Court of Queen's Bench of Alberta

Citation: SG v JPB, 2014 ABQB 418

Date: 20140711
Docket: FL01 16923
Registry: Calgary

Between:

SG

Applicant

- and -

JPB, KLB and the Director of Child and Family Services

Respondents

Memorandum of Decision on Costs of the Honourable Mr. Justice C.M. Jones

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Introduction

[1] This matter was heard before me on January 23 and 24, 2014. My decision was delivered on January 24, 2014.

[2] SG had, before me, appealed an Order of the Honourable Judge R.J. O'Gorman. SG, on the one hand, and JPB and KLB, on the other, sought private guardianship of a child ("KG"). Judge O'Gorman was required to decide if the best interests of KG mandated that private guardianship be granted in favour of SG or in favour of JPB and KLB.

[3] Judge O'Gorman had, on July 29, 2013, granted private guardianship of KG to JPB and KLB. I dismissed SG's appeal of Judge O'Gorman's decision.

[4] I directed the parties to make written submissions with respect to costs. Submissions were made by counsel for SG, counsel for JPB and KLB, counsel for the Director of Child and Family Services ("Director") and counsel for the child, KG.

Background

[5] The hearing before Judge O'Gorman took place over several days. KG is Metis, as is SG. SG lives in a Metis community in Northern Alberta. JPB and KLB are not Metis and live in Calgary. KG had lived in several foster homes during her short life.

[6] Judge O'Gorman heard expert evidence. That evidence considered the importance of providing KG with an opportunity to be raised by persons sharing her Metis heritage. It also

considered the potential for emotional injury which might ensue to KG from yet another disruption in the attachments which KG had formed, this time with JPB and particularly KLB.

[7] After careful consideration of all of the evidence, Judge O'Gorman decided that the best interests of KG would be served by granting private guardianship to JPB and KLB. Expert evidence satisfied him that KG would be at risk if the emotional attachment she had formed with KLB was broken.

[8] In response to SG's appeal of Judge O'Gorman's Order, an initial hearing took place on September 18, 2013 before Justice P.M. Clark. Dates were set for preliminary applications and for the appeal.

[9] Justice Clark did not rule on the matters before him. Applications were set over to November 7, 2013, whereupon Justice LoVecchio heard the following applications:

1. By SG
   (a) Application for a stay of the Order of Judge O'Gorman;
   (b) Application for access to KG pending her appeal; and
   (c) Request for SG's appeal to be conducted by way of judicial review, should she be found to lack standing to advance her appeal.

2. By JPB and KLB
   (a) Application to strike SG's appeal for lack of standing; and
   (b) Application for security for costs.

[10] In the result, Justice LoVecchio determined that:

1. SG had standing to appeal;
2. SG must proceed by way of appeal and not by way of judicial review;
3. Judge O'Gorman was the proper person to hear SG's application for access; and
4. SG would not be required to post security for costs.

[11] The Director advised Justice LoVecchio that, should he grant a stay of Judge O'Gorman's Order granting private guardianship to JPB and KLB, the effect of which would be to re-vest permanent guardianship with the Director, the Director would not, based on his assessment of expert evidence regarding KG's best interests, move KG from her current placement with JPB and KLB, pending disposition of SG's appeal.

[12] Further to Justice LoVecchio's direction, Judge O'Gorman attempted to hear SG's application for access on December 12, 2013. Technical difficulties necessitated written submissions by the parties and on January 3, 2014 he denied SG's application for a contact order. She was, however, granted leave to re-apply once the appeal of his private guardianship Order was concluded.

Appeal

[13] SG advanced four grounds of appeal. She asserted that Judge O'Gorman:

1. erred in law in applying section 2 of the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 ("*CYFEA*") and in applying section 18 of the *Family Law Act*, SA 2003, c F-4.5 ("*FLA*");
2. erred in placing excessive weight on an expert witness;
3. erred in not placing enough weight on KG's Metis background; and

4. erred in law in not complying with sections 56 and 57 of the *CYFEA*.

[14] I dismissed each ground of appeal. Much of SG's argument was directed at attempting to convince me to re-evaluate evidence which had been put before Judge O'Gorman; evidence which included testimony the credibility of which, his judgment reveals, he was able to carefully assess.

Provisions of the *Alberta Rules of Court* ("*Rules*") Relating to a Costs Award

[15] I note the following:

1. Rule 10.29 provides, *inter alia*, that a successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party. By negative inference, an unsuccessful party (the Applicant) should generally not expect to receive an award of costs against the successful party;
2. Rule 10.29(a) provides that the principle it enunciates is subject to the Court's discretion to award costs under Rule 10.31;
3. Rule 10.31 confers general discretion upon the Court to award costs, taking into account the factors specified in Rule 10.33;
4. Rule 10.33(1) provides as follows:

> 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.

