

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT BLENHEIM**

**I TE KŌTI WHĀNAU
KI TE WAIHARA KEKE**

**FAM-2019-006-000076
[2020] NZFC 8921**

IN THE MATTER OF	THE STATUS OF CHILDREN ACT 1969
BETWEEN	[KEVIN MOSS] Applicant
AND	[JILLIAN PAUL] Respondent

Hearing:	In chambers on the papers
Counsel:	N J S Vallance for the Applicant Respondent is self-represented
Judgment:	14 October 2020

**JUDGMENT OF JUDGE R J RUSSELL
[as to costs]**

Introduction

[1] On 7 May 2020 I issued a decision between the parties and made a declaration that Mr [Moss] was not the biological father of [Amy Paul] born [date deleted] 2002 under s 10 of the Status of Children Act 1969. My decision can be read alongside this decision for the relevant background leading to the making of this declaration.

[2] I reserved the question of costs and invited memoranda to be filed.

[3] Counsel for Mr [Moss], Ms Vallance, has filed a memorandum seeking an award of costs. Ms [Paul], who did not participate in the hearing, and is not represented, has emailed the registrar with her reply to the claim for costs which is now made against her.

Mr [Moss]'s application for costs

[4] In her memorandum, Ms Vallance notes Ms [Paul]'s failure to engage in the hearing leading to the case proceeding by way of formal proof hearing. She noted Mr [Moss]'s evidence that he did not have sexual intercourse with Ms [Paul] in or around the time of conception, and that Ms [Paul] had acknowledged in the affidavit that she filed that she was not sure who [Amy]'s father is.

[5] Ms Vallance noted the various legal principles to be applied on costs awards. She considered it relevant that Ms [Paul] and [Amy] had refused to undergo DNA paternity testing. Mr [Moss] had offered to pay all of the DNA paternity testing costs. The refusal to undergo such testing had meant that Mr [Moss] was put to extra legal cost.

[6] Attempts to settle matters by consent had not been successful. Ms Vallance noted Ms [Paul] had failed to engage in the court process by failing to attend a judicial conference and failing to attend the hearing.

[7] Ms Vallance then went on to note Mr [Moss]'s current asset and income position, contending that he had minimal financial resources and had incurred solicitor client costs of \$8,900. He was not legally aided and had borrowed \$3,000 from a friend to help meet these legal costs.

[8] Ms Vallance sought, calculated on a category 2 DCR basis, costs of \$6,207.50 calculated as follows:

Step	Description	Time Allocation	Subtotal
5	Preparing, filing, and serving application	2.0 days Actual 1.5	\$2,865.00
7.4	Pleading in response to other party's amended pleading	0.4	\$477.50
16.1	Preparation of affidavits or written or oral statements to be used at hearing	2.25 days Actual 1.0	\$1,910.00
18.1	Appearance in court	0.5	\$955.00

Ms [Paul]'s response

[9] In her email, Ms [Paul] said that the time she found out she was pregnant both she and Mr [Moss] knew there was a possibility that he was not the biological father of her child. She had requested DNA tests at that time which her mother had offered to pay for, but Mr [Moss] had not participated. Mr [Moss]'s name was not recorded on the birth certificate.

[10] Ms [Paul] said that [Amy] was now 18 years of age, did not want to undergo DNA paternity tests, and she could not force this issue on her. She said she had applied for legal aid, but this had been refused. She did not participate in the hearing process because she could not afford a lawyer. She worked two part-time jobs to make ends meet and had limited income and no savings.

[11] Ms [Paul] contended that she felt unsafe in and around Mr [Moss], and so for this reason had not attended the hearing. She does not want to be held liable for legal costs incurred, contending that it was within Mr [Moss]'s ability to resolve this issue, as this was offered 18 years ago to him.

Mr [Moss]'s reply

[12] In her submissions in response, Ms Vallance did not accept Ms [Paul]'s mother had offered to pay for DNA testing, and said Ms [Paul] needed to accept some responsibility for not resolving the parentage issue.

[13] Ms Vallance is critical of the failure of Ms [Paul] to properly engage in these proceedings, contending Ms [Paul], as well as [Amy], had not been willing to undergo DNA paternity testing. She queried whether Ms [Paul] was only working part-time as she had said in her email.

