

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ales Hurda, Applicant

AND

Mary Ann Hurda, Respondent

BEFORE: Justice Mark Shelston

COUNSEL: Michael Wonham, for the Applicant

Graeme Fraser, for the Respondent

HEARD: March 27, 2018 (at Ottawa)

ENDORSEMENT

Overview

[1] Both parties have brought motions seeking various orders for temporary relief. The applicant seeks a temporary order for the following relief:

- a) an order that the respondent provide disclosure within 60 days;
- b) an order that the applicant have exclusive possession of the matrimonial home and its contents commencing April 1, 2018; and
- c) an order for costs.

[2] The respondent seeks a temporary order for the following relief:

- a) an interim order for periodic spousal support effective retroactive to November 2016 and secured by life insurance;
- b) an interim order for interest in accordance with the *Courts of Justice Act*; and
- c) an order for costs in a substantial indemnity basis.

[3] At the commencement of the motion, the parties advised that the issue of disclosure was resolved and that the parties agreed that effective June 25, 2018, the applicant was to be granted interim exclusive possession of the matrimonial home with the following conditions:

- a) the respondent shall be permitted to remain in the matrimonial home until June 25, 2018, and the applicant will assume all expenses related to the matrimonial home effective immediately;
- b) the parties shall divide all personal property of the matrimonial home, including personal property removed from the matrimonial home by the respondent and kept in her Dymon storage unit; and
- c) regarding the division of the household contents, the following procedure will be adhered to:
 - i. the respondent will provide the applicant with a list of the personal property she would like to take from the matrimonial home within 30 days;
 - ii. the applicant will provide the respondent with a reply within a further 10 days, followed by negotiations, if necessary;
 - iii. if the parties are not in agreement within a further 20 days, the parties will retain Bytown Auctioneers to appraise the household and storage goods and the disputed items will be shared until each party has equal value; and
 - iv. the sharing shall be done by alternating picks of the items with the party whose personal property is less having the first pick.

[4] Further, the parties agree that commencing on June 25, 2018, the applicant shall pay the respondent the sum of \$500 per month as spousal support and he shall continue to assume all expenses related to the matrimonial home.

[5] Based on the consent of the parties, I grant the relief as set out in paragraph 3 and 4 of this endorsement.

[6] The parties attended a settlement conference on August 2, 2017 at which time the respondent was granted permission to bring a motion after the settlement conference for interim spousal support and that the parties were to file their Trial Schedule Endorsement forms by September 8, 2017 and the matter was to be replaced on the trial list. A further settlement conference was to be scheduled after a decision was rendered on the issue of spousal support.

[7] The matter was not placed on the trial list and no Trial Schedule Endorsement form was filed and signed by a judge as required by the *Family Law Rules*. This matter has been before the court since 2015. In the circumstances, I order that this matter be placed on the next available trial sittings, being January 2019, and that the parties attend a settlement conference to take place on or before October 30, 2018, at which time the parties will complete the Trial Schedule Endorsement form to be signed by the judge. I order the applicant to provide a copy of this endorsement to the trial coordinator's office to ensure that this matter is placed on the trial sittings for January 2019

[8] The remaining issues are:

- (a) the respondent's request for interim spousal support for the period commencing November 2016 to December 2017;
- (b) whether the spousal support of \$500 per month payable by the applicant to the respondent should start in January 2018, as requested by the respondent, or June 25, 2018, as requested by the applicant;
- (c) life insurance to secure spousal support; and
- (d) costs.

Spousal support

[9] The parties married on August 30, 1975 and separated on May 1, 2009. There were three children born during the marriage in the years 1982, 1984 and 1988. All children are now adults and independent. At the time of this motion, the applicant is 66 years of age and the respondent is 63 years of age.

[10] The respondent has a grade 12 high school diploma and worked as a clerk with the federal government from 1972 until 1985, with the exception of two periods of maternity leave

related to the birth of the first two children. In 1985, she resigned from her position, was a full-time homemaker, wife and mother and did not work outside of the home.

[11] The applicant graduated from Algonquin College and the University of Ottawa ultimately leading him to obtain Professional Engineering Certification. The applicant worked at MDS Nordion for over 27 years until he was terminated on May 2, 2013.

[12] Proceedings were commenced in January 2015 raising various issues, including equalization, a request that the respondent repay certain funds and retroactive contribution to household expenses. In March 2015, the respondent signed her answer where she sought periodic spousal support, life insurance, an equalization of the net family property, occupation rent and both parties requested costs.

