

Court of King's Bench of Alberta

Citation: JC v KC, 2023 ABKB 96



Date:
Docket: FL01 36960
Registry: Calgary

Between:

JC and VL

Appellants

- and -

KC

Respondent

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No person shall publish the name or photograph of a child or of the child's parent or guardian in a manner that reveals that the child is receiving, or has received, intervention services.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Identification Ban – See the *Family Law Act*, section 100.

By Court Order, no person shall publish or broadcast information that may identify the children or guardians involved in this proceeding.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

**Costs Decision
of the
Honourable Justice M.A. Marion**

I. Introduction

[1] The appellants, JC (**Grandfather**) and VL (**Grandmother**) (together, **Appellants**), appealed a February 25, 2022, Order (**Order**) of the Honourable Judge J.R. Shaw (**Judge**) of the Provincial Court of Alberta, pursuant to *Alberta Rules of Court* rule 12.61 and section 89 of the *Family Law Act*, SA 2003, c F-4.5 (*FLA*).

[2] The appeal (**Appeal**) was heard on September 15, 2022, and was opposed by the respondent, KC (**Mother**), who represented herself during oral argument. The child that was the subject of the Order, KC (**Child**), was represented by counsel (**Counsel**) at the Appeal, who also opposed the Appeal.

[3] On October 24, 2022, I released my reasons dismissing the Appeal: *JC v KC*, 2022 ABKB 707. My reasons provided that if the parties could not agree on costs of this Appeal within 30 days of this decision, they may make submissions to me in writing. The parties could not agree and the Appellants, the Mother and Counsel each provided the Court with written submissions on costs.

II. Position of the Parties

[4] The Mother argues that, while she represented herself in oral argument on the Appeal, she hired legal counsel to help her with written submissions and preparation for the Appeal. She also notes that she is 50% responsible for the costs of the Child's Counsel. The Mother seeks costs, apparently based on Schedule C (Column 3), in the amount of \$12,950.

[5] The Child's Counsel also seeks costs of the Appeal payable by the unsuccessful Appellants. She argues that a lump sum of \$18,000 in legal fees is appropriate, or alternatively, that solicitor-client costs are appropriate. She provided six different proposed bills of costs which, including fees, disbursements and GST, range from \$11,282.11 to \$23,174.67. She argues that costs payable to Child's Counsel should be used to pay the Mother's portion of her legal account in respect of Child's Counsel.

[6] The Appellants argue that the Mother's costs, as a self-represented party, should be limited to her actual disbursements (plus GST), relying on *Terrigno v Butzner*, 2021 ABCA 125. The Appellants argue that, in the event the Mother can show actual legal costs, they should be limited to 40% of the actual costs incurred. The Appellants also argue that any costs awarded to the Mother should be set-off against the Mother's alleged child support arrears, which the Appellants calculate to be \$10,346.

[7] The Appellants argue that Child's Counsel should not be entitled to costs herself, and that any claim related to the cost of Child's Counsel is a claim by the Mother, not Child's Counsel. The Appellants argue that Child's Counsel fees are currently shared equally between the Appellants and the Mother, each paying 50%, and any change to the sharing is something that should be addressed at an upcoming Provincial Court trial. Alternatively, the Appellants argue that the Mother's recovery should be limited to 40% of the Mother's 50% share (i.e. 20% of the total cost) of the Child's Counsel's billed fees for the Appeal.

III. General Costs Principles

[8] Rule 10.29(1) provides that a successful party is *prima facie* entitled to costs: *McAllister v Calgary (City)*, 2021 ABCA 25 at para 21; *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 404-405. Costs are discretionary, and the exercise of that discretion is based on judicial principles of reasonableness, fairness, balance and equity: *JBRO Holdings Inc v Dynasty Power Inc*, 2022 ABCA 258 at para 26.

[9] This rule applies in family matters, including custody matters, in the same manner as in other civil matters: *JWS v CJS*, 2022 ABCA 63 at para 24 [*JWS 2022*]. Further, success in family matters means substantial success, not absolute success: *JWS 2022* at para 25; *DBF v BF*, 2018 ABCA 108 at para 13.

[10] The considerations which go into the determination of the amount of a costs award are set forth in rule 10.33: *McAllister* at para 23. Rule 10.33 provides:

Court considerations in making 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
- (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 considering the matters described in rule 10.33, rule 10.31 provides the court with significant discretion in the implementation of a costs award: rule 10.31; *McAllister* at para 25.

