In the Court of Appeal of Alberta

Citation: MacPhail v. Karasek, 2006 ABCA 354

Date: 20061124
Docket: 0501-0382-AC
Registry: Calgary

Between:

Calvin James MacPhail

Respondent (Plaintiff)

- and -

Marcy Marie Karasek

Appellant (Defendant)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Keith Ritter

Memorandum of Judgment Regarding Costs

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I. Introduction

[1] Ms. Karasek successfully appealed an order that had awarded custody of her daughter to the father, Mr. MacPhail. Following the oral hearing the panel reserved its decision and issued a written memorandum. As a result, no oral argument was entertained on the question of costs.

[2] By letter dated August 31, 2006, Ms. Karasek seeks instructions as to costs. She refers to Part H of the Practice Directions as well as an annotation in Stevenson & Cote's *Annotated Rules of Court* where they state at 485 that "where a decision of the Court of Queen's Bench has been entirely reversed on appeal, the basis for the award of costs at trial disappears and the Court of Appeal can revisit the matter of trial costs even if there was no error as to costs by the trial judge." She sought instruction as to whether the practice note included trial costs as well as appeal costs.

[3] Mr. MacPhail opposes costs of the appeal. In the alternative he seeks an order setting off any appeal costs awarded to Ms. Karasek against the trial costs awarded to him. Finally, in the further alternative, he argues that Ms. Karasek is not entitled to trial costs because she did not request them in her factum or during oral argument, and because there is a general rule in custody cases that costs are not ordered.

II. Decision

[4] Rule 518 of the Alberta *Rules of Court* applicable to the Court of Appeal provides that the court may, "... (f) make such order as to costs as to it seems just, but where the court is equally divided, the costs shall follow the event of the appeal."

[5] The general rule in civil proceedings is that a successful litigant is entitled to his or her costs. Rule 601(3), applicable to superior courts, provides that "[w]hen no order is made, the costs follow the event, but the fact that a party is successful in a proceeding, or a step in a proceeding does not prevent the court from awarding costs against the successful party in a proper case." Part H of the Consolidated Practice Directions of the Alberta Court of Appeal, commenting on r. 601(3), provides that "no specific direction about costs will be made except when the court hearing an appeal is of the view that the case shall be an exception to that general practice." As a result, costs of the appeal

will generally follow the event without further order.[1] We see no reason to interfere with that general principle.

[6] Turning next to the trial costs, the respondent argues that Ms. Karasek is not entitled to trial costs because she did not request them in her factum or while making her oral argument. He relies on *West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd.*, [1993] A.J. No. 699 (C.A.). While failure to request could, and in many cases may, result in a court refusing to order costs, a court is not precluded from doing so by the failure to request costs in the factum. In this case the decision was delivered by way of written memorandum and, as a result, there was no opportunity to address the issue of costs of the trial arising from success on the appeal. In answer to Ms. Harme's question, costs of the trial below do not flow to a successful appellant automatically. They must be awarded.

[7] Counsel for Mr. MacPhail also argues that we are *functus* because we vacated the trial judgment which would include costs. We note that argument conflicts with his earlier argument that his client should have a set-off against his award of trial costs. In any event, we do not agree that we are *functus*. It is our view that when Mr. MacPhail's trial judgment was reversed the basis for his costs award disappeared. But vacating a trial judgment for costs does not address the issue of a successful appellant's entitlement to an award of trial costs.

[8] As noted in *FFM Holdings Ltd. v. Lilydale Co-operative Limited*, 2002 ABCA 113, this court held that when a decision of the Court of Queen's Bench is entirely reversed on appeal, the basis for the award of costs at trial disappears and the Court of Appeal can revisit the matter of trial costs, even if there was no error as to trial costs.

[9] At various times, both parties suggested that the general rule of law in custody cases was for each party to bear his or her own costs. We do not agree. While parties may frequently agree, or a trial judge may conclude, that no costs to either party is a proper disposition of costs in the circumstances of a particular case, that is not a general rule of law. The rule in custody cases is no different from the rule in other civil litigation – it starts from the proposition that a successful litigant is generally entitled to his or her costs. This court recently addressed this issue in *Metz v. Weisgerber*, 2004 ABCA 151, where it stated at para. 30:

> Strong public policy reasons militate in favour of awarding costs in custody cases in accordance with the usual Rules.

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[1] Practice Note H also provides for three things: that submissions need not be made unless the party seeks an exemption to the general practice; that if a party seeks an exception on the assumption of a certain outcome of the appeal, this should be stated in the factum together with a brief statement of argument; and that oral submissions about costs will be requested only in exceptional circumstances.

[10] The court noted that there were several rationales to justify consistency between the rule for costs in custody cases and the rule for costs in other civil litigation. Those rationales included the encouragement of settlement, predictability, the danger of discouraging meritorious litigants and encouraging unmeritorious ones, the disproportionate and negative impact on the parent with fewer financial resources, the fact that costs are not a full indemnity, and finally, an award of costs best comports with constitutional rights.

[11] The circumstances of this case do not justify departure from the general rule that a successful litigant is entitled to costs. Ms. Karasek was entirely successful in her appeal. She has retained custody of her daughter and has been put to considerable expense in doing so. Ms. Karasek should not be deprived of trial costs simply because the request was not included in her factum.

[12] In our view, this case falls squarely within the rationales noted above. In particular, failure to award costs would have a disproportionate and negative effect on Ms. Karasek, considering the relative imbalance in their financial positions. In our view, the basis for the trial costs award disappeared with appellate judgment. We are also satisfied that Ms. Karasek's success on appeal should entitle her to trial costs as well as those on appeal. There is no appropriate reason to depart from the general rule that costs follow success.

III. Conclusion

[13] Ms. Karasek is awarded party/party costs of the appeal and party/party costs of the trial on the basis of Schedule C, Column 3, together with all reasonable disbursements, payable forthwith. Costs shall include costs of this application. If there is any disagreement as to costs, the parties are at liberty to approach any member of this panel, who will settle the costs without the necessity of a formal taxation.

Appeal heard on June 12, 2006

Memorandum filed at Calgary, Alberta
this 24th day of November, 2006

Conrad J.A.

Paperny J.A.

Ritter J.A.

Appearances:

D.L. Harms
for the Appellant

D.L. Shennette
for the Respondent