[13] After separation, the respondent resided with another individual until June 2015 when she moved to live with her son in Kanata. In September 2015, the respondent returned to the matrimonial home which had been occupied by the applicant since separation. Since that time, the parties have been living separately and apart under the same roof, sharing common areas only.

[14] In June 2016, the parties entered into Partial Minutes of Settlement where the applicant agreed that the respondent could receive 50% of the *Family Law Value* of his pension and, commencing February 14, 2016, the applicant would pay the respondent spousal support in the amount of \$2,212 on a temporary without prejudice basis. Further, the parties agreed that as long as the respondent resided in the matrimonial home, she would pay to the applicant 50% of the monthly utility expenses as they were incurred, 50% of the pro rata monthly costs incurred for property taxes and property insurance and that the parties would exchange a list of items that they intended to keep.

[15] In November 2016, the applicant stopped paying spousal support to the respondent. On December 5, 2016, the respondent received the MTA transfer of her agreed-upon share of the applicant's pension. The respondent received some funds from this fund but it was only in June 2017 that she started to receive a monthly amount being \$1,750 per month.

[16] The respondent seeks an order that the applicant pay her a lump sum retroactive spousal support payment of \$31,038 based on a monthly payment of \$2,217 from November 2016 to and including December 2017.

[17] The applicant submits that her income earned in 2017 was based on earning \$1,750 per month from a RIF (as of June 2017) and \$796.65 per month from the Canada Pension Plan, for a total monthly income of \$2,546.65.

[18] The applicant submits that his income in 2017 was \$52,596.75 from CPP, OAS and his employment pension, and in 2018, he will have a slight increase in his monthly pension and he anticipates his annual income to be approximately \$53,000.

[19] Both parties seek to impute income to the other. Neither party has provided their 2017 income tax returns.

Spousal support from November 2016 to December 2017

[20] Both parties agree that the respondent has a *prima facie* entitlement to spousal support.

[21] The respondent is seeking a lump sum amount of retroactive spousal support while the applicant submits that the claim for retroactive support should not be carved out of all claims outstanding between the parties as it would be prejudicial to the applicant to be required to pay a lump sum payment prior to all claims being adjudicated at the same time by the trial judge.

[22] Further, the applicant submits that based on the parties' actual incomes earned in 2017, the amount of spousal support that could be payable should be offset by the amount that the applicant is assuming towards the respondent's contribution to the household expenses.

[23] The applicant earned \$106,127 in 2016 and the respondent earned \$45,316. The parties signed a Partial Minutes of Settlement in June 2016 that formed the basis of the temporary order dated July 6, 2016. The Partial Minutes of Settlement contain the following clause:

4. Spousal support payments shall cease immediately upon receipt of the Nordion lump sum payment to Ms. Hurda for her share of Mr. Hurda's pension. Ms. Hurda may proceed to schedule a motion date for ongoing spousal support only after Mr. Hurda's monthly pension amount has been adjusted.

5. So long as Ms. Hurda continues to reside in the matrimonial home, she will promptly pay Mr. Hurda, 50% of the monthly utility expenses, as they are incurred, and bills showed to her promptly by Mr. Hurda; with respect to property taxes and property insurance, she will pay 50% of the pro rata monthly costs incurred to Mr. Hurda, who will provide her with copies of the statements received in this regard. Mr. Hurda will not deduct any of these amounts from his monthly spousal support payments made to Ms. Hurda.

[24] The MTA pension transfer of \$495,018.58 occurred on December 5, 2016. The applicant unilaterally ceased paying the support in November 2016. Based on the temporary order of July 6, 2016, the applicant was required to pay the \$2,212 per month in spousal support on the first day of each month until the respondent received of the lump sum transfer. Since the lump sum payment was received on December 5, 2016, the applicant owes the respondent the sum of \$2,212 of spousal support for the months of November and December 2016.

[25] As of December 5, 2016, the issue of variation of the temporary order was in play. Since the pension was divided on December 5, 2016, the respondent could have brought a motion to determine ongoing spousal support. No motion was brought until December 22, 2017. However, the parties attended a settlement conference on August 2, 2017 at which time the issue of spousal support was canvassed and an order was issued by the judge permitting the bringing of a motion to deal with temporary support pending trial.

