnesses to confirm the forgeries.

17. In deciding whether a party has behaved reasonably or unreasonably per Rule 24(5), the Court shall consider:

- 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.

18. Costs are not based on the personality, or perceived personality of a party, but rather, on his or her litigation conduct. A party who fully participates in good faith, provides timely and complete disclosure, is consistently truthful and who attempts to resolve matters acts reasonably.

19. An award of costs is discretionary. A measure of latitude is rightly given to separating parties who are in distress, are slow to accept their changed circumstances and who fear for their child’s future. But that latitude dissipates when the actor knowingly causes litigation harm to the other party and emotional harm to a child. Unreasonable litigation conduct must be actively sanctioned lest it appear to be of little risk. What we permit, we promote.

20. In extreme cases, there may be a finding of bad faith per Rule 24(8) and an Order for a full recovery of costs.

21. This is one of those extreme cases.

Bad Faith

22. Rule 24(8) provides that, “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.”

23. There is no question that Indira acted in bad faith throughout this proceeding. She actively deceived Kevin, made false allegations, falsified documents and spoofed emails and social media. Her actions were clearly designed to inflict maximum emotional and financial harm, to deceive service providers and ultimately to manipulate the evidence before the Court.

24. In *S. (C.) v. S. (M.)* (2007), 2007 CarswellOnt 3485 (S.C.J.), Justice Perkins held that bad faith includes behaviour shown to be carried out with intent to inflict financial or emotional harm on the other party or other persons affected by the behavior; to conceal information relevant to the issues; or to deceive the other party or the court.

25. The costs sought to be fully recovered must have been incurred in relation to the issues affected by the bad faith. And as Justice Perkins writes, “[a] misguided but genuine intent to achieve the ostensible goal of the activity, without proof of intent to inflict harm, to conceal relevant information or to deceive, saves the activity from being found to be in bad faith. The requisite intent to harm, conceal or deceive does not have to be the person's sole or primary intent, but rather only a significant part of the person's intent.”

26. This course of litigation was no misguided or uneven series of attempts to act in A’s best interests. Indira planned and executed each step in the proceeding to dramatic effect and singular purpose: to punish Kevin. From trying to trick him into believing that their baby had been born prematurely, to omitting his name on the birth registration, to falsely accusing him of sexual abuse, to falsely claiming that A had Covid19; Indira mocked Kevin’s vulnerability and manipulated his concerns for their daughter.

27. Indira misrepresented information from medical professionals and the CAS. She actively sabotaged Kevin’s first parenting weekend in February 2019, laying an elaborate trap for him which may have worked had it not been so poorly executed.

28. In the August before Trial she openly, and with some measure of delight, taunted Kevin with her ability to run up his legal fees, writing “Oh so sad. I feel for this dumb ass. I already filed bankruptcy, so I don’t care about costs. But you have to pay lol lol lol. Ha aha ha.’ The following month she wrote that she had blocked the junior lawyer’s email, “so that [Kevin] can only receive emails from the senior lawyer so that it costs [Kevin] more money.”

29. With respect to parenting, her delight bordered on cruelty. Zoom calls with A often had the video and audio turned off. Kevin was forced to watch A ignore him. One call left Kevin helpless

as he watched the children eating sugar from a bag on the floor. On another, he called out to them as they climbed over tipping furniture. As the litigation neared Trial, Indira changed her position on paternity and tendered a Sperm Donor Agreement with his forged signature as the Donor. She called false testimony from a man purporting to be her husband and A's other "legal" father.

30. In the recent case of *O.M. v. S.K.*, 2020 ONSC 4765, Justice Bell affirmed that parental conduct that attempts to remove a parent from a child's life amounts to bad faith within the meaning of Rule 24(8). In that case, the mother had engaged in a wide range of alienating behaviour that mirrored Indira's, including false allegations of physical and sexual abuse of the child by the father, effectively "depriving the child of her relationship with her father" and engaging in behaviour that "evidenced a disregard for the importance of the child maintaining a healthy relationship with both her parents." Justice Bell made a finding of bad faith and concluded that the father was entitled to a full recovery of costs.