5. Rule 10.33(2) provides as follows:

> 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 defense from that of another party;
>
> (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.

Parties' Positions on Costs

[16] The parties' positions may be summarized as follows:

SG

Despite being unsuccessful in her appeal before me, SG seeks costs against both the Director and against JPB and KLB, asserting:

1. that the Director failed to meet his obligations under the *CYFEA*, as articulated in ***C.B. v Alberta (Child, Youth and Family Enhancement Act, Director)*** 2008 ABQB 165. SG cites this case as offering guidance with respect to the specific obligations imposed on the Director [Written Submissions on Behalf of SG ("SG's Brief"), para 18]. Specifically, SG alleges that:

   (a) the Director failed to advise SG of legal steps that were required to secure the permanency plan in respect of KG [SG's Brief, para 23];

   (b) the Director failed to advise SG that a kinship placement did not provide any certainty at law and that in order to become KG's legal guardian, there were additional steps required [SG Brief, para 24];

   (c) the Director's failure in this regard lead SG to delay seeking legal guardianship immediately which, she alleges, would, had she pursued it immediately, likely have led to her obtaining legal guardianship of KG [SG Brief, para 24];

   (d) the Director gave advice to JPB and KLB relating to the advancement of their private guardianship application which somehow conflicted with advice given and steps taken by the Director to have KG placed with SG [SG Brief, para 25];

   (e) the Director misled SG into thinking that there would be a "smooth transition of KG to her family under the department's kinship placement plan." [SG Brief, para 26];

   (f) the Director failed to advise SG that JPB and KLB "were unhappy with the transition plan which was underway in respect of KG, and that they (JPB and KLB) were investigating options to interrupt that placement." The Director failed to advise SG despite his obligation to deal with all parties with fairness, equity and respect. The Director was "aligned" with and "preferred" JPB and KLB over SG [SG's Brief, para 27]

   (g) the Director failed to remain neutral in respect of SG's proposed access visits with KG in the period between Judge O'Gorman's decision and the appeal before me. The Director's conduct represented aggressive opposition to SG and failure to treat her with as much dignity as possible [SG's Brief, para 28];

2. that costs should be awarded against JPB and KLB because:
   (a) the conduct of JPB and KLB, in pursuing guardianship of KG, were "out of self-interest" because they wished to adopt a child [SG's Brief, para 29];
   (b) the conduct of JPB and KLB warrants an award of costs against them because they knew that SG wanted permanent guardianship of KG. Their successful pursuit of guardianship of KG meant that KG would not be "reunited with her family...in her community of origin" [SG's Brief, para 31];
   (c) their application effectively disrupted the Director's plan to place KG with SG [SG's Brief, para 32]
   (d) the attachment which the Court found had been formed between KG and KLB (and, which I note, the Court ultimately found it would not be in KG's best interests to disrupt) was the result of inappropriate conduct by several players, including JPB and KLB. Comments about KG having a "forever home" with JPB and KLB were premature, inappropriate and improperly encouraged KG to form an attachment with JPB and KLB [SG's Brief, paras 33-36];
3. SG submits that there has never been any costs award made against a losing party in any case similar to this. By "similar to this", she appears to mean a situation where the child had not been residing with either party for any extended period prior to the trial. She acknowledges that there are several cases which, presumably, stand as authority for the proposition that costs may be awarded against a losing party where care of a child has been vested with a foster family for a number of years. I assume she refers to these cases in order to distinguish them from the factual circumstances of this case which do not include an extended period of care by one of the parties to the litigation [SG's Brief, para 37]. Unfortunately, however, she does not cite those cases. Accordingly, I am unable to attach significance to her observation;
4. SG was "forced to bring her own application for private guardianship before the courts as a result of the actions taken by both Respondents." [SG's Brief, para 38];
5. if costs are to be awarded in favour of JPB and KLB they should, for ethical, legal and moral reasons, be awarded solely against the Director [SG's Brief, para 39]; and
6. SG incurred out of pocket costs and lost wages in her efforts to form a relationship with KG [SG's Brief, para 8].

