

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
Manuele Monari	)	James S. Marks, for the Applicant
	)	
	Applicant	
	)	
<b>– and –</b>	)	
	)	Tricia Simon, for the Respondent
Mercy Ojo	)	
	)	
	Respondent	
	)	
	)	<b>HEARD:</b> In Writing
	)	

**SHORE J.**

[1] This is a cost decision following my reasons and decision in the Hague Application brought by the Applicant Father for the return of his daughter to Italy. The Father brought the Application following a two-year search for his daughter. The child was only found by chance, when a picture of the child at Niagara Falls was posted by a third party on social media. I found that the Mother wrongfully removed the child from her habitual place of residence (Italy). The child was placed in the care and control of her father and returned to Italy.

[2] I invited the parties to settle the issue of costs between them, failing which they were to provide written submissions, to my attention. I have now received their submissions. The Father is seeking costs of \$42,973.45 (\$28,947 in legal fees, \$10,263.34 in disbursements and costs, such as airfare, accommodations, photocopies, filing fees, and translation services, plus \$3,763.11 in HST). The Mother incurred fees of \$14,843.68 (about half of the Father’s legal fees) and submits that no costs should be awarded as she is of modest means and income and has no ability to pay costs. She specifically advises that although she was awarded property by the Italian courts (including the matrimonial home), the property was transferred to the Father by the Italian court when she left Italy with the child.

[3] For the reasons set out below, I fix costs in the amount of \$42,973.45 payable by the Respondent Mother to the Applicant Father, within 30 days.

**Law:**

[4] Article 26 of the Hague Convention provides that:

*“Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.”.*

[5] This is an appropriate case to direct the Respondent Mother to pay the Applicant Father his costs, including his travel expenses and costs of legal representation in Ontario. In determining the costs, I look to guidance from the Ontario cost rules. Modern costs rules are designed to foster four fundamental purposes: (1) to partially indemnify successful litigants, (2) to encourage settlement, (3) to discourage and sanction inappropriate behaviour by litigants, and (4) to ensure that cases are dealt with justly under subrule 2(2) of the *Family Law Rules*, O. Reg. 114/99 (“Rules”): *Mattina v. Mattina*, 2018 ONCA 867, [2018] OJ No 5625.

[6] Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that costs are within the discretion of the court and the court may determine by whom and to what extent costs shall be payable, subject to the provisions of an Act or rules of court. In family law, costs are addressed in rule 24 of the *Family Law Rules*. Subrule 24(1) creates a presumption of costs in favour of the successful party. An award of costs is subject to the factors listed in rule 24(12) (see factors below), rule 24(4) (unreasonable conduct of a litigant), rule 24(8) (bad faith), rule 18(14) (offers to settle), and the reasonableness of the cost sought by the successful party.

[7] Subrule 24(12) reads as follows:

- 24 (12) In setting the amount of costs, the court shall consider,
- (a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
    - (i) each party’s behaviour,
    - (ii) the time spent by each party,
    - (iii) any written offers to settle including offers that do not meet the requirements of rule 18,
    - (iv) any legal fees, including the number of lawyers and their rates,
    - (v) any expert witness fees, including the number of experts and their rates,
    - (vi) any other expenses properly paid or payable; and
  - (b) any other relevant matter.

[8] Further guidance was recently provided by the Court of Appeal in *Beaver v. Hill*, 2018 ONCA 840, 143 OR (3d) 519, which clarified two important principles in exercising discretion, being reasonableness and proportionality.

[9] I am required to look at the factors set out in rule 24(12) while considering the principles of reasonableness and proportionality. The cost determination must reflect proportionality to the issues argued. There should be a correlation between legal fees incurred (for which reimbursement is sought) and the importance or monetary value of the issues at stake.

[10] In considering the four fundamental purposes of cost awards, and the factors set out above, I find that the Applicant is entitled to his costs on a fully recovery basis, both as a successful party and the Respondent's behaviour, amounting to bad faith. I cannot think of a more appropriate case in which to order costs on a full recovery basis.

