In the Court of Appeal of Alberta

Citation: Metz v. Weisgerber, 2004 ABCA 151

Date: 20040505
Docket: 0301-0071-AC
Registry: Calgary

Between:

Nancy Metz

Plaintiff
(Respondent)

- and -

Fred Weisgerber

Defendant
(Appellant)

The Court:

The Honourable Chief Justice Fraser
The Honourable Mr. Justice Côté
The Honourable Madam Justice Picard

Reasons for Judgment Reserved of the Honourable Mr. Justice Côté
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Madam Justice Picard

Appeal from the Judgment by
The Honourable Mr. Justice J.H. Langston
Dated the 17th day of February, 2003
(2003 ABQB 160, Docket: 010601521)

Reasons for Judgment of
the Honourable Mr. Justice Côté

A. Issue

[1] The issue here is whether there should be special rules for costs in custody disputes. (Here we use that term to include questions of access and who has primary physical care.) The appellant argues that there should usually be "no costs" in such cases. Is that correct?

B. Basic Facts

[2] The judgment appealed from sets out the facts in some detail: see 2003 ABQB 160, [2003] A.J. #264, [2003] A.R. TBEd. MR 102, 2003 Carswell Alta. 251. I give the highlights below.

[3] The parents had a child. They never married. Nor did they live together. The father had access to the child and exercised it on a regular basis. The mother decided to move to be closer to her family and support system. When the father learned of this, that led to a custody and access dispute that carried on for about 1-1/2 years. The father began with an Originating Notice seeking "residential custody" or, in the alternative, joint custody. The mother filed a cross-suit. Six Notices of Motion were then filed, some by the mother, more by the father. Various court orders called for cross-examination on affidavits and examinations for discovery. Two judges gave contested orders, and then there were four consent orders, the last settling all other matters, but reserving and not settling costs. The judge who had heard the last three consent applications then heard a contested application about costs. He heard live evidence from the father and had before him 11 affidavits (most but not all by the two parents), and a transcript of cross-examination of an independent witness. The affidavits exhibited reports by two different psychologists. The first report, which had recommended that custody go to the father, was subsequently discredited and rejected as the proceedings unfolded. The court then ordered a report by a second psychologist, who found the mother to be the more appropriate custodial parent.

[4] The judge then awarded costs to the mother. The father appeals.

C. Standard of Review

1. Facts

[5] Fact decisions are reviewed on a standard of palpable and overriding error: ***Housen v. Nikolaisen*** [2002] 2 S.C.R. 235, 286 N.R. 1, 2002 SCC 33.

2. Discretion

(a) Generally

[6] Appeal courts are very deferential to discretionary decisions. The cases are collected in Stevenson and Côté, ***Civil Procedure Encyclopedia***, Chap. 75, Part G.2 (2003).

(b) Costs appeals

[7] A Court of Appeal should affirm an award of party-party costs unless the trial judge made an error in principle or was plainly wrong, because a trial judge has advantages over a Court of Appeal: ***Hamilton v. Open Window Bakery***, 2004 SCC 9 (paras. 24-7).

3. Legal Questions

[8] On appeal, legal questions are decided on a correctness standard: ***Housen v. Nikolaisen***, ***supra*** (para. 8).

D. Exercise of Discretion Here

[9] The trial judge found that both parents were suitable and that the father had non-guardian status (para. 19). The trial judge's reasons for giving the mother costs (2003 ABQB 160) included the following:

1. The final settlement (consent order) in substance is not remarkably different from the position which the mother took from the outset of litigation (para. 8).

2. The mother had to resist three applications by the father (para. 9).

3. The mother had to help fund a bilateral assessment and pay her lawyer (para. 9).

4. The father had still not made full financial disclosure (para. 10).

5. R. 601(1) (para. 12).

6. The father made repeated court applications (para. 19).

7. The focus of the dispute was not really the child's best interests (para. 20).

8. The contest need not have occurred, because the final settlement was reasonable and was predictable all along, and the mother was never unreasonable (para. 21).