<u>The Director</u>

The Director challenges SG's assertions. He notes as follows:

1. SG was compensated for costs she incurred for travel and lost wages [Director's Written Submissions Regarding Costs ("Director's Brief"), para 8(b)]
2. SG was informed by the Director of the pending private guardianship application filed by JPB and KLB as soon as the Director became aware of that application [Director's Brief, para 8(c)];
3. Any advice which JPB and KLB may have received with respect to their application for private guardianship was not received from anyone working in the Director's office at the time the advice was given [Director's Brief, para 8(d) and para 46];

[17] The Director argues that case law does not support a finding of special or unusual circumstances existing in this situation which would justify an award of costs against the Director [Director's Brief, para 40]. In support of his position he cites:

(a) *Feagan v. Corcoran* 1978 CarswellAlta 16: As authority for the proposition that the Director, when intervening in matters relating to maintenance and recovery, acts to serve the interests of the public and the child. His position is different from that normally advanced by litigants;
(b) *J.T. and L.T. v. Director of Child Welfare*, 2003 CarswellAlta 634: As authority for the proposition that awards against the Director require evidence of special and unusual circumstances. Special circumstances include (but, presumably, are not limited to) delay on the part of the Director; the Director's failure to pursue family reunification, pending appeal of a temporary guardianship order; and an unreasonable position on the part of the Director in light of expert evidence;
(c) *B.(C.) v. Alberta (Director of Child Welfare)* 2008 ABQB 165: As authority for the proposition that costs should not be awarded against the Director unless it can be shown that there are special and unusual circumstances;
(d) *Alberta (Child, Youth and Family Enhancement Act, Director) v. L.B. and J.B.* 2008 ABQB 468: As authority reaffirming the special role played by the Director in serving the public interest and the best interests of the child and, therefore, the need to find special or unusual circumstances, such as unfair actions or misconduct on the Director's part, before costs may be awarded against him.

[18] In support of his assertions that no such special or unusual circumstances exist, the Director further takes the position that:

1. He initially supported the plan to place KG with SG as part of a kinship placement but took a neutral position at trial, leaving the task of weighing expert evidence regarding KG's best interests to Judge O'Gorman [Director's Brief, para 16];
2. He acted responsibly in seeking expert assistance in deciding where KG should reside if a stay or Judge O'Gorman's Order was granted, pending SG's appeal. The Director acted on the basis of that expert assistance in advising the parties that he would favour leaving KG with JPB and KLB, pending SG's appeal [Director's Brief, para 20];
3. He took a neutral position on appeal before me;
4. He asserts that he acted responsibly in working with JPB and KLB to pursue their efforts to adopt KG when, prior to becoming aware of SG and the possibility of pursuing a kinship placement with SG, it became necessary for the Director to take action in light of KG's then foster parent's and maternal grandmother's refusal to continue to provide SG with care [Director's Brief, para 41]. Further, he points out that he stopped the adoption process involving JPB and KLB and started working cooperatively with SG when he became aware of a possible kinship placement with SG. [Director's Brief, para 43]; and
5. He could not have been expected to advise SG of what legal steps she should consider taking in respect of an application for private guardianship because it was his understanding that JPB and KLB were not opposing SG's pursuit of a kinship placement [Director's Brief, para 45].

[19] The Director does not advance a claim for costs against SG.

JPB and KLB

[20] JPB and KLB note the decision of the Alberta Court of Appeal in ***Metz v. Weisgerber*** (2004), 243 D.L.R. (4th) 220 ("***Metz***"). That decision points out that there is no presumption against costs in custody cases and that costs usually follow the event. They point out that the Court of Appeal reaffirmed this reasoning in ***MacPhail v. Karasek*** (2006), 401 A.R. 100 ("***MacPhail***"). [JPB and KLB Memorandum on Costs] ("JPB/KLB Brief"), page 6. They acknowledge that the matter before Judge O'Gorman was not a "traditional" case of custody and access, in light of the Director's participation, but that in substance, this case involved a contest between private individuals. Accordingly, in their view, either the principle governing the award of costs in a "regular" litigation context would apply, if the reasoning in ***Metz*** and ***MacPhail*** did not apply, or the reasoning in ***Metz*** and ***MacPhail*** would apply. In either case, they submit, the expected outcome would be for the Court to award costs in favour of the successful party.

[21] JPB and KLB take the position that SG used the appeal before me to re-try the case: JPB/KLB Brief, page 10. They dispute SG's assertions of misconduct on their part, asserting that:

1. Just because they wanted to adopt a child, in this case, KG, does not mean that they were simply acting in their own interests, without regard for KG's best interests;
2. The fact that they applied for guardianship, knowing that a potential kinship placement with SG was underway, does not amount to misconduct on their part. Rather, they were reacting to the evidence of experts who indicated that KG had come to regard them as her "psychological parents"; and
3. Whatever attachment KG may have formed with them was not as a result of any misconduct on their parts or the Director's part: JPB/KLB Brief, page 11.

[22] JPB and KLB note that costs, awarded in accordance with Column 1 of Division 2 of Schedule C to the *Rules*, would aggregate $5,273.65. This amount, they assert, would not be a fair award, given that their actual legal costs were $19,503.01.

[23] They seek the average of these two amounts, being $12,388.33.