[26] In her affidavit dated March 20, 2018, the respondent states that despite the court order requiring the applicant to provide the respondent with documentary evidence regarding her contribution to the household expenses, the applicant stopped providing the expense details in September 2016 and did not provide the information until July 3, 2017, four weeks prior to the settlement conference. The next disclosure occurred on January 10, 2018 and February 16, 2018. The applicant filed an affidavit dated March 22, 2018 in reply to the respondent's affidavit of March 20, 2018 and did not deny the respondent's allegations regarding the disclosure of the household expenses. Consequently, I find that the applicant did not comply with the terms of the temporary order dated July 6, 2016 regarding timely disclosure.

[27] I have reviewed the expense sheets prepared by the applicant regarding the respondent's share of the household expenses and filed in these proceedings. From the documents, I cannot conclude the exact amount owed by the respondent. In the circumstances, on a without prejudice basis, I determine that the respondent owes the applicant \$5,000 from January 2017 to December 2017. However, at trial, the amount owed by the respondent will be determined as will a possible variation of this support order.

[28] With respect to spousal support in 2017, I find that the parties' incomes have changed based on the evidence before me. I decline to use the 2016 line 150 income of the parties when the best evidence available results in a different finding as to the parties' incomes on a temporary basis. Further, at trial the judge will have the complete information for the parties' respective incomes and can vary this order in the final trial decision.

[29] I find that in 2017 the applicant's income was \$52,596.75 based on the evidence available at this time.

[30] With respect to the respondent's income, the applicant submits that I should impute an income, originally of approximately \$28,000 a year. He amended that request by letter dated April 3, 2018 to \$26,520 a year or \$2,210 per month. Currently, the respondent is receiving approximately \$21,000 a year or \$1,750 per month from such payment. I decline to impute an income to her of greater than \$1,750 per month. That issue is best reserved for the trial judge upon the production of expert evidence regarding a reasonable amount to be drawn from the lump sum payment.

[31] In 2017, the respondent received Canada Pension Plan benefits of \$9,560. She also received from June 2017 to December 2017 the sum of \$1,750 per month from her RIF totalling \$12,250. As well, the respondent indicated that she is able to access irregular amounts from the RIF in the first few months of 2017. In March 2017, the respondent withdrew \$1,250 from the RIF to pay Amanda's first month rent. Despite indicating in her affidavit material that she drew irregular amounts for the first few months of 2017, the respondent has not indicated exactly what she drew from that fund. Based on the evidence that I have, her total income in 2017 was \$21,810. However, I believe it is reasonable to increase that amount to a total income in 2017 to

\$24,000 based on the admission that irregular amounts were withdrawn in the first few months of 2017. Again, the trial judge will be in a better position to determine the respondent's total income in 2017 at the trial.

[32] Based on my findings as to the parties' incomes, the *Spousal Support Advisory Guidelines* provide a range of spousal support as follows:

- a) Low \$894
- b) Mid \$1043
- c) High \$1192

[33] This is a long-term marriage where the respondent has an entitlement to spousal support on a *prima facie* basis both on a compensatory and non-compensatory basis. She is currently significantly in debt and has medical issues. She will be moving out to her own accommodations. The respondent has significant credit card debts while the applicant has none. I find that the respondent was entitled to be paid spousal support as of November 2016 going forward. She has received no support. The applicant was aware that an order was possible to cover the period after the pension was divided.

[34] In the circumstances, I find that the midrange of spousal support will provide the applicant with 52% of the net disposable income and the respondent with 48% of the net disposable income. I order that commencing January 1, 2017 up to and including June December 1, 2017, the respondent should pay spousal support to the applicant in the amount of \$1,043 per month.

[35] Coupled with the support owed for November and December 2016, I find that the applicant owes the respondent the sum of \$16,940 from November 2016 to December 2017. I find that the respondent should contribute to the carrying expenses of the home. I deduct the sum of \$5,000 representing the respondent's share of the household expenses on a without prejudice basis.

[36] I order that the applicant pay to the respondent the sum of \$11,940 no later than May 11, 2018 for the support owing from November 2016 to December 2017.

Commencement date of support in 2018

[37] The respondent seeks the commencement date of the agreed-upon spousal support of \$500 per month to be January 2018 while the applicant submits that the sum should start as of June 25, 2018, when the applicant vacates the matrimonial home.

[38] The applicant is paying all of the expenses related to the matrimonial home, save and except the payment made by the respondent to the joint line of credit.

[39] The parties agree that the respondent can remain in the matrimonial home until June 25, 2018. Until that time and after the respondent leaves the matrimonial home, the applicant will be paying all the expenses of the matrimonial home.

[40] The motion was filed on December 22, 2017. At that time, the applicant was put on notice that the respondent was proceeding with her claim for support.

