Court of Queen's Bench of Alberta

Citation: JWS v CJS, 2021 ABQB 411

Date: 20210526
Docket: 4801 153868
Registry: Calgary

Between:

J.W.S.

Plaintiff

- and -

C.J.S aka C.J.H.

Defendant

Reasons for Decision on Costs
of the
Honourable Madam Justice C.L. Kenny

---

[1] The trial of this matter on the issue of parenting was heard by Justice Brooker. The trial started on May 2, 2016 and was set for 3 weeks. It did not conclude then and went over to the fall of 2016 for a total of 19 trial days. After the trial was concluded there were many post-trial applications. The trial decision was rendered on October 31, 2018. There were further post-decision applications which eventually concluded in August of 2019.

[2] Justice Brooker retired from the court before submissions were made on the issue of costs. The writer has been asked by the Associate Chief Justice to render the decision on costs in this matter. Counsel have prepared written argument for the court on the issue of costs. Since the writer was not involved in any court proceedings with respect to this matter, I have relied on the material provided by counsel as to the facts and findings as well as the pleadings and orders on the court file.

BACKGROUND

[3] This matter involved the custody/parenting of 5 children. The parties separated in 2012. At that time, the children were approximately ages 10, 9, 7, 6 and 1. They are currently 19, 18, 16, 15, and 10. The relationship between the parties was very acrimonious after the separation. The litigation lasted over 7 years. There were two expert reports prepared. Counsel was appointed for the children. The Procedure Record is 20 pages long and shows 58 applications throughout the litigation. There were further applications after the conclusion of the custody matters pertaining to child support. Justice Brooker remarked at the beginning of his trial decision: "This is a case of child custody. I must say that I have found it to be one of the most difficult cases I have had to deal with in my over 22 years on the bench".

[4] At the end of the trial, Justice Brooker awarded primary parenting of all 5 children to the mother. The two oldest children would determine when they would see their father. With respect to the three youngest children, Justice Brooker awarded access to the father every second weekend from Thursday after school until Monday drop off at school as well as one overnight on the off week. Holidays were to be shared. The parties were to consult on major decisions affecting the children however failing agreement between them, the mother would have the final decision- making authority. The father appealed the trial decision with respect to the 3 youngest children. The two older children had severed any contact with their father. New evidence was adduced by the mother at the Court of Appeal. Since the trial decision, the middle child (the oldest of the 3 younger children subject to the appeal) refused to move to her mother's home and had no contact with her mother since the trial decision. The mother asked that the trial judge deal with the parenting of that child which was directed by the Court of Appeal. The appeal otherwise was dismissed.

POSITION OF THE PARTIES ON COSTS

[5] The mother seeks solicitor and her own client costs from the start of the litigation in 2012 until the conclusion of the custody matters in August of 2019. These total $400,000 exclusive of the advance costs already paid to her pursuant to an interim order. She further seeks reimbursement for costs paid by her to the expert, Ms. Rohatinsky in the sum of $1,050 and $13,400 to legal counsel for the children which were to be reviewed upon the trial of the matter. She seeks a further $60,000 for the writing of the costs argument and reply.

[6] The father says that success was mixed and so each party should be responsible for their own costs. In the alternative, costs should be awarded on Column 1 of Schedule C with a reduction to reflect the mixed success. The father says solicitor-client costs are reserved only for exceptional circumstances and this is not one of those cases. The father also seeks return of the advance costs that he has paid to the mother.

RELIEF CLAIMED IN PLEADINGS

[7] The father commenced this action by filing a Statement of Claim for Divorce on September 24, 2012. In that claim he sought sole custody of the children with supervised access to the mother. In argument, after the trial, when all of the evidence was in and in the face of two expert reports, the father adjusted his request to seek joint custody of the children with primary parenting to the father.

[8] The mother, as stated by the trial judge, sought to have the children reside with her on a full-time basis with access to the father.

