Date: 19990621
Docket: CV 07096

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GERRIANN DONAHUE

Applicant

-and-

GABRIEL MANTLA

Respondent

MEMORANDUM OF JUDGMENT

[1] This memorandum addresses the issue of costs of these proceedings.

[2] On April 9, 1999, after a three day trial, I issued reasons for judgment wherein I ordered that the applicant be granted access to the respondent's child. The applicant's request for access was strenuously opposed by the respondent. The Director of Child and Family Services was also represented by counsel at the trial since the child was then, and continues to be, under the temporary care of the Director. The Director took no position on the request for access (notwithstanding that the Director had earlier commissioned an assessment which concluded that continued contact with the applicant would be in the child's best interests).

[3] The applicant now seeks costs of these proceedings against the respondent and against the Director. I will address these claims separately but first some general comments.

[4] It is almost trite to say that, insofar as costs are concerned, the court has a wide discretion, not only as to the circumstances under which costs are awarded but also as to their measure and extent. The discretion is an inherent one and may be exercised in any proceeding in the Supreme Court. The discretion, however, must be exercised judicially and in accordance with legal principles pertaining to costs.

[5] One of those principles is that costs generally follow the event. There is an expectation that the successful litigant will recover costs from the unsuccessful one. Generally speaking there is no reason why this principle would not ordinarily apply as well in "family" litigation: see *Gold v. Gold* (1993), 49 R.F.L. (3d) 56 (B.C.C.A.). In custody cases, however, one often finds comments to the effect that there is no general rule as to costs because it is not a matter of "success" in litigation so much as a determination of the child's best interests. Therefore, a party should not be penalized in costs if he or she made a *bona fide* attempt to assert a child's best interests: *Henry v. Pham* (1987), 55 Alta. L.R. (2d) 227 (C.A.); *Heon v. Heon* (1989), 23 R.F.L. (3d) 408 (Ont. H.C.J.). On the other hand, if a party persists in pursuing litigation to its fullest extent even in the face of indications as to the likely outcome, then there is no good reason, in my opinion, why the general costs rule should not apply. In *Andrews v. Andrews* (1981), 20 R.F.L. (2d) 348, the Ontario Court of Appeal observed that the trial judge, in exercising his or her discretion as to costs, should consider (a) relative success; (b) the conduct of the parties both prior to and during the litigation; and (c) the economic circumstances of the parties and their relative means to bear costs.

[6] With these thoughts in mind I turn to the specific claims in this case.

Costs Against the Director:

[7] The applicant seeks costs against the Director for three specific applications. Two of them were applications for specific periods of access prior to the trial. The third was before me after the trial to set the specific terms of access. The applicant's position is that it was in the Director's power to consent to the first two applications and thus she was required unnecessarily to go to court to obtain those orders. On both occasions the Director neither opposed nor consented to the applications. On the third occasion the Director left it up to me to set specific terms of access notwithstanding that a plan of care was being formulated whereby the child would actually be placed in the applicant's home on a temporary basis. The applicant essentially says that the Director abdicated the responsibility to act in the child's best interests by not agreeing to her exercise of access.

[8] The Director's counsel responded that the Director had no other choice but to let these decisions be made by the court. The child is not a permanent ward so the Director must still be cognizant of the respondent's position as the natural father. There is, at least for now, good reason to try to work with the respondent in an effort to reunite him with his child. These efforts would have been undermined if the Director had simply sided with the applicant. Furthermore, the Director's responsibility does not necessarily include protecting the rights of a non-parent such as the applicant. The governing statute, that being the *Child and Family Services Act*, S.N.W.T. 1997, c.13, is silent on the topic of third party access. I think these are all highly relevant observations.