[12] The purpose of costs includes providing partial indemnification to the successful party, and Schedule C may or may not be appropriate, or may be a good "reality check": *McAllister* at paras 52-64. Indemnification is a more important consideration at the end of litigation than at the interlocutory stages: *McAllister* at para 64. The general principle is that, if a percentage of costs approach is adopted, a 40-50% level of indemnification is a reasonable guideline subject to the court's discretion to move it higher or lower depending on how the litigation was conducted and other factors, including the reasonableness of the fees incurred: *McAllister* at paras 33 and 41-51.

IV. Application to this Case

A. Entitlement to Costs

[13] Mother. The Mother was completely successful in opposing the Appeal. She is presumptively entitled to her costs. Although she was self-represented at the Appeal oral hearing, she appears to have paid for the assistance of legal counsel for the Appeal, although the amount paid has not been disclosed. In my view, the cases dealing with self-represented litigants do not apply in this situation. The Mother is entitled to costs.

[14] Child's Counsel. Child's Counsel was appointed as counsel for the Child pursuant to the September 24, 2021, order of Judge Mah (**Mah Order**). The Mah Order specifically contemplated that the Child's lawyer would be appointed by Legal Aid Alberta. The Mah Order did not

specifically authorize Child's Counsel to appear in an appeal at Court of King's Bench, but no party objected to her doing so and I find it was appropriate for her to do so in the circumstances.

[15] Child's Counsel asserted that she, on behalf of the Child, was a party respondent on the Appeal. I do not agree. While I am aware of paragraph 5 of the Mah Order, which provides that Child's Counsel is to be treated by the other parties "as would any other party", I do not believe this makes the Child a party to the Appeal. In my view, Child's Counsel acted for the Child in a non-instructional role, and the Child is the subject of the litigation between the Appellants and the Mother, but is not a party to it. The Child's role in the Appeal was more in the nature of an interested person or intervenor than a party.

[16] The Mah Order provides that Child's Counsel can seek costs. She asserts, further, that she is required to seek costs by Legal Aid Alberta. There is no question that she may ask for costs, but the issue is whether it is appropriate for Child's Counsel to be awarded costs in these circumstances.

[17] Children's Counsel has not provided me any previous cases where the child, or children's counsel, is awarded costs as if they are a party. However, I located one Alberta Queen's Bench case where costs were awarded to the child's counsel, where one of the guardians was the less successful party: *KAW v MEW*, 2019 ABQB 563 at para 56, rev'd in part 2020 ABCA 277.

[18] However, most cases that deal with children's counsel's costs in custody or parenting matters recognize that the child does not pay for the child's counsel: Legal Aid Alberta and/or the child's guardians do. In at least one case, a request was made to have costs payable directly to Legal Aid Alberta: *Prediger v Santoro*, 2016 ABCA 11. The Court of Appeal rejected the application as inappropriate in that case, but did so "without suggesting any rule for or against doing so in a proper case": at para 32.

[19] Other cases address children's counsel's costs as part of cost awarded to the successful guardian, or through the court's jurisdiction to allocate the children's counsel's costs under section 95(4) of the *Family Law Act*, SA 2003 c F-4.5. Courts are reluctant to alter the originally ordered or agreed cost sharing arrangements, particularly where children's counsel served the desired purpose, and was necessary and of assistance to the parties and the court, or where changing the allocation would upset the reasonable expectations of the parties as to the cost sharing: *CB v PC*, 2003 ABQB 605 at para 19; *HKH v JDH*, 2019 ABQB 163 at para 11. However, in some circumstances, costs of children's counsel have been ordered to be borne fully by one of the guardians based on the results of the litigation or the conduct of the party: *JWS v CJS*, 2021 ABQB 411 at para 49, aff'd 2022 ABCA 63 [*JWS 2021*]; *TH v EM*, 2019 ABPC 95 at paras 22-26; *Smith v Smith*, [2000] OJ No 5051, 102 ACWS (3d) 563 (Ont Sup Ct J) at para 7; *Voakes v Trumley*, [1996] OJ No 2831, 64 ACWS (3d) 1330 (Ont Ct J (Gen Div Fam Ct)) at paras 35-37.

[20] Even if I have jurisdiction to order costs payable to the Child or his Counsel, I decline to do so in this case. It is more appropriate, and consistent with the authorities and purposes of costs awards generally, to deal with the Mother's share of Children's Counsel costs as part of her cost entitlement from the Appellants.