31. In *Goldstein v. Walsh*, 2019 CarswellOnt 8310, Justice Kristjanson was faced with a situation in which she made findings of bad faith against a father who had taken unreasonable and obstructive positions throughout the proceedings, including having made false allegations. The successful mother sought a full recovery of \$456,411 in costs. Justice Kristjanson assessed the claim for costs, took a view of what the unsuccessful party had paid in costs, reviewed the caselaw, and concluded with the following from *S. (C.) v. S. (M.)* at para. 17:

At some point, a party could be found to be acting in bad faith when their litigation conduct has run the costs up so high that they must be taken to know their behaviour is causing the other party major financial harm without justification.

She assessed a full recovery of costs payable to the mother in the amount of \$420,000.

32. Particularly relevant to this decision, Justice Kristjanson notes in *Goldstein v. Walsh* that the high level of costs incurred by the successful mother was a reasonable response to the father's litigation conduct, concluding that, "the Applicant [had] pursued a scorched earth policy. Scorched earth litigation calls out big guns in response."

33. None of Indira's litigation conduct was directed at what was best or appropriate for A, only at what punished Kevin and his family. As observed by Kevin's father, there were no limits to her behaviour. Indira measured her success by the ruination of Kevin's reputation and the power she gained from controlling Kevin's access to A.

34. Kevin shall have a full recovery of his costs for the whole of this proceeding.

Amount of Costs

35. The Rule 24(12) factors warrant a significant cost Order in this proceeding. At the same time, a Bill of Costs is not a blank cheque. The court must be satisfied that an award is reasonable and proportionate and within the contemplation of what an unsuccessful party might pay.

36. The claimed amount of \$450,000 is a rounded figure of \$385,165.02 in fees, \$14,438.77 in disbursements and HST thereon. Kevin's Bill of Costs includes amounts for various pre-Trial steps for which no previous determination of costs has been made per Rule 12 (11.) It excludes events on which costs were previously determined.

37. I begin with the disbursements.

38. Indira does not dispute the disbursements, or the amounts claimed. Kevin incurred \$5,000 in fees for the psychological assessment of Indira performed by Susan Walker-Kennedy – \$3,200 for the assessment and report, and \$1,800 for Dr. Walker-Kennedy's Trial retainer. Kevin also incurred a further \$3,200 in consulting fees for Dr. Raymond Morris, who was retained to assist counsel in preparing for the examination and cross-examination of Dr. Walker-Kennedy and Indira's expert, Dr. Jean Szkiba-Day.

39. Given the observations and recommendations of the OCL Report, it was reasonable and necessary for Kevin to have incurred these expenses. The Order of January 9, 2020 confirming the assessor allowed Kevin to seek reimbursement of the assessment fees at Trial.

40. His disbursements, in addition to the expert witness and consulting fees, total just over \$10,000, inclusive of fees related to the ex-parte motion before Justice Goodman, the supervised access fees for Jane Walsh, fees to transfer the file to Brampton (at Indira's request), witness summons and filing fees, copying charges for the Trial exhibits briefs and Trial Records, and process server and courier fees. With HST, they total \$14,438.77. In my view there is no basis to deny a full recovery of these fees and I grant them in full.

41. With respect to legal fees, Kevin was initially represented by Epstein Cole LLP and then by Normandin Chris LLP. The rates charged by both firms were reasonable and commensurate with legal fees charged in the GTA. Within each firm, work was primarily performed at the most cost-effective hourly rate.

42. Fees for two counsels at Trial are not always recoverable, but I find that in this case, having two counsels was reasonable and is recoverable. Junior counsel managed the technology for both parties in this hybrid Trial: half in person and half on Zoom. Despite Indira having independent access to her and opposing counsel's documents, she was rarely able to access them without assistance of junior counsel for the Applicant. But for counsels' assistance, the length of the Trial would have been significantly longer, and Indira would not have been able to present her case.