LAW ON COSTS

Party- Party Costs

[9] Party-party costs are governed by Rule 10.29 which states:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
>
> (a) the Court's general discretion under rule 10.31,
>
> (b) the assessment officer's discretion under rule 10.41,
>
> (c) particular rules governing who is to pay costs in particular circumstances,
>
> (d) an enactment governing who is to pay costs in particular circumstances, and
>
> (e) subrule (2).

[10] Rule 10.33 provides a list of factors that the court may consider in making a costs award:

> 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;
>
> (h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

[11] After the court has considered factors in Rule 10.33 with respect to quantum, the court is then directed to consider Rule 10.31:

> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> > (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
> >
> > (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
> >
> > > (i) an indemnity to a party for that party's lawyer's charges, or
> > >
> > > (ii) a lump sum instead of or in addition to assessed costs.

Solicitor-Client Costs

[12] The test for solicitor-client costs is set out in ***Jackson v Trimac Industries Ltd,*** (1993) 138 AR 161, 1993 CarswellAlta 310 (QB), varied on other grounds, 1994 ABCA 199. A departure from party-party costs should only occur in rare and exceptional circumstances. Examples are set out in ***Trimac*** at para 28:

> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (*Reese*);
>
> 2. cases in which justice can only be done by a complete indemnification for costs (*Foulis v. Robinson*);
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which

required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Sonnenberg*);

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson);

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v. Newton*);

6. defendants found to be acting fraudulently and in breach of trust (*Davis v. Davis*);

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v. Tecumseh Road Builder et al*.);

8. fraudulent conduct (*Sturrock*);

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand*).

DISCUSSION

[13] It is important in any discussion of costs, that the entire reason for the litigation is kept in perspective. This was an application by the father for sole custody of 5 young children with supervised access to the mother. The mother had been the primary parent of all 5 children since the birth of the oldest child. She was not employed outside the home.

[14] An incident occurred in September of 2012 which started this whole litigation. The mother was hospitalized as a result of a drug overdose. The mother alleges that the father drugged her coffee when he brought it to her in bed as he knew she was unhappy and contemplating leaving the marriage. The father says the mother intentionally overdosed presumably to end her life. At the time, the mother had sought counselling and was on medication in an effort to deal with what she described as a very emotionally abusive marriage.

[15] The trial judge found that the mother did not intentionally overdose but that the evidence also did not satisfy him that the father administered the drugs to the wife. The trial judge found it was simply an accident.

[16] In any event, while the mother was in the hospital, the father went to court and obtained an *ex parte* order giving him custody of the 5 children and obtaining a restraining order against the mother.

[17] From that point forward, it was an uphill battle for the mother to obtain any time with the children through and until the trial decision. The father points to several orders by consent as evidence he was being accommodating and the parties agreed to the relief. As the mother points

out, consent is a relative concept in this case. She started from having no access to her children as a result of an *ex parte* order based on what she says is false evidence and no financial resources to do anything about it. Any order going forward giving her any time with her children would be naturally consented to on an interim basis.

[18] The disparity in financial resources to fight this litigation is amply shown in the Property Statement prepared by the parties for their property settlement in 2012. It shows the father with net assets of approximately 20 million dollars and the mother with assets of $271,000. In statements filed at the end of the trial, the father shows net assets of approximately 27 million dollars while the mother shows no income and net assets of just under $400,000.

[19] The father raised 5 issues in responding to the mother's claim for solicitor-client costs.

i. Mixed success

[20] The father argues that success was mixed as the mother sought supervised parenting time for the father and limited holiday time. The father was successful, he argues, in getting shared custody, shared holiday time, and primary parenting of the middle child.

[21] Costs are related to the conduct of the litigation as well as the result. What the father does not mention when he talks about mixed success is that he started these proceedings with a claim for sole custody and supervised parenting to the mother. He followed that up with an *ex parte* order giving him sole parenting of the children and supervised parenting to the mother. The mother had to bring a court application even to get any access to her children.