9. There was little merit to the father's applications, and the mother had to defend them (para. 21).

10. The costs to be paid would cover only part of the litigation expense incurred by the mother (para. 22).

[10] The father's argument stressed a number of alleged errors in the fact recitals of the Reasons under appeal. The recitals so emphasized were about payments, the relief sought in various motions, and whether there had been full disclosure. We received extended argument, written and oral, about the details. I am satisfied that some of the errors alleged do not exist. The others are an awkwardly worded phrase or two, and small matters of detail or degree. They do not affect the points being made, and scarcely affect their force.

[11] The father also alleges bias on the part of the judge who is under appeal. This is largely based upon the same, or similar, allegations of factual error. I see no significant error, and nothing even approaching evidence or appearance of bias.

[12] Even had there been an appearance of bias, the only relief sought by the appellant father is that the Court of Appeal decide costs afresh. Had we had to make that decision ourselves, I would have made the same costs award, for all the reasons which I give below.

E. Legal Tests for Costs in Custody Cases

1. Preliminary

[13] The father argues a question of principle. He suggests that ordinarily no costs should be awarded in custody disputes unless the court finds that the losing parent was unreasonable in the legal steps pursued. The authorities on that topic conflict.

[14] One must start with the governing legislation. The ***Divorce Act*** and Rules under it do not apply to this suit, though where they do, R. 577.2 gives a general discretion as to costs, and R. 562(2) makes the ordinary Rules of Court apply. This case is governed by the ***Domestic Relations Act*** (then R.S.A. 1980, c. D-37 as am., now R.S.A. 2000, c. D-14). Its s. 56(4) says that in custody cases, "The Court may . . . make any order respecting costs the Court considers just." There is no reason that the ordinary Rules of Court would not apply, and R. 601(1) is similar.

"**601(1)** Notwithstanding anything in Rules 602 to 612, but subject to any Rule expressly requiring costs to be ordered, the costs of all parties to any proceedings (including third parties), the amount of costs and the party by whom or the fund or estate or portion of an estate (if any) out of which they are to be paid are in the discretion of the Court, and when deciding on costs the Court may consider the result in the proceeding and

(a) the amounts claimed and the amounts recovered,

(b) the importance of the issues,

(c) the complexity of the proceedings,

(d) the apportionment of liability,

(e) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding,

(f) a party's denial of or refusal to admit anything that should have been admitted,

(g) whether any step or stage in the proceedings was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(h) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated their defence from another party, and

(i) any other matter relevant to the question of costs."

2. Discretion

[15] Though costs are discretionary, there are limits to the discretion. Costs cannot be awarded or withheld on legally irrelevant grounds, such as sympathy, wealth, or dislike of proper conduct. And a judge exercising a discretion must similarly give some weight to all the legally relevant factors. So "the ordinary rules of costs should be followed unless the circumstances justify a

different approach": ***Min. of Forests v. Okanagan I.B.*** [2003] 3 S.C.R. 371, [2004] 2 W.W.R. 252, 273, 313 N.R. 84, 2003 SCC 71 (para. 22). Costs cannot be withheld to give the loser a consolation prize.

3. Binding Precedents

[16] In Alberta the modern Queen's Bench decisions do not agree on the applicable rule or tests for costs in custody cases. These cases support costs in custody cases: ***Groenveld v. Groenveld*** (2003) 332 A.R. 397, 13 Alta. L.R. (4th) 70, 38 R.F.L. (5th) 271, 2003 ABQB 281; ***Scott v. Scott*** (1993) 144 A.R. 264, 9 C.P.C. (3d) 162; ***Arcand v. Arcand*** (1989) 100 A.R. 185, 68 Alta. L.R. (2d) 284. These cases do not support costs in custody cases: ***St. Laurent v. St. Laurent*** (2002) 32 R.F.L. (5th) 459, 2002 ABQB 899; ***Marshall v. Butt*** (1996) 188 A.R. 118. These cases adopt a qualified approach to costs: ***Miller v. Miller*** (2000) 272 A.R. 397, 2000 ABQB 671; ***Low v. Robinson*** [2000] 10 W.W.R. 690, 274 A.R. 377, 2000 ABQB 399.

[17] So one must see if there is any binding precedent on point. The research by counsel and ourselves has turned up only the following binding decisions.