43. In considering the factors in Rule 24(12), I find that the legal fees sought by Kevin are reasonable and proportionate to the seriousness of the issues in the proceeding, the length of the Trial, and the time and effort that was necessary to address Indira's unreasonable litigation behaviour, specifically:

- a. The first ex-parte Order granted by Justice Goodman resulted from Indira's unreasonable refusal to allow Kevin access to medical and other information and her earlier threat to remove A from Canada.
- b. Multiple consent Orders were made requiring Indira to facilitate paternity testing for A, which she insisted upon, then ignored.
- c. The October 19, 2018 Order of Justice Thorburn required Indira to produce any evidence she had to substantiate her various allegations against Kevin. She also ignored this Order.
- d. The October 19, 2018 and the January 15, 2019 Case Conferences ought to have been unnecessary as both focussed on basic parenting time for Kevin that Indira unreasonably refused.
- e. The January 31, 2020 Order of Justice Price required Indira to produce, *et. alia*, a copy of A's birth certificate and information about her activities and care providers. Indira ignored the requirement to deliver a copy of the birth certificate and to provide information on A's enrollment at Montessori Works.
- f. After the May 2020 Trial dates were adjourned due to the pandemic, rescheduling the hearing required four appearances: an attendance at Assignment Court, a motion by Indira's counsel to be removed from the record, and two subsequent scheduling calls with Justice Ricchetti in August 2020. The matter could have (and should have) been dealt with at the initial July 2020 Assignment Court date but for Indira's conduct requiring her counsel to bring a motion to be removed and her subsequent refusal to consent to an early rescheduled hearing date.
- g. Kevin's September 2020 motion for Skype parenting time (the costs of which were specifically reserved to the Trial judge), should not have been required. This was basic parenting contact that should have been facilitated by Indira once the pandemic limited his ability to travel to Ontario.
- h. Indira's hiring of new Trial counsel two days before the start of the Trial hearing resulted in numerous breaks during the first week to allow counsel to get up to speed. Multiple documents that had been served months before had to be again provided to Indira's counsel, some of which were her own documents.

- i. The Friday afternoon of the first week was lost to Indira's counsel's motion to be removed from the record after it was revealed that several documents tendered by her were forged or manipulated.
- j. The following Monday was lost to Indira's agent's request for a brief adjournment after Indira fled to India without any prior notice.
- k. Trial time was expended to address Indira's non-compliance with Orders made during the course of the Trial, including Orders that she produce a copy of A's birth certificate, confirmation of her address and proof of her intended return travel from India.
- l. Several hours of Trial time were devoted to addressing Indira's shifting positions on paternity and whether she consented to A's birth registration being amended to include the father.

44. I am prepared to reduce the Applicant's account by approximately \$10,000 to reflect some very minor duplication within the Bill of Costs, and one of the summer 2020 attendances that was attributable only to the Covid19 suspension of regular court services.

Ability to Pay

45. In setting this amount of costs, I have considered Indira's claim that she is destitute and unable to pay any award of costs. She does not directly ask that her inability to pay an award of costs be considered, but she does write at some length about her impecuniosity and that she has already or will declare bankruptcy. She does not attach her own Bill of Costs, but she reflects (albeit inconsistently) her own costs as being in the same range as those incurred by Kevin.

46. A party's ability to pay an award of costs can be considered when deciding a claim for costs, see *MacDonald v. Magel* (2003) 67 O.R. (3d) 181 (Ont.C.A.) but modest means alone is not a barrier to an award. As I wrote in *Mohr v. Sweeney* 2016 ONSC 3338, citing *Balaban v. Balaban*, 2007 CanLII 7990, those who can least afford to litigate should be the most motivated to seriously pursue settlement, and to avoid unnecessary proceedings.

47. The purpose of considering a litigant's modest means is to achieve fairness and proportionality, and to ensure that cases are dealt with justly. Conduct that has been found to have been carried out in bad faith is conduct outside of these principles. Family court processes are designed to help parties peaceably resolve, or have decided on their merits, the legal issues arising from the end of an intimate relationship. A bad faith actor abuses such processes and, in my view, forfeits her ability to claim a reduction in costs due to limited means.

48. When I review these facts as a whole, consider the purposes of a costs award, Kevin's Offer to Settle, Indira's bad faith conduct and the Rule 24(12) factors, I can find no principled basis on

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SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Kevin William Lenihan

Applicant

- and -

Indira Shankar

Respondent

COSTS ENDORSEMENT

MCGEE J

Released: March 1, 2021