[22] The parties consented to a PN 8 report from Ms. Ailon. That assessment started in 2012 and a report issued in September of 2013. That report clearly recommended that the mother have primary parenting of the children and the father undergo psychiatric and psychological therapy with respect to his behavior involving his children and the litigation. The purpose of such reports is to encourage resolution before further litigation and further damage to the children by providing an unbiased report to the parties and the court. The father did not like that recommendation and so the litigation continued.

[23] After 19 days of trial and before the decision, the court ordered a PN 7 report. That report clearly indicated that the father should not be the primary parent with respect to the children. It further indicated that the father had coached the older children on what to say and to lie to the lawyer representing them. The children however chose to tell their own legal counsel everything including the coaching and efforts to have them lie. That report was received by the parties in December of 2017. Rather than resolving the matter at that stage, although 5 years later and after 19 days of trial, the litigation continued.

[24] Six years later, in the trial decision issued October of 2018, the mother was awarded primary parenting of all 5 children. While the parties were given joint decision-making responsibilities, in the event they could not agree, the mother had the final say.

[25] The very sad reality for this family is that the two oldest children have chosen to have no contact at all with their father, one since 2016 and the other since 2018. The middle child who now resides with her father has had no contact with 2 of her 4 siblings, her mother or her maternal grandparents, all of whom she was very close to before the trial. The father's "scorched earth" approach to this litigation, win at any costs, has torn this family apart. The expert reports make it clear that the father did everything in his power throughout the litigation to tear down the mother in front of the children and to the courts and build himself up. As Ms. Ailon indicated in

her report, she received corroboration from several sources that indicated the father was coercive and controlling, he was emotionally intimidating of the children, he indicated to the children that they would be "dead to him" if they did not do as he wished, that the children had been coached by their dad to report negatively with respect to their mother, and that the children felt they had to placate their father. It took two expert reports and counsel for the children to be able to drill down and separate the misrepresentations from the truth.

[26] Justice Brooker commented as follows in his decision:

> I was not impressed with the plaintiff (father) as a witness. I found him to be less than forthright. At times he seemed to be making things up as he went along. Thus he often embellished his evidence. He answered questions in a non-responsive fashion. Often in answering a question, he would try and "take a shot" at the defendant (mother) or "build himself up". The evidence shows the plaintiff (father) to be controlling, self-centered, and manipulative.

[27] That is not mixed success. Each party sought primary parenting of the children as set out by Justice Brooker in his decision. The mother was wholly successful.

ii. Consent and Interlocutory Orders.

[28] The father argues that many of the interim orders dealt with the issue of costs and those orders cannot now be revisited with respect to costs: ***Rufenack v Hope Mission***, 2006 ABCA 60 at para 23.

[29] It is further argued that all of the interim orders that were silent as to the issue of costs should not now attract costs: ***SR v TR***, 2020 ABQB 394.

[30] The mother argues that "consent" was never given voluntarily but was simply something the mother had to do to get any order with respect to her children. The financial resources of the parties were very disparate and the mother could not afford to fight every interim order pending trial.

[31] In a quick review, it appears that approximately one third of the interim orders had costs spoken to. The rest were silent. I agree that it is not appropriate to revisit costs that have already been set out in an order even if the mother felt that she had no choice but to agree to pay her own costs. I am satisfied however, that where the order is silent as to the issue of costs, those costs can be and should be dealt with at the end of the litigation in favour of the successful party or in any other fashion that the trial judge determines. I do not accept that silence is indicative of a shared belief that an award of costs would not be sought. That is especially so in the circumstances of this case which was very high conflict and with other orders specifying that each party would bear their own costs. If that was intended in the orders that were silent on costs, the parties would have said so as they did in many of the orders. Costs follow the outcome and that includes interlocutory costs as well as trial costs unless otherwise specified.

iii. Conduct deserving of Solicitor Client Costs

[32] The father relies on the SCC decision in ***Young v Young,*** [1993] 4 SCR 3, 1993 CarswellBC 1269 at para 260, which said that solicitor-client costs are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of the parties and in ***Sidorsky v CFCN***, 1997 ABCA 280 at para 28, where the court indicated solicitor-client costs should only occur in rare and exceptional circumstances.