(a) ***Henry v. Pham*** (1987) 81 A.R. 276, 55 Alta. L.R. (2d) 227, 10 R.F.L. (3d) 418 (C.A.). This was a guardianship/adoption revocation case. It contains no general rule about costs in custody cases. It had unusual facts.

(b) ***Sullivan v. Sullivan*** (1995) 219 A.R. 178 (C.A.), leave den. (S.C.C.) (1995) 187 A.R. 160, 197 N.R. 318. It states no general rule.

(c) ***Gordon v. Goertz*** [1996] 2 S.C.R. 27, 196 N.R. 321. It contains no useful general discussion.

(d) ***M.M.K. v. U.K.*** (1990) 109 A.R. 241 (C.A.), leave den. [1991] 1 S.C.R. x, 131 N.R. 160. It gives no reasons at all respecting costs, though it awards costs in both courts to the successful parent.

(e) ***MacMinn v. MacMinn (#1)*** (1995) 174 A.R. 261, 271-72 (paras. 53-55), 17 R.F.L. (4th) 88 (C.A.). Where the court gave the mother access terms close to what she had proposed, the Court of Appeal concluded that she had won the trial, and the father had lost it. Therefore, the Court of Appeal awarded her costs of the divorce action (but not double costs under Rr. 170, 174). In so doing, the Court implicitly accepted that the general Rules should apply to the award of costs.

(f) ***Cador v. Chichak*** [1998] A.J. #1188, [1998] A.R. Uned. 527, [1998] A.U.D. 897, 1998 ABQB 881. Wilson J. gave enhanced costs in a case involving custody, maintenance and matrimonial property, holding that as a general rule, costs in matrimonial matters should not be

treated any differently than costs in any other matter, subject to the exercise of discretion, which cannot be codified or patterned into rules. One should start with the principle that usually costs should follow the event, if one party succeeded and the other did not, or if success was not clearly divided. On appeal, the Court of Appeal dismissed the appeal, and expressly agreed with the trial reasons supporting the award of enhanced costs. It is ironic that this important appellate decision is unreported, but it may be found in 2000 ABCA 10, [2000] A.J. #24, [2000] A.R. Uned. 2, Edm. 9803-0571-AC (Jan. 12) (para. 18).

(g) ***V.L. v. D.L. (#2)*** [2002] 6 W.W.R. 620, 303 A.R. 122, 211 D.L.R. (4th) 191, 1 Alta. L.R. (4th) 12, 2002 ABCA 43. This says that the general practice is that the successful party is entitled to costs of the proceeding. That the Court of Appeal delved into broad legal issues, or that there were allegations of misconduct outside the litigation, or that the party losing was not guilty of any misconduct, is not a reason to withhold costs from the winner. It takes evidence to show that costs would be a hardship. The winner got costs of the appeal.

(h) Many other Court of Appeal decisions have merely dismissed (or allowed) an appeal about custody with costs to the winner, but with no discussion of costs. What is more, the Court of Appeal's Practice Direction's Part H.1, and R. 601(3), give costs to the winner if the judgment is silent. And so the Court of Appeal has awarded costs of every custody appeal where it has not expressly stated the contrary.

4. Should Costs in Custody Cases be Different?

[18] The preceding paragraphs show that no legal authority compels this court to treat costs differently in custody cases than in other cases. Nor does the legislation say otherwise. Indeed, the legislation seems to say to treat them the same. Typically, that would mean that costs go to the successful party.

[19] Are there any policy or social reasons to treat costs differently in custody cases? In particular, when a judge exercises the statutory discretion over costs in a custody case, are some of the usual circumstances inapplicable or of little weight? Are there some circumstances which are important in custody cases, but rarely present in other litigation, which would warrant a special rule for costs in custody cases?

[20] In my respectful view, the answer to all three questions is no.

[21] It is true that when the only parties to a custody dispute are the child's parents (not the government), then ordinarily the substantive question is the best interests of the child, not the interests (or rights) of the parents. And it is true that the child is usually neither represented, nor heard by the court. And occasionally a parent may litigate custody or access against his or her own

interests or desires, in order to put before the court a viewpoint about the child's best interests not otherwise available to the court.