### **Analysis:**

#### **Successful Party**

[11] There is no doubt the Applicant was the successful party.

#### **Importance**

[12] Although not complicated, the issues before this Court, starting with the ex parte order for the police attend at the Mother's home to apprehend the child and place her in the Father's care and ending with the return of the child to Italy, were extremely important to the litigants.

#### **Bad faith**

[13] The Applicant invites me to find that the Respondent acted in bad faith. Rule 24(8) has a high threshold of egregious behaviour; therefore, courts do not often make such a finding. However, I cannot think of a more fitting case to find that a party acted in bad faith.

[14] In May 2017, the Court in Modena, Italy, made an order for joint custody of the child, following an assessment by social services in Italy. Thereafter, and in accordance with the order, the child lived with the Mother and the Father had access. However, only two months after the order was made the Mother fled Italy with the child, keeping the child's whereabouts from the Father. It is every parent's nightmare – having a child taken away, with no idea when or if they will ever see the child again.

[15] The Father searched for his child, but it was only by chance two years later that he came across a picture on social media, showing the child in Niagara Falls.

[16] The Father was required to make multiple attendances in court in both Italy and Canada before he was able to have the matter heard and determined by this court, the delays and adjournments all occurred at the behest of the Mother. The Father was required to leave his home and his family and temporarily relocate to Ontario for a month. The child was placed in his care immediately, but he could not leave the jurisdiction without the Application being heard.

[17] The legal fees and costs incurred by the Father all stem from the Mother's egregious behaviour in hiding the child from the Father (and in breach of the Court orders in Italy).

#### **Legal fees and costs incurred**

[18] The Father used a senior lawyer in Ontario. His rate was \$450/hour, a lower hourly rate than many lawyers of similar call and experience. Further, Mr. Marks appropriately used his law clerk, where possible, to reduce the legal fees incurred. The law clerk's rate was \$190/hour.

[19] As set out above, several attendances were required, given the requests for adjournments by the Mother. Further, the Mother filed a voluminous case law brief, which needed to be read in preparation for the motion. As set out in my Reasons, most of the cases filed were not helpful.

[20] Finally, the Mother took several unreasonable positions that still needed to be addressed by the Father in his materials. The Mother argued that the child's habitual residence was not in Italy, and even if it was, she was now settled in Ontario, and that there was grave risk that returning the child would expose the child to harm or place the child in an intolerable situation. The Mother was not successful on any of her arguments.

[21] I find the legal fees of \$28,947 and the additional costs of \$10,263 plus HST of \$3,763, to be reasonable and proportionate in these circumstances and having regard to the importance of the issue at stake, namely the return of the child to Italy, following two years of knowing the child's whereabouts.

**Ability to pay:**

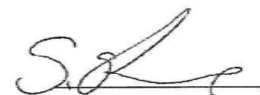
[22] The Mother argues that she has no ability to pay because the Italian courts took away the property that had been awarded to her under the divorce order. While a party's ability to pay is a consideration, I am not prepared to reduce the costs owing to the Father in this case. The Italian Courts made an order vesting the property in the Father's name as a result of the Mother's actions, namely ignoring the Italian Court order and hiding the child from her father for two years. She has no one to blame but herself. I am not prepared to take this factor into consideration in this case.

**Summary:**

[23] I have considered the facts of the case, the costs submissions of counsel, the bad faith actions of the Mother, the success of the Father, the importance of the issue, the ability of the Mother to pay and the proportionality and reasonableness of the legal fees incurred. I find that the Applicant is entitled to his costs on a full-recovery basis.

**Order:**

The Respondent shall pay the Applicant costs in the amount of \$42,973.45, inclusive of disbursements and HST, payable within 30 days of the release of this judgement on costs.



Shore J.