[33] The father suggests that the false evidence in an affidavit by the mother on one issue rises to the level required for solicitor-client costs presumably against her. The mother did lie in an affidavit. She acknowledged it and corrected the facts. Justice Brooker stated: "This conduct, I am satisfied was out of character for the defendant, and I attribute it to the emotional turmoil she was going through at the time in her marriage to the plaintiff, since she separated from him she appears to have done well".

[34] Counsel for the mother points out that the father set out many facts which could not be corroborated throughout these proceedings as set out by Ms. Ailon and Ms. Rohatinsky. He forced, manipulated, and threatened his own children into lying for him to the court, the experts, the doctors, their teachers, the police and their own counsel. While it may be argued that it is not the conduct of the party that gives rise to solicitor-client costs but rather the conduct of the litigation, it is impossible to separate those notions in this case. It was the conduct of the father and his manipulation of the children to misrepresent facts that created and propelled this litigation for over 7 years. It took 2 experts, counsel for the children, 19 days of trial and 2 separate meetings between the judge and the children to show that the things the father had been saying about the mother and that he had the children say about the mother, were not true.

[35] The PN 8 report prepared by Ms. Ailon was of great assistance. The father made all sorts of terrible allegations against the mother to try and prove that she was mentally ill, suicidal, and incapable and unwilling to look after the children. Ms. Ailon found all of these accusations to be unfounded after speaking with the contractor at the home daily with the mother for the summer of 2012, the school, the doctor, and Child and Family Services. The latter indicated "that the father may be attempting to make things difficult for the mother and there had been concerns raised that he may be coaching the children regarding allegations against the mother". At the forefront of the report was the very serious concern about the harm to the children caused by the father's conduct and hence the recommendation that he attend psychiatric and psychological therapy.

[36] The issue of delay is also important to the issue of costs. This matter was to go to trial in 2014. The father had retained another expert to review the expert report of Ms. Ailon. By mistake, Ms. Ailon sent her boxed file to counsel for the mother. Counsel for the mother confirmed that she had not opened the box and sent it to the father's expert who also confirmed that the box had not been opened. Despite that, the father sued Ms. Ailon and alleged she was biased and that the report should be withdrawn.

[37] Counsel for the father argued for a delay in the trial. The mother sought an interim variation to the custody as a result of the delay. Instead, the father relied on a provision in the previous order setting down the 2014 trial, which said that there would be no interim applications pending trial. As a result, the father delayed the trial and prevented the mother from making any changes to his custody pending the trial.

[38] In late 2015, the oldest child ran away from the father's home. The mother sought an order to reflect this change and for advance costs both of which were granted. The father appealed that order. When the Court of Appeal Justice indicated that he would deal with the issue of interim custody pending the new trial date as a result of the delay, counsel for the father finally sought an expedited trial date.

[39] One of the most egregious examples of the father's manipulation of the children was at Christmas of 2013. The parties were sharing custody of the children over the holidays. Two of

the children got into a scuffle while at their mother's home and one of the children ended up with a slight black eye. When they returned to their father's home, he took them immediately to the police and coerced the children to say that their mother had hit the one child with a closed fist and hence the black eye. She was arrested and charged with child abuse. On further investigation, the police were told by the children that they had made it up and their mother did not hit the child. The children then confided in their mother that their father had told them to lie and told them exactly what to tell the police.

[40] Further information came from the oldest child's guidance counsellor who was called at the trial as a witness by the father. She told the court that she had met 26 times with the oldest child and the constant theme was the stress the children were under caused by their father's demand that they tell the school they did not want to visit their mother anymore, that if the oldest child did not speak out against her mother, she would be dead to her father and no longer his child, that her father demanded that she say derogatory and untrue things about her mother, and about the father smashing the phone because the children wanted to use it to call their mother.

[41] All of this is directly related to the conduct and length of this litigation. Every step of the way, the mother had the emotional and financial burden of refuting all of the misrepresentations and manipulation in order to obtain custody of her children. The conduct of the father directly impacted the conduct of the litigation.