[22] However, the last situation is relatively uncommon. And in any event, where it occurs, it is not likely that litigation will proceed, since there is less chance of a conflict with the position taken by the opposing parent. The spectacle of a parent litigating to give up custody or restrict access is a rarity, if not a chimera. Most parents litigating about custody seek to advance their own desires to some significant degree. I do not suggest that such parents are all acting for oblique reasons. Doubtless most honestly believe that what they propose (more custody or access for themselves) would be better for the child. But what such a litigating parent proposes is almost always what he or she desires too.

[23] Nor do I think that most custody litigation is good for the child in question, and that we should have more of it. Indeed it is remarkable how often both contestants are good parents. Rarely does the court find the losing parent to be truly unfit. Still less do I believe that custody litigation is so good for the child that it should be encouraged by immunity from paying costs. To state that as an explicit general proposition is almost to show why it cannot be generally accepted.

[24] I can see no reason why costs should be limited to suits over money or marketable commodities. The rights and wrongs and expenses are the same with or without money or merchandise. Courts routinely award costs in litigation over administrative law, employment, injunctions, and professional discipline, for instance. Yet no money or inventory is battled over there. Though one cannot measure a custody award in dollars, it is usually plain which side's contentions prevailed at the end: see ***MacMinn v. MacMinn***, ***supra***.

[25] It is argued that costs should only be awarded in custody cases where a parent has acted unreasonably. Indeed, the father contends that still more conditions must be met before costs should be awarded against a parent in custody cases. But there is a problem with requiring a threshold finding of unreasonable conduct by one parent before awarding costs against that parent: that would effectively make no costs the default rule for almost all cases. The one exception would be cases in which a parent has been found to have engaged in egregious conduct.

[26] Very often, neither party's litigation position was significantly unreasonable at the outset, before full evidence was available, from full cross-examinations, discovery, affidavits, and home studies. Initially, information is often lacking, untested, or contradictory. At those early stages, often the facts known or understood by each side make that party's position arguable. Therefore, if courts were to weigh reasonableness of conduct heavily, and discount greatly all the other criteria for costs listed in R. 601(1), the courts would deny anyone costs for most of the steps in custody suits. Then each party would largely bear his or her own expenses, with little or no indemnity.

[27] Usually at the end of the suit, one parent's arguments are clearly better founded than the other's. Objectively, one side is much closer to being right than the other. It may be because one is

a much more suitable parent, or because one's proposals are much more realistic and fair. That parent wins. If his or her arguments or demands or proposals have been more or less the same throughout the contest, then he or she was right all along. It is not fair that he or she bear alone the litigation expenses created by the opponent's mistaken position or arguments; a costs award is like damages, to reimburse: ***Min. of Forests v. Okanagan I.B.***, ***supra***, at 273 (W.W.R.) (para. 21). It does not exist primarily to punish.

[28] One must be wary of any silent suggestion that litigation over custody is a mere gamble, and that the judges are as likely wrong as right. I reject that. Juries are not used, and judges take great pains with the evidence. Ordinarily there is an oral hearing. Though some mistakes will be made by mortals, the mere fact that this might occur cannot be used as a justification for withholding costs generally in custody cases. One who believed that would logically not oppose costs awards: he or she would oppose courts, and would substitute flipping a coin to resolve disputes: Goodhart (1929) 38 Yale L.J. 849, 876-7. Rule 601 tells the court to look at the "results in the proceeding". That is not because anyone worships success above all else. It is a shorthand recognition of the correctness of the winning position.

[29] Some trial-level decisions suggest that there are never any "winners" in custody litigation. But one must remember the context in which those statements are made. When a court decides a custody case, no matter who succeeds, the opposing parties remain parents forever and their lives continue to be linked by their children. Therefore, in that sense, custody litigation and the ensuing friction it engenders are not seen as creating "winners". However, that does not negate the fact that there is very often one party who proves to be right, and one who proves to be wrong: ***MacMinn v. MacMinn***, ***supra***. For purposes of evaluating the "results of the proceedings" under R. 601(1), therefore, the successful party is the "winner".

