

ONTARIO COURT OF JUSTICE

B E T W E E N :

SAJJAD AHMED,
Applicant,

— AND —

YASMINE SHAD,
Respondent.

Before Justice June A. Maresca
Heard on 16 October 2006
Reasons for Judgment released on 14 November 2006

CIVIL PROCEDURE — Costs — Assessment of quantum — Aggravating factors — Unreasonable behaviour — Child abduction — Mother’s abduction of children from California and her attempt to co-opt Ontario court to further her unlawful custody was conduct that did not attract costs on “substantial indemnity” basis, but it was pertinent aggravating factor in assessing costs against her.

CIVIL PROCEDURE — Costs — Assessment of quantum — Discretion of court — Bill of costs from lawyer for successful father was riddled with unexplained arithmetic inconsistencies — It also failed to indicate level of lawyer’s experience or to set out any breakdown of alleged 70 hours for case preparation — Despite [rule 24 of Family Law Rules](#), judge retains discretion to fix costs in amount that he or she feels appropriate in totality of circumstances — Of bill claiming \$17,688.97, inclusive of G.S.T., court assessed recovery at \$10,400.

CIVIL PROCEDURE — Costs — Entitlement — Misconduct in or abuse of litigation process — Unreasonable behaviour — Mother who abducted children from their home abroad and brought them to Ontario had behaved unreasonably (but not necessarily in “bad faith”) in that (1) she had scooped children from abroad without notice to father; (2) she had dishonestly tried to enlist aid of Ontario court by seeking custody on *ex parte* basis; and (3) when father appeared in Ontario, she refused him unsupervised access, claiming that he was “flight risk” — Parents must understand that they cannot unilaterally remove children from their home jurisdiction without extremely clear and compelling reasons for doing so — Costs are one way to censure and discourage such behaviour — In this case, costs award in father’s

favour must be made against kidnapping mother.

CIVIL PROCEDURE — Costs — Jurisdiction — Costs generated in earlier steps in case — Mother who abducted children from California to Ontario had promptly launched her own claim for custody before Ontario court and managed to secure interim *ex parte* order — Within 6 weeks of abduction, father had launched claim for children’s return under (Hague) [Convention on Civil Aspects of International Child Abduction](#), which was portion of case heard by judge who was now asked to decide costs — This judge had not presided over earlier appearances or steps in mother’s custody claim and therefore had had no jurisdiction to award costs with to those steps of case — Judge therefore confined herself to deciding costs for appearances under Hague Convention only.

STATUTES AND REGULATIONS CITED

[Convention on Civil Aspects of International Child Abduction](#), [1983] Can. T.S. No. 35.
[Family Law Rules](#), O. Reg. 114/99 [as amended], [rule 24](#), [subrule 24\(1\)](#), [subrule 24\(8\)](#),
[subrule 24\(10\)](#) and [subrule 24\(11\)](#).

CASES CITED

[MacDonald v. Magel](#) (2003), 67 O.R. (3d) 181, 176 O.A.C. 201, 231 D.L.R. (4th) 479, 43 R.F.L. (5th) 149, [2003 CanLII 18880](#), [2003] O.J. No. 3707, 2003 CarswellOnt 3606 (Ont. C.A.).

Shawn M. Philbert for the applicant father
Anita K. Kania for the respondent mother

[1] JUSTICE J.A. MARESCA:— On 16 October 2006, I gave oral reasons for my decision that the respondent mother had unlawfully removed the children, Faizah and Hasan Ahmed, from their home state of California, U.S.A. The parties were permitted to make written submissions as to the issue of costs. On the basis of those submissions, the following award of costs is made.

[2] The respondent mother unlawfully removed the children from their habitual residence, without the knowledge of the applicant father on 22 August 2006. Proceedings were brought by each of the parents, in Brampton and in California, for custody of the children. The applicant father’s application under the (Hague) [Convention on Civil Aspects of International Child Abduction](#), [1983] Can. T.S. No. 35, was brought on 4 October 2006. The application was initially before the court on 10 October 2006, at which time it was adjourned to 16 October 2006 for argument.

[3] There were a number of procedural irregularities in this case, on the part of both parties. I do not propose to deal with these.

[4] [Subrule 24\(10\)](#) of the [Family Law Rules](#), O. Reg. 114/99, as amended, stipulates that costs are to be decided at each step of the proceeding, by the judge who dealt with that step. In my view, I have no jurisdiction to award costs with respect to appearances or steps

over which I did not preside. I therefore confine myself to deciding costs for the appearances of 10 and 16 October only.

[5] Pursuant to [subrule 24\(1\)](#), the successful party is presumptively entitled to costs. In determining the quantum of those costs, the court must consider whether either party has acted in bad faith [[subrule 24\(8\)](#)], as well as the factors enumerated in [subrule 24\(11\)](#).

[6] In this case, there is no question that the applicant father was completely successful in his application. I find no unreasonable behaviour on his part with respect to the litigation. The respondent mother’s conduct was, in my view, unreasonable, but did not amount to bad faith as contemplated by the rule. I may consider her actions under [subrule 24\(11\)](#), but not [subrule 24\(8\)](#).

[7] The mother’s behaviour was, in my view, unreasonable in the following ways:

1. she removed the children from California with no notice to the father;
2. she brought a motion in Brampton for custody on an *ex parte* basis; and
3. she refused to give the father unsupervised access when he came to Toronto to see the children, as she felt he was a “flight risk” — an ironic view, given her own actions.

Although this conduct does not attract costs on a substantial indemnity basis, it is a pertinent aggravating factor in assessing costs.

[8] Counsel for the applicant father submitted a bill of costs that claims \$14,215 for legal fees. It is unclear to me how counsel arrived at this figure, as the hours listed add up to 78 hours, which at the amount of \$250/hr. claimed, would yield a total of \$19,500. Disbursements are claimed at \$663.22, and a further claim is made for airline tickets, car rental, and hotel for the applicant at \$1,794.06 (U.S.). The final amount claimed is \$17,688.97, inclusive of G.S.T.

[9] There is no indication of counsel’s experience level. There is also no breakdown of the time claimed at 70 hours for preparation.

[10] The Court of Appeal in *MacDonald v. Magel* (2003), 67 O.R. (3d) 181, 176 O.A.C. 201, 231 D.L.R. (4th) 479, 43 R.F.L. (5th) 149, [2003 CanLII 18880](#), [2003] O.J. No. 3707, 2003 CarswellOnt 3606, acknowledged that, despite [rule 24](#), the trial judge retains discretion to fix costs in an amount that he or she feels appropriate in all of the circumstances. It is also clear that the court may consider the financial circumstances of the party against whom a costs order is made. I have no financial statement from either party.

[11] In my view, an award of costs in favour of the applicant father must be made in this case. Parents must understand that they cannot unilaterally remove children from their home jurisdictions without extremely clear and compelling reasons for doing so. The kidnapping of children is to be censured and strongly discouraged.

[12] In all of the circumstances, the following award of costs in favour of the applicant

father is made:

1. For legal fees	\$9,000
2. For disbursements	\$400
3. For costs incurred	\$1,000
TOTAL:	\$10,400

[13] Costs are to be paid within 60 days.