[42] Justice Brooker came to the same conclusion as the two experts: the children had been coached throughout the proceedings about what to say to whom- all of which was to disparage the mother at every turn in these proceedings. Justice Brooker found Ms. Ailon to be a credible witness and that several of her comments mirror some of the same conclusions which he reached in the case.

iv. Costs of the PN 8 and PN 7 reports

[43] Justice Brooker ordered that the mother pay 20% and the father pay 80% of the PN 7 "in the first instance". With respect to the PN 8 report, the parties agreed that the father would pay 100% of the cost subject to the ultimate determination of the trial judge as to how the parties would share the costs.

[44] The father argues that the parties should equally bear the costs of these reports and he should be reimbursed for any portion paid by him over 50%. He says the reports were necessary to determine the best interests of the children. The mother seeks to have the father bear the full costs of the expert reports given the outcome of the trial and the father's conduct. This would require him to reimburse her the 20% of the PN 7 that she paid. Both parties rely on the decision of ***AE v TE***, 2017 ABQB 674.

[45] It is to be remembered that this action started when the mother went to the hospital as a result of an overdose found by the trial judge to be an accident. The father alleged that the mother was suicidal and mentally ill and told the doctors and the hospital those things about the mother that later turned out not be true. The mother had been the primary caregiver of the children with no issue until this incident. She had no choice after the *ex parte* order but to agree to a PN 8 report to prove that what the father was saying was not true. The report indicated that the mother should have primary parenting. In the face of that report, the father would not relent and the litigation continued for another 6 years with the end result after trial being what had been recommended in 2013.

v. Costs of Counsel for the Children

[46] The father seeks reimbursement of $10,000 which he paid towards the mother's 20% of the costs of children's counsel. Justice Brooker had apportioned the costs at 80/20 to be reviewed at trial. The mother seeks to have her full portion of the 20% (less $10,000 already paid) to be paid by the father. Counsel for the children was extremely helpful to the trial judge as that is how, in some instances, the trial judge was able to actually get to the facts and what the children were really saying, not what they had been told to say by their father.

DECISION

[47] If ever there was a custody case in which it is proper and necessary to award solicitor-client costs, this is it. Factors 1-5 and 9 set out in the ***Trimac*** case above are directly relevant here.

[48] It started with an *ex parte* order removing the mother from the home and preventing any contact with the 5 children where she had been the primary parent to the children. She had no job and virtually no financial resources to fight the litigation. Years of coaching of his own children prolonged the proceedings. Two expert reports, children's counsel, 2 meetings between the judge and the children and 19 days of evidence at trial proved most of the father's allegations to be false. Six years after the litigation started, the mother received the decision of the court in her favour. That decision was what had been recommended by Ms. Ailon in 2013 in the PN 8 report.

[49] The mother seeks her outstanding legal fees in the sum of $400,000 plus an additional $60,000 for preparation of the costs argument and the reply. This is net of the $140,000 already paid in advance by court order. She also owes or has paid children's counsel $13,400 as her 20% share of the costs (net of $10,000 already paid by the father). This was to be revisited after trial and in my view, those are costs that should be solely borne by the father. The same applies to the outstanding balance to Ms. Rohatinsky. The $1,050 owing to her by the mother will be paid by the father.

[50] This totals $474,450. As I indicated earlier however, a number of the interim orders reflected that each party would bear their own costs of that order. I am not prepared to revisit those orders and as such reduce the award by $50,000 to reflect that.

[51] The father will therefore pay to the mother, the sum of $424,000 in solicitor-client costs.

[52] In the event that this was not a case for solicitor-client costs (which I have found it is), I would in any event have awarded multiple times column 5 costs as against the father with respect to this matter.

Dated at the City of Calgary, Alberta this 26th day of May, 2021.

C.L. Kenny
J.C.Q.B.A.

Appearances:

Diann Castle and Bradley G. Smith
for the Plaintiff

Deborah Shennette
for the Defendant