

In the Provincial Court of Alberta

Citation: V.N. v. P.S. (P.B.), 2014 ABPC 217

Date: 20140912
Docket: 121309041F101001
Registry: Calgary

Between:

V.N

Applicant

- and -

P.S. (P.B.)

Respondent

Corrected judgment: A corrigendum was issued on October 28, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

Costs Decision of the Honourable Judge V.T. Tousignant

[1] This is an application for Costs by P.S. (P.B.) (the Mother) following a five-day trial, at the conclusion of which I dismissed the Grandmother's application for Contact with her grandchild.

[2] The Mother seeks an award of solicitor and client Costs against V.N. (the Grandmother) in the amount of approximately \$42,000.00. In the alternative, she seeks enhanced Costs under Columns 3, 2, or alternatively 1 of the *Alberta Rules of Court*.

[3] The Mother also seeks Costs personally against the Grandmother's former counsel, Richard Dudelzak, Q.C. for his failure to attend Court on several occasions. Mr. Dudelzak was not present in court today, despite having had an agent appear on his behalf on the last Court date, despite correspondence from the Mother's lawyer reminding him of today's court date, and despite a Court Order directing his attendance, either in person or by agent.

[4] The Grandmother concedes that, because of her lack of success at trial, she should pay some Costs, but that those should be based upon Column 1 of the *Alberta Rules of Court* in the

amount of approximately \$12,500.00 with a requirement that she pay \$4,000.00 forthwith and the balance in increments over the next approximately 18 months.

[5] The authority of the Provincial Court of Alberta to award Costs is set out in Section 93 of the *Family Law Act*, which states:

93 Subject to the regulations, the court may at any time in a proceeding before the court and on any conditions that the court considers appropriate award Costs in respect of any matters coming under this Act.

[6] The *Alberta Rules of Court* provide guidance in determining whether, and in what amount, to award Costs. In particular, *Rule 10.33* sets out the following considerations:

10.33(1) In making a Costs award, the Court may consider all or any of the following:

- (a) the result of the action and the degree of success of each party;
- (b) the amount claimed and the amount recovered;
- (c) the importance of the issues;
- (d) the complexity of the action;
- (e) the apportionment of liability;
- (f) the conduct of a party that tended to shorten the action;
- (g) any other matter related to the question of reasonable and proper Costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a Costs award, the Court may consider all or any of the following:

- (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
- (b) a party's denial of or refusal to admit anything that should have been admitted;
- (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
- (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
- (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
- (f) a contravention of or non-compliance with these rules or an order;
- (g) whether a party has engaged in misconduct.

[7] Jurisprudence in Alberta confirms that solicitor and client Costs are awarded where the conduct of the party has been “reprehensible, scandalous or outrageous” (*Walsh v. Mobil Oil Canada*, 2008, ABCA 268 (CanLII)). For a general review of the case law relating to solicitor and client Costs, see the decision of Madam Justice Greckol in *Daved v. Daved*, 2010, ABQB 696 at paragraphs 34-35.

Considerations under the *Rules of Court*

[8] In considering the result of the action under *Rule* 10.33(1)(a), both the Mother and Grandmother acknowledge that the Mother was entirely successful at the conclusion of trial.

[9] In regards to *Rule* 10.33(1)(c) the Mother argues that there is nothing as important as the best interests of a child, which were at the heart of this litigation. The Mother had no choice but to defend, given the Grandmother’s excessive demands as set out in the evidence, including the purported agreement she sent to the Mother following a meeting with her at Tim Horton’s.

[10] The Grandmother argues likewise that the issue of contact was an important one. As evidence of the importance of a Grandmother’s relationship with a grandchild, the Grandmother referred to the case of *Chapman v. Chapman* [2001] O.J. No. 705 at paragraph 19 where the Court stated that:

A relationship with a grandparent can – and ideally should – enhance the emotional well-being of a child. Loving and nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship.

