Court of King's Bench of Alberta

Citation: MMP v TWZ, 2023 ABKB 355

Date: 20230614
Docket: FL03 53685
Registry: Edmonton

Between:

MMP

Applicant

- and -

TWZ

Respondent

Reasons for Decision
of the
Honourable Justice Kevin Feth

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[1] MMP applied to relocate the parties' child to the United States of America. Following a two-day hearing, I concluded that the proposed relocation was not in the child's best interests and dismissed the application. TWZ now seeks costs.

[2] Both parents received legal representation through Legal Aid Alberta and the unsuccessful Applicant currently has limited financial means. The Applicant asks that I consider her financial circumstances and decline to award costs.

[3] I have concluded that the Applicant's modest means do not disentitle TWZ from receiving costs. Further, in the circumstances of this case, including a high conflict parenting relationship, MMP's modest means are not a justification for materially reducing the costs award.

Relevant principles

[4] A successful party is entitled to costs against the unsuccessful party, subject to the Court's general discretion: Rule 10.29(1)(a) of the *Alberta Rules of Court,* Alta Reg 124/2010. A judge's discretion must be exercised judicially and in accordance with established principles and the *Rules*: ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 18 [***McAllister***]; ***Lameman v Alberta***, 2011 ABQB 532 at para 6, leave to appeal refused, 2011 ABCA 724.

[5] Rule 10.33(1) states that in making a costs award, the Court may consider all or any of the following matters:

(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; and

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[6] In deciding whether to impose, deny or vary an amount in a costs award, Rule 10.33(2) allows the Court to consider other matters including:

- whether a party's conduct "was unnecessary" or "unnecessarily lengthened or delayed the action or any stage or step of the action"
- any "irregularity in a commencement document, pleading, affidavit..."
- "whether a party has engaged in misconduct."

[7] The guidance in Rule 10.33 concerns the *amount* of the costs award: ***McAllister*** at para 23. However, some of the factors also assist the Court in determining whether the qualified "entitlement" to costs under Rule 10.29 is engaged: in particular, the result of the action and the degree of success, the apportionment of liability, and litigation misconduct.

[8] After considering the matters in Rule 10.33, the Court may order one party to pay to another party the "reasonable and proper costs" that a party incurred or "any amount the Court considers to be appropriate in the circumstances": Rule 10.31. The latter is typically reserved for "an exceptional, discretionary costs award": ***McAllister*** at para 2.

[9] Costs in family law matters usually follow the same principles applicable to other litigation: ***Metz v Weisgerber***, 2004 ABCA 151 at paras 47 and 151; ***Shaw v Shaw***, 2014 ABQB 165 at para 14. The successful party is therefore presumptively entitled to costs: ***DBF v BF***, 2018 ABCA 108 at para 13.

[10] Relocation applications leave little room for compromise but the general legal principles for costs awards still apply: ***BLC v JJDC***, 2019 ABQB 129 at para 56.

[11] Column 1 of Schedule C is "the usual column on custody and mobility trials": ***SAL v BJL***, 2019 ABCA 350 at para 6. However, Schedule C is not the "default rule": ***McAllister*** at para 28. Schedule C costs are not "a standard or a starting point": ***McAllister*** at para 53.

[12] A costs award based on Schedule C is "only one of several options open to a court in awarding costs to a successful party" and "awarding a percentage of assessed cost is expressly authorized": ***McAllister*** at para 27.

[13] In Alberta, "the weight of authority is that party and party costs should normally represent partial identification of the successful party at a level approximating 40-50% of actual costs": ***McAllister*** at 41. However, indemnification in that range is not required: ***McAllister*** at para 51. If the option chosen is to award costs as a percentage of assessed costs, the assessment of the costs may require a consideration of what is a reasonable amount for the services rendered: ***McAllister*** at para 46.

[14] An assessment of the reasonableness of the legal costs incurred must take into account the factors set out in Rule 10.2(1), among other considerations: ***McAllister*** at para 47. The factors include:

> (a) the nature, importance and urgency of the matter;
>
> (b) *the client's circumstances*;
>
> (c) *the ... fund, if any, out of which the lawyer's charges are to be paid*;
>
> (d) the manner in which the services are performed;
>
> (e) the skill, work and responsibility involved; and
>
> (f) any other factor that is appropriate to consider in the circumstances. [*emphasis added*]

[15] An assessment therefore involves some meaningful analysis of the reasonableness of the actual legal expenses incurred having regard for, amongst other things, the client's circumstances and the fund from which the expenses are paid.

[16] Schedule C costs do not presumptively yield "reasonable and proper costs." The Alberta Court of Appeal recognizes Schedule C costs as a "convenient and transparent foundation for judicial determination of costs" which "may be appropriate in the 'common stream of litigation' ... and particularly useful and efficient in high-volume interlocutory matters such as chambers applications ...": ***McAllister*** at para 59.

