

## MEMORANDUM

**TO:** Barrister & Solicitor

**FROM:** Karen Frieday  
Family Law Research Service, under the supervision of **JOHN T. SYRTASH, BEARD WINTER LLP.**

**DATE:** -----

**FILE:** -----

**RE:** Inability to pay order for costs – Rules of Civil Procedure

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### THE LAW

1. Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Section 131(1), *Courts of Justice Act*, R.S.O. 1990, c. C.43, as am.

2. In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
  - (a) the amount claimed and the amount recovered in the proceeding;
  - (b) the apportionment of any liability;
  - (c) the complexity of the proceeding;
  - (d) the importance of the issues;
  - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
  - (f) whether any step in the proceeding was,
    - (i) improper, vexatious or unnecessary, or
    - (ii) taken through negligence, mistake or excessive caution;
  - (g) a party's denial of or refusal to admit anything that should have been admitted;
  - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
    - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
    - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
  - (i) any other matter relevant to the question of costs.

Rule 57.01(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3. Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,
  - (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
  - (b) to award a percentage of assessed costs or award assessed costs up to or from particular stage of a proceeding; or
  - (c) to award all or part of the costs on a substantial indemnity basis.

Rule 57.01(4), *Rules of Civil Procedure*, supra.

4. Costs pursuant to the *Rules of Civil Procedure* should be distinguished from those under the new *Family Law Rules*. Under the new *Family Law Rules*, the concept of the two traditional sets scales of costs (on a solicitor-and-client basis and party-and-party basis) was obsolete. Unlike the *Rules of Civil Procedure*, fixed cost were now the norm not the exception. The new rules also jettisoned the idea of a tariff and the idea of having costs “assessed” by some other Court official. Instead, the new rules now required the Judge who dealt with a specific matter to decide not only the issue of entitlement to costs but also to fix the quantum of costs at some figure between a nominal sum and full recovery, according to criteria in rule 24...Ability or inability to pay costs was not noted anywhere in the *Family Law Rules* as a factor to consider unless it could qualify under the catch-all heading “any other relevant matter” in subrule 24(11). But even there, the ability to pay went to quantum of costs and not entitlement.

*Kearney v. Kearney*, [2001] O.J. No. 3290 (QL) at para. 7, 15 (Ont.C.J.)

5. Pursuant to subrule 1(2), the *Family Law Rules* apply to all family law cases in the Family Court of the Superior Court of Justice and in the Ontario Court of Justice. They do not apply to the Superior Court of Justice in jurisdictions where there is no Family Court. Nonetheless, in applying the broad discretion granted to me with respect to the issue of costs pursuant to section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 [as amended by S.O. 1991, c.46], many of the same principles as are enunciated in the rules apply. A successful party is presumptively entitled to costs. A party who makes an offer to settle that ought to have been accepted usually is entitled to full indemnity costs for time spent after the offer.

*Dietrich v. Franklin*, [2003] O.J. No. 3679 (QL) at para. 2 (Ont.S.C.J.)

6. In *Andrews v. Andrews* (1980), 32 O.R. (2d) 29 at pp. 35-36, 20 R.F.L. (2d) 348 (C.A.) Houlden J.A., set out a non-exhaustive list of factors the court should consider in awarding costs in family law matters:

- (a) the success of the parties. In matrimonial causes success is frequently divided; hence the success of the parties is not as important as in ordinary civil litigation;
- (b) the conduct of the parties prior to the commencement of the litigation. This will not involve an investigation of the “fault” or “blame” for the marriage breakdown. It will, however, include such matters as refusals to provide support for children, or refusals of access without just cause;
- (c) the conduct of the parties during litigation. This will include such matters as unreasonable delay in prosecuting or defending the action, the neglect or refusal to admit something that ought to have been admitted, the use of wrong or defective procedures, the furnishing of wrong or misleading information, and the use of delaying or other improper tactics at trial;
- (d) the income and assets of each party, the relative means of each party to bear his or her own costs, and the effect of the award on the ability of a party to meet the obligations imposed on him or her by the judgment.

*Andrews v. Andrews* (1980), 32 O.R. (2d) 29 at pp. 35-36 (Ont.C.A.)

7. In family law matters, the same approach is used as in other litigation. Costs usually follow the event. However, other factors may also be relevant. In a case with many diverse issues, success is often divided. Success is, therefore, only one factor. The conduct of the parties prior to litigation, during litigation and the income and assets of each party which affect their ability to bear their own or the other party's costs are all the factors recognized as relevant to the costs determination. Unlike other civil litigation, in family cases, the ability to pay a costs order or the effect of a costs award is taken into account as part of the financial arrangement on judgment. In *Schmuck v. Reynolds-Schmuck* (2000), 46 O.R. (3d) 702 at paragraph 13, the Court concluded that the husband's assets and income base was such that he was better able to withstand an award of costs against him and bear his own costs.

*Schmuck v. Reynolds-Schmuck* (2000), 46 O.R. (3d) 702 (QL) at para. 11 (Ont.C.J.)

8. The Court of Appeal in *Tauber v. Tauber* (2000), 48 O.R. (3d) 577 referred to and accepted the considerations elucidated in *Andrews*, supra, with respect to determining costs under the Rules of Civil Procedure. The court also noted, that “the rules with respect to costs in family matters have tended to be somewhat different than in other civil litigation. This court has held that discretionary factors, including the ability to pay, can play a more significant role... where there is a huge disparity in the ability of the parties to pay the costs of the litigation, it is reasonable to consider that factor to be of paramount importance.”

*Tauber v. Tauber* (2000), 48 O.R. (3d) 577 at para. 52-53 (Ont.C.A.)  
*A.M.D. v. A.J.P.*, [2003] O.J. No. 3 (QL) at para. 13 (Ont.C.A.)

9. Where parties have incurred legal costs in order to litigate the issues of custody of and access to a child, and where both parties have acted in a fashion that he or she believed were in the child's best interests, neither should be required to contribute to the other's legal costs. In *Hughes v. McColl*, [1998] O.J. No. 2627 (QL), Aitken J., declined to order costs payable by either party where the parents had both advanced cases that they perceived to be in the child's best interests. Justice Aitken also took "into account that any award of costs against one of the parties will have a significant impact on that party's new spouse and children...I would not want to put any added financial stress on either new marriage and on the children living in either household."

*Hughes v. McColl*, [1998] O.J. No. 2627 (QL) at para. 15, 16  
(Ont.Gen.Div.)

10. A litigant's meagre financial resources do not afford immunity from a costs order but will affect the scale (or quantum) of such a costs award.

*L.C.M. v. C.A.V.*, [2003] O.J. No. 4843 (QL) at para. 6 (Ont.S.C.J.)

**Statutes and Regulations Cited:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43, as am., s. 131(1)

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194., rules 57.01(1), 57.01(4)

**Cases Cited:**

Kearney v. Kearney, [2001] O.J. No. 3290 (QL) (Ont.C.J.)

Dietrich v. Franklin, [2003] O.J. No. 3679 (QL) (Ont.S.C.J.)

Andrews v. Andrews (1980), 32 O.R. (2d) 29 (Ont.C.A.)

Tauber v. Tauber (2000), 48 O.R. (3d) 577 (Ont.C.A.)

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L.C.M. v. C.A.V., [2003] O.J. No. 4843 (QL) (Ont.S.C.J.)