[14] Ms Vallance reaffirmed her earlier submissions that actions or inactions of each part on the issue of paternity over the past 18 years should not penalise Mr [Moss] from obtaining an award of costs. She reiterated her submission Ms [Paul] could have settled the issues by either signing a consent or participating in the DNA paternity testing process which Mr [Moss] had agreed to pay for. She again drew my attention to Ms [Paul]'s evidence that she was uncertain as to who [Amy]'s biological father was.

The law

[15] There is no statutory provision in the Status of Children Act 1969 providing for an award of costs. The necessary jurisdiction is found in r 207 Family Court Rules 2002. Rule 207 provides:

207 Costs at discretion of court

- (1) The Court has discretion to determine the costs of—
 - (a) any proceeding;
 - (b) any step in a proceeding;
 - (c) any matter incidental to a proceeding.
- (2) In exercising that discretion, the Court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:
 - (a) 14.2—principles applying to determination of costs;
 - (b) 14.3—categorisation of proceedings;
 - (c) 14.4—appropriate daily recovery rates;
 - (d) 14.5—determination of reasonable time;
 - (e) 14.6—increased costs and indemnity costs;
 - (f) 14.7—refusal of, or reduction in, costs;
 - (g) 14.8—costs in interlocutory applications;

- (h) 14.9—costs may be determined by different Judge:
- (i) 14.10—written offers without prejudice except as to costs:
- (j) 14.11—effect on costs:
- (k) 14.12—disbursements.

(3) This rule is subject to the provisions of the Family Law Act under which the proceedings are brought.

[16] It must be remembered the appropriate District Court Rules only apply as far as applicable and with all necessary modifications.

[17] Rule 14.2 of the DCR sets out the general principles applying to determination of costs:

14.2 Principles applying to determination of costs

The following general principles apply to the determination of costs:

- (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
- (b) an award of costs should reflect the complexity and significance of the proceeding:
- (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
- (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
- (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
- (f) an award of costs should not exceed the costs incurred by the party claiming costs:
- (g) so far as possible the determination of costs should be predictable and expeditious.

Discussion

[18] I have carefully considered the proceedings filed and the costs submissions which have been made. I note Ms [Paul] did initially engage Mr Smith, solicitor of Blenheim, who then withdrew as her counsel when legal aid was refused. Initial affidavit evidence was filed by her prior to her legal aid grant being withdrawn.

[19] Mr [Moss] did sign an acknowledgement of paternity in April 2005 which formed the basis of his child support assessment. He does need to take some responsibility for this. Had he not signed this document, these declaration proceedings would probably not have been required.

[20] I accept that at the age of 18 years, [Amy] cannot be forced to undergo DNA paternity tests, despite the recommendation I had made for such tests to be undertaken under s 54 of the Family Proceedings Act. Adverse inferences can be drawn from Ms [Paul]'s refusal, especially given Mr [Moss] had offered to pay for them.

[21] I accept the affidavit evidence does show that there was considerable friction and animosity between these parties at the earlier stages when the parties were separating.

[22] I accept the submissions that both parties have limited income and assets.

[23] Ms [Paul] could have signed a memorandum of consent agreeing to the declaration being made, which would have avoided some of the legal costs being incurred by Mr [Moss] and she was granted legal aid at an earlier stage of the proceedings, but that was withdrawn. On the other hand, Mr [Moss] has been saved the DNA paternity testing costs which he had offered to pay for as a result of Ms [Paul]'s and/or [Amy]'s refusal to undergo the tests.

[24] I note \$596.88 costs has already been ordered to be paid by Ms [Paul] as a consequence of the costs decision of 2 October 2019.

[25] Mr [Moss] has been successful in the outcome which he sought, namely a declaration was made that he was not the biological father of [Amy], and I accept costs should follow the event.

Conclusion

[26] Balancing all of these factors, I have reached the view that Mr [Moss]'s costs award is justified, but not to the extent claimed. Each party could have taken steps to mitigate the costs incurred in the way I have outlined. Each party has modest assets and income. Mr [Moss] was successful in the outcome which he sought, but it does seem paternity issues may have been able to have been resolved earlier had the parties put their minds to it, and Mr [Moss] did sign the acknowledgement of paternity in 2005 which led to these proceedings being required.

[27] I consider Ms [Paul] should pay approximately two thirds of the DCR scale costs, which equates to approximately just under half of the actual costs Mr [Moss] has incurred. I consider the sum of \$4,000 is an appropriate costs award.

Outcome and orders

[28] Ms [Paul] is ordered to pay Mr [Moss] the sum of \$4,000, including GST and disbursements.

Judge RJ Russell
Family Court Judge

Date of authentication: 14/10/2020

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.