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

[31] First, one of the basic rationales for awarding costs to the successful litigant is to encourage the settlement of disputes: ***Min. of Forests v. Okanagan I.B.***, ***supra***, at 274, 275 (W.W.R.) (paras. 22, 26). Competing parents often estimate their possible expenses and rewards before deciding to fight, settle, or surrender. Therefore, one cannot calculate a costs régime without seeing how the parents would so estimate if they thought rationally.

[32] One must also recall that custody litigation is not a debt or damages suit. In a suit for debt or damages, the defendant has much to lose, but nothing to gain. He or she must evaluate competing risks, yet can anticipate no possible rewards. But here it is very different for both parties. There is a child or children whose presence both parents value highly. (Otherwise there would be no contest.) The child or children will always be with someone 365 days a year. So one parent's custody or access is the other's deprivation. It matters little which parent is the applicant or the plaintiff; in

effect each parent claims, even by merely opposing a motion for custody. The rational cost/benefit analysis of each parent is the mirror image of the other's. And it is common for the court to split access; i.e., not leave the child with one parent 365 days a year. Therefore, an extreme intransigent demand (exclusive custody with no access), or fighting a case unlikely to win, should not be shielded from expenses if it fails.

[33] What if courts normally tell each parent to bear his or her own expenses? Then fighting an improbable, even hopeless, custody battle will entail no more risk or expense than fighting one likely to succeed. Merits will become irrelevant to each parent's pre-suit calculation of likely benefits and expenses. After a final judgment on custody, to treat equally those proven to be right and those proven to be wrong, does nothing to discourage doubtful, unduly prolonged, or ill-founded litigation. This alone is a very weighty factor in favour of there being no special rule about costs in custody cases. Yet costs exist as a disincentive for meritless positions in litigation: ***Min. of Forests v. Okanagan I.B.***, ***supra***, at 275 (W.W.R.) (para. 26). In many other suits, money or property is in issue, so that a party with poor chances knows that he will probably gain nothing and have to pay his lawyer, even before he takes likely party-party costs into account. One with good prospects will probably win, and thereby get money in hand to pay his lawyer. But rarely will a custody dispute let either parent win money.

[34] Therefore, custody disputes need at least as many costs awards as other litigation, not fewer.

[35] If one parent consistently opposes the other's demands, and ultimately is found to be correct, why should the successful parent be forced to bear all the expenses so incurred? What consolation to the correct parent is it, that the mistaken parent did not realize that he or she was mistaken? That will not lower by one penny the expenses necessarily spent by the parent who was right all along. In most suits, the purpose of a costs award is indemnity, not punishment.

[36] Custody disputes are usually not about money (though a few are). But they cost the parents money just as much as any other litigation does.

[37] Denying costs does nothing to encourage (or permit) well-founded litigation or a well-founded defence. Few sensible people will pursue a pyrrhic victory, and only a wealthy person could do so. Where both parents have money, such a "no costs" policy will tempt the parent who is correct to keep his or her money, and not participate in a lengthy war of attrition. The party with the stronger will thus prevails, and no court gets a chance to rule on the best interests of the child. Custody will often be governed by one parent's will, not by the best interests of the child.

[38] Second, not awarding costs in custody cases in accordance with the Rules would deter meritorious litigants and encourage the unmeritorious ones. It is often objected that in all types of litigation, any chance of paying costs will deter a few timid but meritorious litigants from suing or defending. That may be. But where litigants act rationally, any prospect of winning and getting no

costs will deter a much larger number of meritorious parents (or other litigants) from suing or defending. That is only logical, as academics and judges have rigorously demonstrated: Shavell (1982) 11 J. Leg. Stud. 55; Posner, ***Economic Analysis of Law***, §§21.4, 21.7, 21.8.3 (2d ed. 1977) (pp. 434-41, 445-7, 450-53), or §§21.5, 21.8, 21.9 end (5th ed. 1998) (pp. 607-15, 620-23, 627-32). We deter meritorious positions where we rarely if ever award costs. Those studies show that costs awards give a much heavier weight to who will likely win, in pre-trial calculations of whether to sue or settle. The only way to deter unmeritorious litigation is the prospect of paying costs.

