In the Court of Appeal of Alberta

Citation: JWS v CJS, 2022 ABCA 63

Date: 20220222
Docket: 2101-0171AC
Registry: Calgary

Between:

JWS

Appellant
(Plaintiff)

- and -

CJS aka CJH

Respondent
(Respondent)

The Court:

The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Elizabeth Hughes
The Honourable Justice Anne Kirker

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice C.L. Kenny
Dated the 26th day of May, 2021
Filed on the 12th day of August, 2021
(2021 ABQB 411, Docket: 4801 153868)

Memorandum of Judgment

The Court:

Background

[1] The father obtained leave to appeal a judgment regarding costs of a parenting trial and pre- and post-trial applications: 2021 ABCA 375.

[2] The trial was held in 2016 and the trial decision was delivered from the bench in October 2018. The main issue at trial was which parent would have primary parenting of the couple's five children, and which parent would have scheduled access. It was a very high conflict proceeding with numerous interim applications. Initially, the mother had no access to the children, but over time, parenting time was provided to her.

[3] As set out in the appellate decision 2019 ABCA 153 at paragraphs 4 and 30, the trial judge had before him a substantial record:

> i. 19-days of *viva voce* evidence from 23 witnesses heard between May 2, 2016 and September 19, 2016; the testimony included evidence from the mother, the father, and the author of a Practice Note 8 assessment (prepared between January and September of 2013);
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> ii. meetings between the trial judge and the children, first in late 2016 and again in March and May of 2018;
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> iii. numerous interim applications involving the children between the end of the *viva voce* evidence and May of 2018;
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> iv. a report by a court expert appointed under Rule 6.40 (submitted to the court on December 19, 2017);
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> v. thorough and extensive written argument submitted to the trial judge by counsel for the mother and counsel for the father, including reply submissions by the father; and
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> vi. as permitted by the order appointing counsel for the children, written submissions by counsel for the children in the summer of 2018 after all other evidence and submissions were in.

[4] After reviewing all the evidence, the trial judge was satisfied that it was in the best interests of the three youngest children for their mother to have primary care and their father to have

generous access. The mother was also awarded primary care of the two oldest children with the father's access to be determined by the children.

[5] After trial, there were numerous applications and proceedings into 2019 as well as an appeal of the trial decision by the father which was largely dismissed. Costs on that appeal were dealt with on a party-party basis: 2019 ABCA 153 at para 44.

[6] The trial judge retired before submissions on costs on the trial proper were made and a different judge was appointed to determine costs. That costs hearing was conducted based on written submissions made by the original trial counsel for the parties.

[7] Given the father's conduct, the costs judge determined that this case met many of the criteria listed in *Jackson v Trimac Industries Ltd* (1993), 138 AR 161, 1993 CanLII 7031 (QB) where departure from party-and-party costs was appropriate. The costs judge determined that the mother had been successful at trial and was entitled to solicitor-client costs: 2021 ABQB 411 at paras 20-27, 32-42 and 47.

[8] The parties also disputed whether the costs award should capture the numerous interim orders. The costs judge determined that approximately 2/3 of the interim orders did not address costs and that it was appropriate to assess the costs of these orders in favour of the successful party at trial. However, she chose not to revisit any order that expressly set out how costs of that application would be addressed. For those orders, she deducted a lump sum amount ($50,000) from the solicitor-client amounts put forward by the mother's counsel ($474,450). Ultimately, the mother was awarded $424,000 in costs: 2021 ABQB 411 at paras 28-31 and 50-51.

[9] The father appeals. For the reasons set out below, the appeal is dismissed.

Issues on Appeal

[10] The father argues six grounds of appeal that have been paraphrased and restated below:

a) The costs judge misapprehended the facts and findings of the trial judge about the father's conduct and relied upon the mother's misstatement of the facts in her brief.

b) The costs judge erred in determining that the mother was successful at trial.

c) The costs judge erred in concluding that several of the circumstances described in *Trimac* were met and in awarding solicitor-client costs against the father.

d) The costs judge erred by awarding any costs for interim orders that were silent on the issues of costs.

e) The costs judge erred in awarding the quantum of solicitor-client costs, minus the global deduction for interim orders, when there was no bill of costs or accounting evidence provided by the mother.