Counsel for the Child

[24] Counsel for KG submitted a letter dated February 21, 2014 ("Submissions by Counsel for the Child") wherein she noted that the Court of Queen's Bench has authority to make an award of costs pursuant to both section 93 of the *FLA* and the *Court Rules and Forms Regulation*. She points to section 93 of the *FLA* and to section 2(1) of the *Court Rules and Forms Regulation*. The former provides that:

> Subject to the regulations, the court may at any time in a proceeding before the court and on any conditions that the court considers appropriate award costs in respect of any matters coming under this Act.

The latter provides that:

> In any matter not provided for in the Act or this Regulation, the Court may follow the Alberta Rules of Court and the procedures of the Court of Queen's Bench.

This authority, she points out, was confirmed by the decision of this Court in ***B.H. v. Alberta (Director of Child Welfare)***, 2002 ABQB 898.

[25] Counsel for KG takes the position that:

1. rule 10.33(1)(a) supports the assertion that JPB and KLB should receive their costs because they were entirely successful on appeal before me;
2. their decision not to make oral submissions, having received comments from LoVecchio, J in response to their written submissions regarding standing, operated to shorten proceedings and engages the provisions of Rule 10.33(1)(f) in favour of JPB and KLB;
3. rule 10.33(2)(d) in engaged against SG because she made the following applications that were unnecessary or improper:

   (a) Applying to this Court for access to KG, pending her appeal of Judge O'Gorman's decision, after he directed that applications for access should be directed to him; and
   (b) Applying for a stay of Judge O'Gorman's Order pending her appeal, despite being aware that the Director would, were a stay granted, propose not to change the existing parenting arrangements pending that appeal;
4. the reasoning in ***S.B* v. *J.F*.** 2009 ABQB 553, indicating that public policy reasons justify awarding costs in custody cases should apply to guardianship matters;
5. KG's best interests are served by an award of costs in favour of JPB and KLB. JPB and KLB did not receive financial support from the Director for the care of KG, as they had sought and received a private guardianship Order. Costs incurred by JPB and KLB in pursuing the application for private guardianship have impacted their budget, placing strain on their ability to provide KG with resources, supports and extracurricular activities required in her new environment;
6. counsel for KG takes no position regarding SG's requests for costs against the Director;
7. counsel for KG asserts that SG was advised by LoVecchio J that her appeal had a remote chance of success but she nevertheless chose to proceed with an unmeritorious appeal. At appeal, she engaged largely in re-argument of the issues at trial. An award of costs should operate to discourage attempts to re-litigate in appellate courts [Submissions by Counsel for the Child, page 6]; and
8. SG's decision to appeal Judge O'Gorman's Order extended litigation and interrupted her relationship with KG, operating against the best interests of KG.

Decision

[26] I accept the arguments of the Director, of JPB and KLB and of Counsel for the Child. I find on the evidence which I heard during the appeal that:

1. The Director acted fairly, equitably and impartially, did not favour JPB and KLB and made significant effort to pursue a kinship placement with SG. When faced with an application for private guardianship advanced by JPB and KLB, the Director properly stepped back to let the Court decide what would be in KG's best interests. He acted responsibly in expressing his views on SG's best interests in the period between Judge O'Gorman's decision and its disposition on appeal before me;
2. JPB and KLB acted responsibly in pursuing what they considered, and what the Court ultimately concluded, was in SG's best interests. Their behavior throughout was entirely

appropriate. They incurred considerable expense to respond to KG's need for security and certainty and they did so with dignity and with respect for SG and for Metis culture;

3. SG sought before me to re-litigate the evidentiary determinations made at trial by Judge O'Gorman. I did not have the benefit of *viva voce* evidence, while he did;
4. SG's submissions concerning costs, as well as her arguments before me on appeal, cast dispersions on the motives and conduct of the Director and of JPB and KLB. I find her assertions to be entirely without merit;
5. The cases support an award of costs in favour of the successful parties (JPB and KLB) in circumstances such as this. On these facts, there is no credible basis for distinguishing between an award of costs in respect of a custody matter and one involving competing applications for private guardianship, which to some extent requires the participation and input of the Director; and
6. It is appropriate to award costs in favour of JPB and KLB based on their success in this matter.

[27] Counsel for the Child noted at page 7 of her submissions that:

> The position and strategy taken by the Applicant has ultimately resulted in the proliferation of litigation, and has interrupted her relationship with the child. None of this is in the best interests of the child.

[28] I agree. I award costs of $12,388.33 against SG in favour of JPB and KLB. No costs are awarded in favour of or against the Director.

Heard on the 23rd day of January, 2014 to the 24th day of January, 2014.
Dated at the City of Calgary, Alberta this 11th day of July, 2014.

C.M. Jones
J.C.Q.B.A.

Appearances:

Lisa D. Weber and Lionel Chartrand
for the Applicant, SG

Sonja Lusignan
for the Respondents, JPB and KLB

Lori G. Bokenfohr
for the Child

Christopher R. Ford
for the Director