[11] The Mother argues that a consideration of the three basic issues to be determined at trial led the Court to render an 81-page decision. She concedes that the Grandmother contributed in shortening what otherwise would have been a longer trial by instructing her counsel to terminate his cross-examination of the Mother and by shortening her witness list, which at one point supposedly included 37 individuals.

[12] The Grandmother argues that the length of the trial (5 days) does not determine the question of complexity (*Rule* 10.33(1)(d)). See *X. v. Y.*, 2012 BCSC 37 (CanLII).

[13] Apart from the issue of whether to award solicitor-client Costs, the Court has jurisdiction to depart from the Tariffs set out in the *Rules of Court* and in doing so, the Court may take into account factors set out in *Rule* 10.33(2).

[14] The Mother argues that the conduct of the Grandmother (*Rule* 10.33(2)(a)) unnecessarily delayed the action and points, for example, to the fact that there were five Pre-Trial Conferences in this matter. Some of those were required to deal with the DVD referred to below.

[15] The Mother also points to the fact that a further Court appearance was required, after counsel had made final submissions, because of the failure of Grandmother’s counsel to put a relevant case before the Court. Counsel for the Grandmother had referred to two cases from the Alberta Court of Appeal, which dealt with the same fact situation (*A.H.T. v. E.J.P.*, 1994 ABCA 140 (the First AHT Case) and *A.T. v. E.P.*, 1995 ABCA 502 (the Second AHT Case). In those

cases, the Court of Appeal refused to deny the Grandparents access, despite their obstreperous behavior.

[16] In the case before me, the Court eventually determined that there was a third Memorandum of Judgment from the Court of Appeal (the Third *AHT* Case) filed March 15, 1999 in Appeal #97-17321 (*C.L.T and A.H.T. v. E.P. and G.P.*) in which the Grandparents' access was finally terminated. The decision effectively reversed the outcome of the First and Second *AHT* Cases, but Grandmother's counsel had not brought it to the Court's attention.

[17] The Grandmother encourages me to distinguish her conduct from that of her counsel, Richard Dudelzak, Q.C.. The Grandmother had attended mediation and a Judicial Dispute Resolution. She argues that she was committed to resolving the issues, and points to the meeting at Tim Horton's as evidence of that.

[18] The Grandmother also argues that it should only be conduct of the Grandmother within the litigation which should be taken into account. See *S.L.T. v. A.K.T.* [2008] A.J. No. 1293. She relies on the Court's decision in *W.A.D. v. D.L.S.*, 2005 ABPC 310 (CanLII). Despite the egregious conduct of the Grandparents, Costs were awarded against them under Column 1 of the *Rules*, following the dismissal of their Claim for access.

[19] The Grandmother argues that another matter the Court should take into account under *Rule* 10.33(1)(g) ("any other matter") is the Grandmother's impecuniosity. The Grandmother acknowledges that her financial circumstances cannot be a barrier to an award of Costs, but that I should take into account that she is now subject to a consumer proposal and lost her home in March of 2011. She has also been under the stress of having lost her son and of being estranged from her grandchild.

Analysis

[20] In considering the factors set out under *Rule* 10.33, I take into account the following:

- (a) The Mother was 100 percent successful in defending Grandmother's claim for contact.
- (b) The issues to be determined were important ones, particularly to the Child.
- (c) The Trial should not have been inordinately complex; however, because of the Grandmother's conduct, the litigation was needlessly protracted. This conduct included:
 - (i) Asserting her intention to put into evidence at trial a DVD of video evidence and then refusing to provide a copy of it despite the Court's May 3, 2013 and November 5, 2013 Orders. The Grandmother never did produce the DVD and did not seek the Court's obligation to be excused from complying with the Court's direction.
 - (ii) The Grandmother called witnesses who provided little or no relevant evidence. The trial was, therefore, prolonged because of the time required to hear these witnesses.

- (iii) Much of the Grandmother's evidence was irrelevant, as was much of the scope of the cross-examination of the Mother.