Standard of Review

[11] Costs awards are discretionary and are entitled to great deference. An appellate court should be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable, or non-judicial manner: *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 52.

[12] A discretionary decision on "costs may be set aside if an appellate court finds that a judge has misdirected herself on the applicable law or made a palpable error in her assessment of the facts": *Deans v Thachuk*, 2005 ABCA 368 at para 16.

[13] The appellant asserts that since the costs judge was not the trial judge, this Court should not show any deference to her decision. He has not pointed to any case law to support this proposition nor are we aware of any such authority. We have found only a few reported decisions where a judge other than the trial judge determined trial costs and there is no suggestion in these reported decisions that the approach to appellate review was any different: see for example, *Tregobov v Paradis* et al, 2017 MBCA 60, *Lyne v McClarty*, 2003 MBCA 18, *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540, and *Singh v Kaler*, 2017 ABCA 275.

[14] In assessing the submissions of the parties, the costs judge was required to make several factual findings and apply those findings to well-established legal tests. The appellant's suggestion that those findings would not be assessed for the deferential standard of review appears inconsistent with the majority decision in *Housen v Nikolaisen*, 2002 SCC 33 at paragraph 25 where the majority explains that deference is owed to the lower court's factual findings and inferences of facts for a variety of reasons, not just because they heard from the witnesses:

> As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge -- that of palpable and overriding error.

[15] Further, costs can be ordered to fulfil a variety of purposes such as to provide indemnity to the successful litigant, to facilitate access to justice by impecunious parties, to discourage frivolous positions, to sanction misconduct, and to encourage settlement: *GO Community Centre v Clark*

Builders and Stantec Consulting Ltd, 2020 ABQB 203 at para 59. The respondent advanced her costs position based on the appellant's misconduct throughout the litigation, which findings were not solely within the purview of the trial judge.

[16] As a result, this Court will apply the established legal principles of appellate review to this costs decision.

Analysis

A. Misapprehension of Facts or the Trial Decision

[17] As the costs judge was not the trial judge in this very high conflict proceeding over seven years with 58 applications, it was imperative that the parties provided her with the relevant materials to ground the assessment.

[18] Much was made by the father's counsel during oral argument that the costs judge did not review the trial transcripts. The costs judge indicated at the outset of her decision that she relied upon "material provided by counsel as to the facts and findings as well as the pleadings and orders on the court file": 2021 ABQB 411 at para 2. We have reviewed the materials the parties submitted to costs judge and understand that she had before her the following:

a) Written Submissions of the father, which included the following documents

   i. Transcript of the oral decision of the trial judge dated October 31, 2018

   ii. Invoice of the Practice Note 8 parenting expert

   iii. Consent Order granted on January 27, 2014

   iv. Excerpts of the transcripts of the proceedings on January 14, 2016

   v. Interim Trial Order granted on March 10, 2017

   vi. Correspondence and accounting for the children's counsel

   vii. Statement of Claim for Divorce and Division of Matrimonial Property filed September 24, 2012

   viii. Order for Substitutional Service granted on September 28, 2012

   ix. Interim Consent Order granted October 4, 2012

   x. Interim Consent Order granted October 18, 2012

xi. Consent Order granted December 21, 2012

xii. Consent Order for Parenting and Disclosure granted on December 21, 2012

xiii. Consent Order to Sever Divorce Judgment from Corollary Relief Issues granted on March 21, 2013

