CITATION: Urbisci v. Urbisci, 2011 ONSC 3
COURT FILE NO.: 03-88/10
DATE: 20110104

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Franco Urbisci and Floriana Tetford, Applicants

AND:

Maria Urbisci, Trillium Health Centre, Stephania Urbisci, also known as Stefania Urbisci and The Public Guardian and Trustee, Respondents

BEFORE: D. M. Brown J.

COUNSEL: Franco Urbisci and Floriana Tetford, in person

S. Philbert, for the Respondent, Maria Urbisci

J. Herszkopf, for the Respondent, Stephania Urbisci

D. Bur, for the Public Guardian and Trustee

HEARD: November 2 and December 2, 2010; with subsequent written cost submissions.

REASONS FOR DECISION - COSTS

I. Costs on a contested *Substitute Decisions Act* application: positions of the parties

[1] In my Reasons released November 8, 2010, I dismissed the application of the applicants for an order under section 79(1) of the *Substitute Decisions Act* that Maria Urbisci attend a capacity assessment and I directed the parties to attend a mediation on or before November 30, 2010.

[2] At the request of Maria Urbisci I held a further hearing on December 2, 2010. On that day Maria Urbisci brought a cross-motion on short notice. I also was advised that the parties had not attended the ordered mediation. I did not accept Mr. Philbert's submission that Maria Urbisci's medical condition prevented her participation in the mediation. I continued my order that the parties to this proceeding must attend a mandatory mediation under Rule 75.1 of the *Rules of Civil Procedure*. I ordered that no party to this proceeding may take any further step in this proceeding, including initiating or continuing a motion, prior to the completion of the mediation which I have ordered. I directed that the claim by Maria in her cross-application for

partition and sale of the matrimonial home be dealt with in the context of her matrimonial litigation, not in this proceeding. Finally, I set a timetable for written cost submissions.

[3] The applicants submitted that they should be awarded costs on a full/substantial indemnity basis ($43,943.94), or alternatively on a partial indemnity basis ($34,011.34), or alternatively each party should bear its own costs. The applicants submitted that they were successful on their application. Of course, they were not. I dismissed their primary request for relief.

[4] Maria Urbisci submitted that she should be awarded costs against the applicants on a full indemnity basis ($42,386.03) or, alternatively, on a partial indemnity basis ($26,540.61). Maria contended that the applicants were not entitled to any costs.

[5] The respondent, Stefania Urbisci, sought costs against the applicants on either a full indemnity ($11,752.00), substantial indemnity ($11,752.00) or partial indemnity ($8,226.40) basis.

[6] The respondent, Maria Urbisci, made a Rule 49 offer prior to the hearing of the main application/cross-application on November 2, 2010; the applicants did not. Given the terms of disposition of the November 2 matters, the cost consequences of Rule 49 are not engaged.

II. Analysis

[7] The main issue before me on November 2, 2010 was the applicants' request that I order Maria Urbisci to undergo a capacity assessment. Although a few other issues were raised by the parties, most of the filed materials and most of the oral submissions were directed towards that primary issue. I dismissed the applicants' request. Consequently, I see no reason why costs should not follow the cause. Maria Urbisci is entitled to some award of costs against the applicants for the November 2, 2010 matter, as well as the earlier, related attendances before Conway J. and myself.

[8] As to the scale of the award, the principles governing elevated costs articulated by the Court of Appeal in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) must govern. I see no basis to conclude that the applicants' conduct was "reprehensible" as the Court of Appeal used that term, so I conclude that Maria Urbisci is entitled to costs on a partial indemnity scale.

[9] According to the Bill of Costs submitted by Maria Urbisci, her counsel and law clerks spent 128 hours working on the motion. Applicants' counsel and law clerks spent slightly more time, 135 hours. Given the detail of the materials filed on the motion and the relative equivalence of the time incurred by both sides, I conclude that the hours claimed by the respondent are reasonable. Mr. Philbert is a 2002 call. The Bill of Costs seeks $225.00/hour for Mr. Philbert; his full indemnity rate is $350.00. I consider the partial indemnity rate sought for Mr. Philbert to be reasonable, and I see no problem with the $80.00/hour sought for the law clerks.

[10] The disbursements sought by the respondent of $3,090.28 are reasonable.

[11] In the ordinary course I would have awarded Maria Urbisci partial indemnity costs of $26,520.61, as set out in her Bill of Costs. However, a reduction in the award of costs to her is warranted because she failed to attend the mediation which I ordered in my Reasons, and I did not accept her explanation for not attending. Sound policy reasons underpin the application of mandatory mediation under Rule 75.1 to contested litigation involving the *Substitute Decisions Act, 1992*. When a court orders the parties to attend mediation, as I did on November 8, 2010, the parties do not enjoy an option whether or not to comply with the court order. They must comply. Maria Urbisci did not; without justification, as I previously found. As a result, I shall reduce the costs awarded to her by $10,000.00. I recognize that marks a substantial reduction. The magnitude of the reduction simply underscores the need for parties to adhere to court orders and, in the case of contested *SDA* litigation, to participate in court-ordered mediation.

[12] I have taken into account the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1). In addition, I have considered the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

[13] I conclude that an award of partial indemnity costs to Maria Urbisci in the amount of $16,520.61 would be a reasonable one in the circumstances, and I order the applicants to pay Maria Urbisci that amount within 30 days.

[14] As to the costs sought by Stefania Urbisci, she did not file any materials in response on the motion. Although represented by counsel on the motion, Mr. Herszkopf basically concurred with the submissions made on behalf of Maria Urbisici. I conclude that Stefania Urbisci is entitled to an award of costs for her counsel's attendance on November 2, 2010. I fix such costs at $1,500.00 and I order the applicants to pay Stefania Urbisci that amount within 30 days.

D. M. Brown J.

Date: January 4, 2011