[41] I order the applicant to pay to the respondent spousal support of \$500 per month commencing on January 1st, 2018 pending further order of this Court.

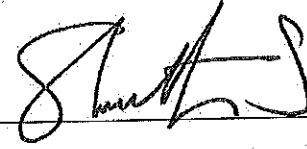
Life insurance

[42] The respondent had sought to secure the spousal support by way of life insurance. In the applicant's financial statement dated March 15, 2018, the applicant indicated that he had a Sun Life insurance policy number 126983173 where he has designated the respondent as the beneficiary of a policy with a face value of \$35,000. I order that the applicant maintain the respondent as the beneficiary of said policy pending further order of this Court

Costs

[43] I direct that the parties should attempt to resolve the issue of costs. If they are unable to do so by April 12, 2018, I order that the applicant provide his costs submissions not to exceed three pages plus a detailed bill of cost and any offers to settle by April 20, 2018. The respondent

is to provide her costs submissions by April 27, 2018 with said submissions not to exceed three pages plus a detailed bill of costs and any offers to settle.



Shelston J.

Date: April 06, 2018

COURT FILE NO.: FC-15-164
DATE: 2018/04/06

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: Ales Hurda, Applicant

AND

Mary Ann Hurda, Respondent

BEFORE: Justice Mark Shelston

COUNSEL: Michael Wonham, for the Applicant

Graeme Fraser, for the Respondent

ENDORSEMENT

Shelston J.

Released: April 06, 2018

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ales Hurda

AND

Mary Ann Hurda

BEFORE: Justice Mark Shelston

COUNSEL: Michael Wonham, for the Applicant

Graeme Fraser, for the Respondent

HEARD: In Writing (at Ottawa)

COSTS ENDORSEMENT

[1] The parties were unable to resolve the issue of costs and they have provided me with their submissions. The respondent seeks reimbursement of her actual costs incurred, being \$15,504.13 inclusive of disbursements and HST. The applicant's position is that there has been divided success. His bill of costs indicates that his actual costs incurred total \$5,846.85 all in.

[2] At the motion, the parties agreed on certain temporary relief. The issues that required adjudication were the respondent's request for interim spousal support for the period commencing November 2016 to December 2017, whether the spousal support of \$500 per month payable by the applicant to the respondent should start in January 2018, as requested by the respondent, or June 25, 2018, as requested by the applicant, the amount life insurance to secure spousal support and costs.

[3] I granted the respondent periodic spousal support of \$2,212 for November and December 2016, \$1,043 per month for January through December 2017, \$500 per month commencing January 2018 and life insurance in the amount of \$35,000.

Jurisprudential and legislative framework

[4] In deciding costs, I am guided by the principle that I am not to necessarily reimburse the successful party for every dollar spent on legal fees but the award of costs must be fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings (see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)).

[5] Fixing costs is not a simple mechanical exercise (see *Delellis v. Delellis*, 2005 CanLII 36447, (Ont. S.C.)).

[6] In *Serra v. Serra*, 2009 ONCA 395, the Court held that family law costs rules are designed to foster three important principles:

- (a) to partially indemnify successful litigants for the cost of litigation;
- (b) to encourage settlement; and
- (c) to discourage and sanction inappropriate behaviour by litigants.

[7] A fourth fundamental purpose for costs is to ensure that the primary objective of the rules is met and that cases are dealt with justly (see *Bridge v Laurence* 2017 O.J. No. 1316 Divisional Court).

[8] The initial assessment of success should be made in relation to the pleadings and specific relief claimed at trial, if it is different (see *Johnstone v Locke* 2012 O.J. No. 1154).

[9] Under Rule 24 (1) of the *Family Law Rules*, there is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.

[10] Rule 24 (5) states that in deciding whether a party has behaved reasonably or unreasonably, the Court shall examine:

- (a) the parties' 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.

[11] Rule 24 (11) states that a person setting the amount of costs shall consider:

- (a) the importance, complexity or difficulty of the issues;
- (b) the reasonableness or unreasonableness of each party's behaviour in the case;
- (c) the lawyer's rates;
- (d) the time properly spent on the case, including conversations between the lawyer and the party or witness, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of order;
- (e) expenses properly paid or payable; and
- (f) any other relevant matter.

[12] The respondent submits that the preferred approach under the *Family Law Rules* is to have cost recovery generally approach full recovery so long as a successful party has behaved reasonably and costs are proportional to the issues and the result. Further, the Court should fix costs in favour of the successful party in an amount that approaches full recovery.

