Family Law News

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Izyuk v. Bilousov [2011] O.J. No. 5814, Trimming Bird Wings in Hamilton

Justice Pazaratz, begins this recent decision from the Family Court in Hamilton by quoting the Red Bull energy drink advertisement slogan, "Red Bull gives you wings". At a costs hearing, following a 17 day custody trial, a self represented litigant submitted that "Legal aid gives you Wings". What the litigant was suggesting was that a legally aided party can do whatever she wants in court without worrying about her fees or the costs to the opposing party. In the costs hearing, Justice Pazaratz was faced with determining whether or not to clip the wings of the legally aided party when determining the proper award.

The self-represented litigant, the respondent in this case, was the father of a three year old child. He was awarded sole custody of that child in this protracted litigation. The mother of the child, the Applicant, was represented by counsel and qualified for legal aid as a result of her poor financial situation as she was in receipt of Ontario Works. The Applicant submitted that she should be excused from costs being payable to the Respondent because of her poor financial situation. According to Justice Pazaratz, the Respondent was 'overwhelmingly successful' at the trial stage. Prior to trial, in June 2011, the Applicant mother had temporary residence of the three year old child and permitted the Respondent limited non-overnight access. Her position was bolstered by a report prepared by the Office of the Children's Lawyer. However at the trial, Justice Pazaratz found that the Applicant mother had unilaterally terminated a viable co-parenting arrangement when the child was 9 months old; she lied at the motions stage to marginalize the Respondent and to create a self serving status quo; she misled the OCL investigator; she engaged in alienating behaviours to shut the Respondent out of the child's life; she demonstrated questionable decision making in vitally important areas for the child; and she was unprepared to promote meaningful and beneficial contact between the father and child. She had definitely not put herself in favour to be successful at the trial or in the aftermath of a costs hearing. The Respondent was seeking costs in the amount of $15,000 following the trial. The Applicant submitted that costs should be minimal as a self-represented litigant perhaps in the range of $3,000 and that full or substantial recovery was not appropriate.

In his decision, Justice Pazaratz, referred to *Family Law Rules* 18 and 24 that address costs. He examined all of the offers made by each party and found that none of the Applicant's offers triggered any cost consequences in her favour because until the 11th day of trial she continued to propose sole custody of the child in her favour. The Respondent obtained a result that was, in every respect, as favourable or more favourable than the terms of his offers. The trouble was that none of those offers were served at least seven days before the trial or hearing date as required by Rule 18(14)(2) and as a consequence the Respondent lost out on the "full recovery" presumptions of Rule 18(14).

Nonetheless, Justice Pazaratz found that the Respondent's offers were still relevant to the issue of costs pursuant to Rule 18(16) as it allows a court to "take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply". He found that the Respondent's offers were, "comprehensive and carefully crafted". Reasonableness of the parties was considered; The Respondent was found to have acted reasonably as parent and litigant, on the other hand, the Applicant was found to have acted unreasonably. An examination into the issue of bad faith is undertaken and the case of *S.(C.) v. S.(M.)*(2007) 38 R.F.L. (6th) 315 (Ont SCJ), affirmed 2010 ONCA 196 is quoted. Justice Pazaratz found that most of the Applicant's behaviour with respect to the trial did not cross the threshold of bad faith, with a few exceptions like speaking to the family doctor in a language that the Respondent could not understand and exercising a self-help remedy of taking a weekend with the child without prearranging make-up time for the Respondent.

Justice Pazaratz takes no issue with the Respondent's disbursements at the cost hearing but instead identifies the biggest challenge as the Respondent's claim for costs for the time and work he expensed on his own file. The Respondent claimed fees for 390 hours

of work at a rate of $35.00 per hour. Of course, disputed by the Applicant based on the fact that her lawyer spent only 154 hours of work on the file. The Applicant's limited ability to pay was one of the relevant factors in determining the costs award. However, Justice Pazaratz looks to the three primary objectives of costs orders:

> 1. To partially indemnify successful litigants for the cost of litigation;
> 2. To encourage settlement;
> 3.To discourage and sanction inappropriate behaviour by litigants.

In a full-throttle head-on fashion he writes at paragraph 58:

> " The dynamics of this file are all too common, and cry out for judicial awareness. In a troubled economy we are seeing more self-represented parties in Family Court, and certainly more people with limited finances. Inevitably, these ingredients create greater strains on the administration of justice. Combined with limited judicial resources, the need to encourage settlement and discourage inappropriate behaviour by litigants has never been more pressing"

He found that the Applicant conducted herself as if her legal aid certificate amounted to a blank cheque. She fought every issue and pursued every dubious allegation to the bitter end. She made up evidence, and defied court orders. He states,

> "There have to be consequences. Either we sanction this irresponsible and destructive behaviour, or we invite more of the same." ..."No litigant should perceive they have "wings"- the ability to say or do anything they want in court, without consequences."

Justice Pazaratz recognized the reality of the situation and the fact that the Applicant would likely not be able to satisfy a costs order until she was able to get back on her feet financially. The issue of a set off against child support was discussed. However, since the Applicant was in receipt of Ontario Works, and the child support payments were deducted from her social assistance, it would be the government that would end up paying the costs award on behalf of the Applicant rather than her. If a set off were permitted, it would act as disincentive for the Applicant to remove herself from the public purse because the tax payers would be paying her legal bill. After the *obiter dicta*, Justice Pazaratz quickly ends by ordering that the fairest hourly rate is $100 and that compensation for 200 hours would be permitted but by applying all of the other required factors, the costs were reduced to $10,000. The Respondents disbursements were not reduced and in the end the Applicant was required to pay $11,500 inclusive of fees, disbursements and HST.

This case teaches and reminds family law practitioners of a few lessons.

> 1. First and foremost make frequent and early offers to settle. If your offer is served seven days in advance of the trial you will be entitled to the presumption of costs on a full recovery.
> 2. Even if your client is impecunious now, counselling them to be reasonable is a must as costs can be ordered and hang as a black rain cloud until they are collectible.
> 3. Self help remedies are never acceptable and may constitute bad faith thus increasing the cost award against a party that utilizes these remedies.

Furthermore, this case provides a new starting point when assessing what the costs to a self-represented litigant might be. $100 per hour was found to be a fair hourly rate for the Respondent. You may want to counsel your clients that this amount could easily be ordered if they are not realistic in their position. *Izyuk v. Bilousov*,levels the playing field in litigation between represented and self-represented litigants, as well as rich and poor litigants. Costs can be ordered against anyone if they act unreasonably in litigation as having a lawyer did not insulate the Applicant against a very large costs award. Most interestingly, this case lends support to altering the traditional thinking in Canada that self-represented litigants could only recover their disbursements, as they did not have an indemnifiable expenditure on lawyers' fees to recover. The writers believe that *Izyuk v. Bilousov,* is part of the evolving common law and will no doubt be relied upon as precedent jurisprudence. ■

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