xiv. Divorce Judgment granted on June 4, 2013

xv. Interim Consent Order granted on December 19, 2013

xvi. Consent Order granted on January 27, 2014

xvii. Order granted on January 27, 2014

xviii. Consent Order granted on March 11, 2014

xix. Consent Order granted on March 18, 2014

xx. Consent Order granted on April 29, 2014

xxi. Interim Consent Order on granted June 25, 2014

xxii. Consent Order granted on December 18, 2014

xxiii. Order granted on March 29, 2016

xxiv. Order granted on July 13, 2016

xxv. Order granted on January 10, 2017

xxvi. Interim Trial Order granted on March 31, 2017

xxvii. Consent Order granted on March 31, 2017

xxviii. Consent Order for a Court Appointed Expert granted on March 31, 2017

xxix. Amended Consent Order for a Court Appointed Expert granted on March 31, 2017

xxx. Interim Trial Order granted on June 29, 2017

xxxi. Order granted on November 3, 2017

xxxii. Consent Order granted on December 13, 2017

xxxiii. Consent Order granted on March 28, 2018

xxxiv. Consent Order granted on April 11, 2018

xxxv. Order to Produce granted on April 25, 2018

xxxvi. Order granted on May 14, 2018

xxxvii. Order granted on December 20, 2018

xxxviii. Order granted on February 12, 2019

xxxix. Interim Interim Without Prejudice Child Support Order granted on March 4, 2019

xl. Amended Order granted on March 26, 2019

xli. Consent Summer Parenting Order granted on June 10, 2019

xlii. Order granted on August 20, 2019

xliii. Order granted on July 24, 2019

xliv. Consent Holiday Order granted on November 15, 2019

xlv. Order granted October 30, 2019

xlvi. Order granted December 11, 2019

xlvii. The appellant's Bill of Costs

b) Written Costs Argument of the mother

c) Response to Written Argument on Costs of the mother

d) Procedure Record

[19] As a result, the father's submission is entirely without merit. He provided the costs judge with significant background documents in his written argument, including the transcript of the trial decision. The costs judge said that she reviewed this material and there is nothing to suggest otherwise.

[20] We have reviewed the oral trial decision, the costs decision, the father's submissions and the mother's submissions.

[21] The costs judge accurately summarized, and in some places quoted, the trial judge's findings. This analysis supported her conclusions about whether the father's conduct supported an award for solicitor-client costs and who the successful party was. She accurately summarized the reports and other evidence referred to and relied upon by the trial judge supporting his conclusion that the children would reside with their mother.

[22] She also reviewed the pleadings and additional evidence, including the 20-page Procedure Card, to ground her factual conclusions. For the purposes of the costs assessment of the entire proceeding, the costs judge was entitled to consider these additional documents and use factual findings from this evidence, along with those found at trial, to support her conclusions.

[23] We find that the costs judge had an extensive record before her in which to ground her findings. This ground of appeal is dismissed.

B. Successful Party at Trial

[24] Rule 10.29 of the *Alberta Rules of Court*, Alta Reg 124/2010 sets out the general rule that the successful party is presumptively entitled to costs. This rule applies in family matters, including custody matters, in the same manner as in other civil matters: *AE v TE*, 2017 ABQB 674 at paras 4-5.

[25] "Success in family matters means substantial success, not absolute success": *DBF v BF*, 2018 ABCA 108 at para 13.

[26] In assessing substantial success, the court looks at overall results, based on what the litigant was initially claiming: *SLT v AKT*, 2008 ABQB 450 at para 14. "A finding of success may be based on a finding that a party was successful on the most important issue litigated": *AE v TE* at para 7.

[27] There can be no doubt that the primary issue, the one most important to all parties and the children, was which party would have day-to-day parenting of the children. The mother was successful on this issue.

[28] It was of no consequence to the assessment that the mother did not receive the ancillary relief requested in her statement of claim, such as an order directing the father undergo counselling or an order that he be supervised while with the children, or that the middle child refused to go to the mother's house after the trial decision was rendered. "Costs are not normally awarded on an issue-by-issue basis": *DBF v BF* at para 13.

[29] The costs judge followed the general rule, and the father can point to no error in her application of the general rule. This ground of appeal is dismissed.

C. The *Trimac* Factors

[30] The costs judge determined that solicitor-client costs were appropriate as the father's conduct met six of the circumstances 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*);
>
> …
>
> 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand*).