[39] Third, the default rule in terms of costs in custody cases should be clear, as it is in other civil cases. Lack of predictability in costs awards is a disincentive to settlement and efficiency in litigation: Canadian Bar Association, ***Systems of Civil Justice Task Force Report*** 46 (1996).

[40] Fourth, not awarding costs in custody cases also has a disproportionate and negative adverse impact on the parent with fewer financial resources. Even if both parents have relatively equal financial resources, that impact is still problematic. Where both have modest means, if courts routinely treat identically both the right and the wrong sides, then that policy virtually forces the party who is right to settle, and give almost half the disputed points to the party who is wrong. One thinks of King Solomon asking the two claimants whether they wish the baby divided in half.

[41] It is even worse if one contending parent manages somehow to fund a custody suit, and the other lacks money to do so. Where one parent has money, and the other is a person of modest means, such a “no costs” policy may well prevent the parent who is correct, but of modest means, from initiating or defending an action. That is because any policy which usually denies costs awards makes deeper pockets (purses) many times stronger in litigation than shallower pockets (purses), and vastly more persistent and enduring. This problem is compounded by the weight given to negotiated settlements. If one parent cannot afford to go to court, then the other parent enjoys an inherent advantage at all stages of the proceedings. The parent with fewer financial resources is then left in this situation: he or she cannot afford to go to court and secure an independent resolution of the dispute; the other parent knows this; and the negotiating position of the poorer parent is then completely undermined. So under a no-costs régime, shallower pockets (purses) are always condemned to lose. Custody then depends upon depth of pockets (purses), not the best interests of the child.

[42] And family lawyers then face a harsh choice: they may refuse to act for shallower pockets (purses), however strong their merits, or the lawyers may finance the litigation of poor parents with very little hope of repayment (because costs awards are rare). Without ordinary costs awards, counsel have no third option.

[43] Indeed, in England, heavy costs awards to the winner favour the impecunious, not the wealthy: Goodhart, ***loc. cit. supra***, at 875, 876.

[44] In theory, a costs award might force a custodial parent to pay money which he or she needed to buy milk for the baby. But that is not likely, because usually the winning parent, the one whose position the court largely accepted, has or gets custody. So it is much more likely that the party with custody would receive costs. It is denying the custodial parent costs, and making him or her fund the litigation unaided, which is more likely to make it harder to feed the child. And judges can adjust costs awards to meet individual circumstances.

[45] Fifth, as the chambers judge here points out, the payment of taxable party-party costs constitutes a partial indemnity only. In other words, awarding costs in custody cases does not cover all the expenses which the successful parent has incurred in any event. The choice, therefore, is not between a costs régime which grants full recovery of expenses or none at all; it is between partial recovery and none at all. In this sense, therefore, a régime of partial costs recovery contemplated by the Rules, already represents a compromise amongst a number of competing values and policy choices. We see no reason to deviate from this in custody cases.

[46] Finally, allowing costs to be recovered by the successful parent, in accordance with the general Rules governing costs awards, best comports with constitutional equality rights. A rule which effectively leads to no costs in custody cases would, as noted, have a disproportionate negative impact on the parent with fewer financial resources. That parent will more often be the mother. Since legislation should be interpreted in accordance with fundamental ***Charter*** values, this is another reason in favour of rejecting a special costs régime for custody cases.

5. The Proper Test

[47] There is no presumption against costs awards in custody cases. In custody cases, R. 601(1) and its enumerated factors, including results, should be fully weighed, as should any other legally relevant factors present in the particular case. That means that costs usually follow the event. The topic of costs is discretionary, as it is in civil cases generally.

F. Conclusion

[48] The reasons of the chambers judge on the facts here are reasonable, and the established tests for reversal of costs on appeal are not met. There was no error in principle in awarding costs.

[49] I would uphold the costs award in Queen's Bench, and dismiss the appeal, with costs of the appeal to the mother.

Appeal heard on March 1, 2004

Reasons filed at Calgary, Alberta
this 5th day of May, 2004

Côté J.A.

I concur:

Fraser C.J.A.

I concur:

Authorized to sign for: Picard J.A.

Appearances:

R.G. Bissett
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M.A. Kain
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