B. Consideration of Relevant Factors re Quantum and Implementation

[21] I now consider the quantum and implementation of Mother's costs entitlement against the Appellants.

[22] With respect to the factors in rule 10.33(1), the Mother was completely successful, the issues were very important to the parties and the Child, and the Appeal was complex in part due to the lack of robust reasons of the Judge below. I address some other factors below.

[23] Settlement Discussions. Child's Counsel raised settlement discussions, however these appeared to be general in nature and over a broad period of time. There were no *Calderbank* or formal offers. This type of information, in this case, is not relevant to costs of the Appeal.

[24] Pre-Appeal and Post-Appeal Conduct. Child's Counsel raised the conduct of the Appellants in the underlying parenting/custody dispute between the Appellants and the Mother. She also raised the conduct of the Appellants after the Appeal. This, again, is not a material factor in deciding costs of the Appeal. Costs for steps in Provincial Court are better addressed in that Court.

[25] Stay Application. The Appellants obtained a stay of the Order pending the Appeal. The order did not address costs. In my view, all steps in the Appeal process, including the stay application, are relevant and appropriate considerations in determining costs on the Appeal. Sometimes it is appropriate for costs of stay applications to follow the outcome of a subsequent appeal: *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2004 ABCA 1 at para 5.

[26] Enhanced Costs. Children's Counsel suggests enhanced costs payable by the Appellants is appropriate given their conduct, including in relation to the Appeal. I have reviewed the *Trimac* factors, as recently set out in *JWS 2022* at para 30. I do not find enhanced costs to be appropriate. The Appeal was not frivolous, including due to the way the Judge made his order. It was not unreasonable or vexatious for the Appellants to seek a stay of the Order. I am not satisfied enhanced costs in the nature of solicitor-client costs or full indemnification costs is warranted.

[27] Impact on the Child. The impact on the Child and on the Mother's relationship with the Child is a valid consideration on costs: *SG v JPB*, 2014 ABQB 418 at paras 27-28.

[28] In all of the circumstances, I find that 40% indemnity of Mother's own legal costs incurred in the Appeal, in accordance with *McAllister*, plus disbursements, is appropriate rather than costs calculated pursuant to Schedule C.

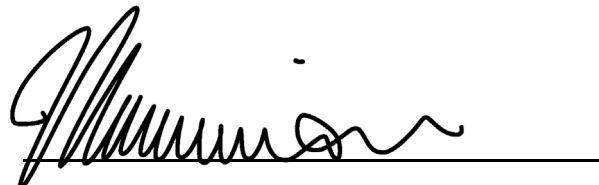
[29] In the Appeal, Appellants unsuccessfully continued to oppose and forcefully challenge the independent, court-appointed Child's Counsel's position made on behalf of the Child, in her non-instructional role, and in her view, in the best interests of the Child. This increased Child Counsel's work and costs on the Appeal. The stay order ultimately proved to only delay the upholding of the Judge's Order made in the best interests of the Child. I find that the Appellants, not the Mother, should be solely responsible for the Child Counsel's actual charges related to the Appeal.

[30] Accordingly:

- (a) the Appellants shall forthwith pay to the Mother 40% of her actual legal costs incurred in relation to the Appeal, which includes all steps in the King's Bench appeal process, including the stay application, plus 100% of her disbursements. Mr. Hoag is directed to provide to the parties a summary of his actual costs, paid or owing by the Mother to him, in respect of the Appeal only;
- (b) the Appellants shall forthwith pay to the Mother 100% of her share of any costs she has paid, or is obligated to pay, to Legal Aid Alberta in respect of Child Counsel's actual amounts charged, or to be charged, to Legal Aid Alberta in respect of the Appeal, including all steps in the King's Bench appeal process and including the stay application.

[31] I strongly urge the parties to reach an agreement on the amounts payable by the Appellants to the Mother. However, if necessary, the parties may have the costs paid or payable in respect of the Appeal assessed by an assessment officer pursuant to rule 10.34. All parties, Mr. Hoag, and Children's Counsel shall cooperate with any such assessment.

Written Submissions provided on December 9th and 13th, 2022 and January 6th, 2023.
Dated at Calgary, Alberta this 22nd day of February, 2023.



M.A. Marion
J.C.K.B.A.

Appearances:

Brynn Doctor, Doctor Law
for the Appellants

K.C., self-represented

Cori Lynne T. Mercier, Castle & Associates
for the Child