[31] While the father is correct that the trial judge did not make any findings as to the *Trimac* circumstances themselves, the costs judge's inferences about the father's blameworthy conduct and delay was supported by the trial decision and additional evidence submitted. The costs judge's inferences and findings of fact are entitled to deference by this Court.

[32] For example, the trial judge made express findings that the father was controlling, self-centred, and manipulative. He also found that the mother did not intentionally take a drug overdose, rather it was an accident.

[33] The trial judge accepted the evidence in the Practice Note parenting reports, which was consistent with his own impressions of the children after interviewing them. He found that:

(a) the father had been coaching the children to say untrue things about their mother;

(b) the children loved and trusted their mother, and that they received emotional comfort and support from her;

(c) the mother presented as the more compassionate parent and the "friendlier parent." She was the parent most likely to co-parent in a manner that was supportive of the children's significant psychological needs and of their relationship with the other parent;

(d) while the father loved his children deeply, he processed information to confirm his own biases; and

(e) the three younger children were subject to subtle pressure at the father's home.

[34] These findings were all contrary to the father's position throughout the litigation where he was openly critical of the mother at every opportunity and failed to recognize or take responsibility for any role that he played in creating a difficult situation for the children.

[35] The costs judge's inferences from these findings, and her review of the additional evidence was sufficient to support her findings at paragraphs 35-42 as well as her conclusion:

> [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.

[36] The costs judge set out and applied the applicable law. She made no palpable and overriding error in the assessment of the facts or inferences from those facts, nor did she unreasonably exercise her discretion to award solicitor-client costs. This ground of appeal is dismissed.

D. Costs for the Interim Orders

[37] The father merely asserts that any other orders on the record that were silent on the issue of costs are outside the scope of triable matters and no costs should have been awarded. This position is contrary to the well-known principle that if neither the parties nor the court addressed the issue of costs at the time of an interim or interlocutory order in a proceeding, rule 10.30(1)(c) provides jurisdiction for the court to make a later order dealing with those costs after trial: *Saskatchewan Power Corp v Alberta (Utilities Commission)*, 2015 ABCA 281 at paras 8-10.

[38] Rule 10.30(1)(c) provides that "[u]nless the Court otherwise orders or these rules otherwise provide, a costs award may be made […] in respect of trials and all other matters in an action, after judgment or a final order has been entered".

[39] The costs judge applied a "costs in the cause" approach to the interim orders, which was consistent with applicable law, appropriate in light of the facts, and a reasonable exercise of discretion.

[40] This ground of appeal is dismissed.

E. Quantum of Solicitor-Client Costs

[41] Finally, in assessing the quantum of solicitor-client costs, including the lump sum deducted for the interim orders where costs were expressly addressed, we find no reviewable error in the costs judge's approach.

[42] The mother presented a lump sum amount as reflecting an approximate of the solicitor-client costs incurred and provided submissions about the numerous calculations and deductions for advanced costs ordered. The costs judge accepted this approach and adopted the lump sum nature of the calculations. Rule 10.31(b)(ii) authorized her to do so.

[43] This is a high conflict matter which took seven years to resolve the parenting of the children. We understand that the matter of support is not yet resolved. Given the father's tactics, it was critical for the mother to have legal representation throughout. As she did not have financial means, her counsel carried most of the expenses for the duration of the litigation. The mother's counsel is a senior practitioner, and we are satisfied that the amounts she put forward were reasonable in the circumstances. We note that the father has not suggested otherwise. We also agree with the costs judge that this is an *exceptional* case and that sending the invoices for assessment would unnecessarily delay conclusion of this matter.

Conclusion

[44] The appeal is dismissed.

[45] The mother received an advanced order for costs of this appeal in the amount of $20,000. No further order for costs of this appeal will be awarded.

Appeal heard on February 10, 2022

Memorandum filed at Calgary, Alberta
this 22nd day of February, 2022

Veldhuis J.A.

Hughes J.A.

Authorized to sign for: Kirker J.A.

Appearances:

D.P. Castle
T. Kelm
for the Appellant

D.L. Shennette
for the Respondent