[17] The primary purpose of costs awards is usually a "reasonable level of indemnification of costs incurred": ***McAllister*** at para 33. However, the public policy objectives underlying the modern approach to costs awards also ensure that the justice system is fair, efficient, and accessible. To that end, cost awards may be used to encourage settlement, discourage unnecessary steps in litigation, and sanction bad or frivolous behaviour: ***McAllister*** at paras 35 and 60; ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at paras 22-23, 26-30.

[18] Against that backdrop, I will turn to the issues raised by the parties.

Analysis

[19] The parties have opposing positions about entitlement to and the amount of any costs award.

a) Entitlement

[20] TWZ submits that he was successful in resisting the relocation application and is therefore entitled to costs.

[21] MMP argues that each party should bear their own costs. Her argument essentially has two components.

[22] First, she contends that her limited financial means should be considered in determining whether cost are awarded. Apart from qualifying for legal aid, the financial disclosure reveals a low income.

[23] The unsuccessful party's inability to pay is not a factor in gauging entitlement to costs: ***DSM v MDS***, 2020 ABQB 749 at para 13; ***Anderson v Canada Safeway Limited***, 2005 ABCA 6 at para 3. Costs may be awarded against a low-income earner who is currently unable to pay. Their circumstances might change, enabling payment in time: ***RHJ, Re*** (1998), 235 AR 358, (1998), 1998 CanLII 29725 at 361.

[24] MMP expects to receive substantially greater earnings once she relocates to the United States. She might then be able to pay.

[25] Second, MMP suggests that TWZ has less need for indemnification because the fund out of which the lawyer's charges are paid is operated by Legal Aid Alberta.

[26] Clients are expected to reimburse Legal Aid Alberta for their lawyers' services, even if only in part. Additionally, the legal aid program is a finite public resource, with limited finding, supporting many vulnerable Albertans. I take judicial notice of these aspects of Alberta's legal aid program because the facts are notorious and can be demonstrated by "resort to readily accessible sources of indisputable accuracy": ***R v Find***, 2001 SCC 32 at para 48; ***R v Spence***, 2005 SCC 71 at para 53.

[27] TWZ is personally liable for at least some of the legal expenses incurred in responding to this application. To the extent any recovered costs ultimately flow to Legal Aid Alberta, a limited public resource is replenished to assist other financially disadvantaged people in need of legal representation.

[28] The involvement of Legal Aid Alberta does not disentitle TWZ from receiving costs. In ***CB v Alberta (Director of Child Welfare)***, 2008 ABQB 165, Justice Martin considered the indemnification of the biological mother's legal costs in the context of a child protection matter. Martin J opined at para 94:

> This is a case in which justice calls for a complete indemnification. Susan qualified for and received Legal Aid, but she is obliged to reimburse Legal Aid for legal costs paid on her behalf. Legal Aid is an independent body, separate from the Director or other departments of government. An award of costs would operate to replenish Legal Aid funds and discharge Susan's debt to them. To the extent that reasonableness and proportionality are factors in an award for solicitor and client costs, I have also considered that the costs in the case at bar are at the Legal Aid rates.

[29] Even enhanced costs may be awarded against a litigant receiving legal aid: ***Alberta (Child, Youth and Family Enhancement Act, Director) v NL***, 2020 ABPC 118 at paras 16-17, affirmed 2022 ABQB 120 at paras 46, 71 and 87; ***Dao v Le***, 2003 ABQB 28 at paras 5-8.

[30] TWZ was successful in resisting the relocation application. I conclude that he should receive costs.

b) Amount

[31] TWZ initially sought enhanced costs estimated at $6,000. He asserted that MMP made unfounded allegations of family violence and provided unhelpful third-party Affidavits. Further, he referenced a history of parenting disputes between the parties resulting in numerous Chambers applications.

[32] Unproven family violence allegations and unhelpful Affidavits might be characterized as litigation misconduct or steps that unnecessarily lengthened or delayed the proceeding, depending on the circumstances. However, that characterization is inapt in the circumstances of this relocation application.

[33] MMP alleged that family violence occurred while the parties lived together, years ago, when the child was very young. The evidence before me did not allow for that allegation to be determined. Nonetheless, I concluded that the allegation was too far removed from the parties' current situation and their shared parenting regime for the past 3 ½ years to have any significant bearing on the child's best interests. Accordingly, I made no finding about the allegation of family violence.

[34] The issue was potentially relevant, however, to the best interests of the child analysis: s 16(3)((j) of the *Divorce Act*, RSC 1985, c 3 (2d Supp). MMP did not unnecessarily raise the issue nor engage in misconduct by doing so.

[35] MMP tendered Affidavits from three community members. The contents were replete with hearsay and opinions based on hearsay. Much of the evidence was unhelpful. However, the Affidavits contained some relevant evidence about MMP's parenting and the child's positive upbringing in their community. The contents therefore provided a little assistance. The Affidavits were not lengthy and did not require much cross-examination. Accordingly, tendering them did not unnecessarily expand the hearing in any material fashion.