[13] Once a court determines that one party is liable to pay costs, the court must fix the amount at some figure between a nominal sum and full recovery. The *Family Law Rules* demand flexibility in examining the list of factors in sub-Rule 24 (11) without any assumption about categories of costs (see *Sims-Howarth v. Bilcliffe* 2000 CarswellOnt 299).

Analysis

Successful party

[14] Under the *Family Law Rules*, the successful party is presumptively entitled to costs.

[15] The applicant's position was that the claim for retroactive support should be left to the trial judge and that the amount of spousal support that could be payable should be offset by the amount that the applicant is assuming towards the respondent's contribution to the household expenses.

[16] The respondent's position was that she sought the sum of \$2,212 per month from November 2016 to December 2017 and \$500 a month starting January 1, 2018.

[17] Success should be determined taking into consideration the parties' pleadings, position at the motion, offers to settle and eventually the result.

[18] On spousal support, the applicant offered to pay \$2,212 a month in November 2012, \$600 a month from December 2016 to June 2018, \$500 per month commencing July 1, 2018 and \$350 per month as of January 2019. However, these amounts were to be offset by \$5,748.28 of carrying costs plus half of the carrying costs from February to June 2018 and half of the interest payments on the line of credit from November 2016 to June 2018.

[19] The respondent's first offer requested \$2,212 per month commencing November 2016. The second offer sought a lump sum of \$30,000 without tax consequences for the period of November 2016 to December 2017 and effective January 1, 2018, the sum of \$500 per month

[20] Neither party's offers addressed the quantum of life insurance.

[21] When I compare the parties' positions at the motion, the offers to settle and the ultimate decision, the respondent was the more successful party and is presumptively entitled to costs.

[22] However, neither of the respondent's two offers were better than the ultimate decision. They were substantially more than what was eventually ordered. Consequently, I exercise my discretion to find that the respondent is entitled to a reasonable amount of costs and not costs on a full recovery basis.

The importance, complexity or difficulty of the issues

[23] I find that the issues were important to the parties but that they were not complex or difficult.

The reasonableness or unreasonableness of each party's behaviour

[24] The respondent submits that the conduct of the applicant was unreasonable. Rule 24(5) of the *Family Law Rules* provides that in deciding whether a party has behaved reasonably or unreasonably, the Court shall examine:

- (a) the parties' 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 withdraw or failed to accept.

[25] Both parties made offers to settle. The applicant did not accept either of the respondent's offers to settle. Since my decision was less than the amount of support contained in the respondent's two offers to settle, I find that that was a reasonable decision by the applicant. I have also considered the reasonableness of the offers made by the applicant. In his first offer, he offered no spousal support based on the applicant, assuming 50% of the respondent's expenses for the matrimonial home and line of credit and \$550 per month commencing May 1, 2018 through December 2018 and thereafter \$300 per month.

[26] The applicant's second offer increased the amount of support but deducted certain other expenses. With respect to the second offer to settle made by the applicant, he did not specify the amount of what half of the household expenses from February 2018 through June 2018 were nor the amount of 50% of the interest on the joint line of credit paid from November 1, 2016 through June 30, 2018.

[27] In any event, I do not find that the offers made by the applicant amount to unreasonable behaviour.

Lawyers' rates and disbursements

[28] I find that the hourly rates of the lawyers are reasonable.

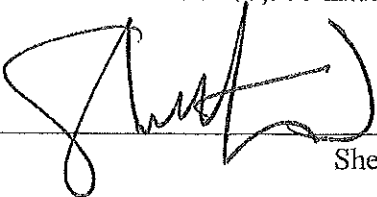
The time properly spent on the case

[29] I note that both counsel spent approximately the same amount of time with respect to this motion, with the applicant's counsel indicating 25 hours while the respondent's counsel spent 29 hours.

Disposition

[30] In assessing costs, I am to be fair, proportional and reasonable as to what the losing party would expect to pay in costs. This motion did not require questioning. Both parties filed detailed affidavits and factums. The issues at the motion were quite narrow in scope based on the previous consent reached by the parties.

[31] I order the applicant to pay to the respondent costs in the amount of \$7,500 inclusive of disbursements and HST.



Shelston J.

Date: May 3, 2018

COURT FILE NO.: FC-15-164
DATE: 2018/05/03

ONTARIO
SUPERIOR COURT OF JUSTICE

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Graeme Fraser, for the Respondent

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Shelston J.

Released: May 3, 2018