[21] Although the issues to be determined were not overly complex, a detailed analysis of the evidence was necessary in order for the Court to properly determine issues such as the Grandmother's lack of credibility, and to adequately describe the lack respect demonstrated by the Grandmother towards the Mother.

[22] I also note that the Grandmother finally instructed her counsel to terminate his cross-examination of the Mother only after bringing the Mother to tears, after she was required to recount her late husband's dying moments.

[23] I find that the Grandmother's conduct within the litigation contributed to delay. I also take into account the fact that, during the trial, it was only by turning towards the Court and providing her evidence in that fashion that the Mother was able to ignore the baleful stare of the Grandmother and her inappropriate body language in reacting to the Mother's testimony.

[24] I also take into account the fact that the Grandmother's performance as a witness contributed to the length of the trial. I found her to be inconsistent in her testimony and that she embellished her evidence. She had selective memory and was evasive.

[25] If I were to take into account the Grandmother's impecuniosity (for which no authority was provided) I would have to do the same for the Mother. She had no choice but to defend while the Grandmother had the option throughout not to pursue the litigation.

[26] Both parties were under stress. While the Grandmother had lost her son (the Father), his death was also the loss to the Mother of her husband. Any estrangement of the Grandmother from her grandchild was caused by the Grandmother's relentless pursuit of her Claim and not by any actions of the Mother. I do not take this factor into account in rendering my decision today.

Conclusion

[27] I distinguish the *W.A.D.* case on its facts. The Respondent parents in that case were self-represented, and the Applicant Grandparents' egregious behavior pre-dated the three-day trial.

[28] Despite the Grandmother's behaviour in the case before me, I am not satisfied that her conduct related to the litigation was "reprehensible, scandalous, or outrageous". Therefore, I decline to award solicitor-client Costs.

[29] In considering the factors set out in *Rule 10.33*, I am, however, satisfied that enhanced Costs are in order. The conduct that the Grandmother demonstrated throughout these proceedings was consistent with her high-handed, disrespectful treatment of the Mother before the commencement of trial. She needlessly delayed pre-trial proceedings by first alleging she intended to rely on a DVD at trial, necessitating a Court Order directing her to disclose the DVD, declining to disclose it (despite Court Order) and not seeking the Court's approval to be relieved of her obligation.

[30] The Grandmother also contributed to the excessive length of the trial by calling irrelevant evidence and conducting unfocussed, irrelevant examinations and cross-examination.

[31] Taking into account the foregoing, I award the Mother enhanced Costs under Column 3 of the *Alberta Rules of Court*. I make no direction as to when those are to be payable other than to say “forthwith”.

[32] The Mother’s claim for Costs personally against Mr. Dudelzak is allowed. He did not appear in Court on several occasions, despite being counsel of record. He purported to file a *Notice of Ceasing to Act*, but did not comply with the *Rules of Court* in that regard. He failed to put before the Court an Alberta Court of Appeal Memorandum of Judgement which entirely undermined the precedential value of two other Memoranda of Judgement upon which he had encouraged the Court to rely.

[33] Mr. Dudelzak did not appear at the Costs application today, despite having had an agent appear on the previous occasion when today’s date was set, despite correspondence from Mother’s counsel reminding him of today’s date, and despite a Court Order directing his attendance in person or by agent.

[34] Costs are awarded personally against Richard Dudelzak, Q.C. in the amount of \$4,500.00 representing four missed appearances plus the additional appearance to argue undisclosed case law, all at \$900.00 an appearance. That amount is to be deducted from the Costs otherwise payable by the Grandmother under Column 3, which I allow in the amount of \$27,615.41.

Heard on the 12th day of September, 2014.

Dated at the City of Calgary, Alberta this 12th day of September, 2014.

V.T. Tousignant
A Judge of the Provincial Court of Alberta

Appearances:

D. Castle, Ms.
for P.B.

A. Bruvels, Student-at-Law
for V.N.

None
for R. Dudelzack, Q.C.

**Corrigendum of the Costs Decision
of
The Honourable Judge V.T. Tousignant**

In paragraph 26, the word Mother has been replaced with Grandmother.