[36] Hearings require litigants and their counsel to make good faith decisions about the issues and evidence being tendered. The Court should be cautious about enhancing costs simply because a hearing was marginally longer or more complicated because of a little extraneous evidence. However, where the extraneous evidence is wholly unnecessary or needlessly expands the issues to which the opposing party must then respond, and the consequences are material to the length or complexity of the proceeding, some enhancement might be appropriate. That was not the situation here.

[37] MMP notes that TWZ made the proceeding more complicated by filing several more pages of Affidavit evidence than originally allowed by the Oral Hearing Order. However, those additional pages did not materially lengthen the proceeding or make it more complex.

[38] TWZ's other argument about prior parenting disputes between the parties is not directly relevant to the costs award. Any costs for those matters were either addressed at the time or referred to the final determination of the action. The relocation application was not the final adjudication of the action under the *Divorce Act*.

[39] The litigation history is relevant, however, in another way. From a review of the Court's Procedure Record, I observe more than 30 appearances in front of judges since August 2017

including hearings, pre-trial conferences, chambers hearings, adjournment applications, and applications for FIATs. Many of the appearances involve parenting disputes, including minor matters. The magnitude of the judicial interventions is excessive. Legal Aid representation is apparent for much of that history.

[40] As discussed earlier, the public policy underlying costs awards seeks to promote responsible litigation. In family disputes, especially parenting matters, parents are encouraged to resolve their disagreements without the expense, conflict, and delay of court hearings. Costs awards against an unsuccessful parent, even a parent of modest financial means, encourage responsible litigation.

[41] The costs award should not prevent access to justice, but litigation steps should be proportional to the interests at stake. In high conflict family disputes, as here, costs awards encourage accountability and urge parents to seek early resolution outside of court.

[42] Impecuniosity is generally not a reason to reduce costs: ***Robertson v Edmonton (City) Police Service (#11)***, 2005 ABQB 499 at para 4. However, caution should be exercised where substantial indemnity would impede access to justice. Concerns about the impact of impecuniosity on access to justice should be considered "on a case-by-case basis, where a Schedule C approach to costs may provide a more equitable result": ***McAllister*** at para 60.

[43] For a person of modest financial means, a reduced costs award might satisfactorily address the public policy goal of responsible litigation. The relative impact on disposable income might impose the necessary discipline. Nevertheless, substantial consideration must still be given to the "primary purpose" of a costs award – a reasonable level of indemnification to the successful party.

[44] TWZ is also a low-income earner. In his initial written submissions, he abandoned the request for $6,000 in costs and instead sought costs calculated under Column 1 of Schedule C. He proposed that the costs be calculated based on specific items in Schedule C, inclusive of disbursements (for which I have included the prescribed fees):

Item 1(1) – Commencement documents, affidavits, etc.	$1,350
Item 10(1) – Preparation for trial/summary trial	$2,700
Item 11(1) – Trial/summary trial (first half day plus 3 additional half days)	$3,375
Total	$7,425

[45] In further written submissions, TWZ's lawyer provided a breakdown of the hours "primarily" attributed to the relocation application (approximately 46 hours) and confirmed the legal aid tariff of $92.40 per hour. That information suggests that TWZ's actual legal expense for the relocation application probably does not exceed $4,250.

[46] Costs are usually capped at full indemnity for actual expenses and generally should not exceed that amount, absent formal offers of settlement. Where a person is receiving legal aid and paying the legal aid rate, those factors may cap the payable party and party costs: ***Carmichael v. Carmichael***, 2006 ABQB 538 at paras 3-6.

[47] TWZ's proposals of lump sum costs of $6,000 or Schedule C costs of $7,425 exceed full indemnity. No formal offers of settlement were mentioned. Accordingly, costs calculated on either basis would be substantially misaligned with the general target of 40-50% indemnification.

[48] The litigation history suggests that both parties require the financial discipline of costs awards. Previous court orders were generally silent about costs or awarded only minimal costs. Responsible litigation needs to be promoted. A significant costs award is appropriate, notwithstanding MMP's modest means, to ensure that both parties are encouraged to pursue settlement, compromise, and constructive communications as they raise their child.

[49] The circumstances do not suggest that MMP will be denied access to justice in the future if substantial costs are awarded against her.

[50] A lump sum award of $3,250 is less than full indemnity but still reflects a substantial contribution towards TWZ's legal expenses. TWZ has limited financial means and was entirely successful in resisting the relocation application. The figure is somewhat higher than the general target range of 40-50% indemnification, but higher costs are necessary to promote responsible litigation moving forward. Both parties are now on notice about the risk of greater costs awards.

Conclusion

[51] I have concluded that TWZ is entitled to costs and that the reasonable and proper costs are $3,250, payable as a lump sum for all fees, disbursements and GST.

[52] TWZ apparently owes arrears in child support and spousal support, although the details are not before me. If the parties wish to address a set-off for the costs award, they may contact me in writing within 15 days.

Heard on the 9th day of May, 2023.
Written submissions received on the 16th and 23rd days of May, and the 9th day of June, 2023.
Dated at the City of Edmonton, Alberta this 13th day of June, 2023.

Kevin Feth
J.C.K.B.A.

Appearances:

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