[9] There is no statutory impediment to awarding costs against the Director. If the Director chooses to participate in private litigation then the Director may be liable for costs as any other litigant would be. But, as some cases have noted, the Director is not really like any other litigant. The Director has a much broader role than an ordinary litigant. The Director is a public officer appointed to act in

the interest of the public generally and in the interest of children specifically. The statute gives the Director broad powers to intervene into private lives to ensure that children are protected. Society, through the *Act*, has sanctioned that intervention. Thus, the Director cannot be equated with a successful or unsuccessful litigant. In such circumstances, considering the public mandate imposed on the Director, costs should not be imposed unless it can be said that the Director (and the Director's officials) acted, before and during the litigation, in a manner that was improper, vexatious or unconscionable.

[10] The law on this point was set out by Justice McFadyen (then a judge of the Alberta District Court but now a judge of the Courts of Appeal of both Alberta and Northwest Territories) in *Faegan v. Corcoran* (1978), 5 Alta. L.R. (2d) 216. In that case the Director of Maintenance and Recovery had intervened on behalf of the complainant in a paternity suit. After the suit had been dismissed the successful respondent sought costs from the Director. Justice McFadyen dismissed the application. In doing so she said (at page 218):

> When the Director intervenes he is a party to the proceedings against whom costs may be awarded. The Director, however, is not an ordinary litigant in civil proceedings. The Director intervenes in proceedings under the Maintenance and Recovery Act to protect the interests of the public and the interest of the child…
>
> I make no comment on the issue of awarding costs against the respondent or the complainant. The position of the Director is different from that of either of the two parties in view of the Director's responsibility to ensure that the interests of the public and of the child are protected. While I am satisfied that the court has the power to award costs against the Director, I am of the view that this award should not be routinely made but should be made only in cases of special and unusual circumstances. Such unusual circumstances are not present in this case.

[11] In the case before me I cannot find any improper conduct or special circumstances warranting an order of costs against the Director. This litigation was propelled by the intransigence of the respondent. The Director was in the unfortunate position of having to work with the respondent so as to achieve a reunited family situation for the child (something in the child's interests) with the

respondent adamantly refusing to allow his child to visit with the applicant (something the Director knew was also in the child's interests). In such circumstances the Director took the only prudent course available, that being to let the court decide.

[12] The application for costs against the Director is therefore dismissed.

Costs Against the Respondent:

[13] The claim against the respondent brings into play the general rule discussed earlier about costs following the event. The respondent's counsel, however, argued that there should be no award of costs since (a) he is in no position economically to pay an award of costs, and (b) the litigation was to a great extent out of his control since, when the child is in apprehension, all control is exercised by the Director. It seems to me that these points gloss over somewhat the true state of affairs.

[14] The evidence clearly brought home to me the fact that the sole reason a trial was necessary was the intransigent and unreasonable attitude of the respondent. I know he loves his child deeply but his refusal to countenance any contact between his child and the applicant — notwithstanding the opinion of every professional who has had contact with the child to the effect that it would be in the child's interest to maintain such contact — made the trial inevitable. I am sure that if he had taken a broader approach and was willing to work with the applicant and the Director then some reasonable resolution could have been achieved short of a trial. His intransigence was also evidenced in the post-trial hearing to set terms of access. He refused to offer anything but a continuing objection to access notwithstanding my order that access be granted. It is apparent to me that the respondent is still motivated more by his antagonism toward the applicant than he is by a concern for his child's welfare (at least insofar as this litigation is concerned).

[15] The fact that the respondent is not now in a position to pay an award of costs is a factor to consider. But, he is not now supporting his child since the child is in foster care. Also, he (the respondent) is being supported by the state in his efforts to upgrade his education so as to obtain steady employment. It seems to me that he may well be in a position to pay an award of costs in the near future.

[16] Considering the circumstances of this litigation, as noted above, I see no good reason why costs should not follow the event. The applicant will therefore be entitled to recover her party-and-party costs of these proceedings, to be taxed on the basis of Column 2 of the Tariff of Costs, from the respondent.

Dated this 21st day of June, 1999.

J.Z. Vertes
J.S.C.

Counsel for the Applicant: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Thomas H. Boyd

Counsel for the Director of Child and Family Services: Shannon R.W. Gullberg