

Costs in Family Law Trials in Alberta

Prepared for: Legal Education Society of Alberta

Family Law Trial Fundamentals

Prepared by:

Michael Kraus QC

and

Shannon Fuhrer (Student-at-Law)

Emery Jamieson LLP

Edmonton, Alberta

Presented by:

Michael Kraus QC

Emery Jamieson LLP

Edmonton, Alberta

For presentation in:

Calgary, Alberta – November 17, 2016

Edmonton, Alberta – November 22, 2016

COSTS IN FAMILY LAW TRIALS IN ALBERTA

INTRODUCTION

This paper is an overview of general costs principles in family law trials in Alberta with a focus on recent family law trial decisions. It is not a comprehensive review of all recent reported decisions. This paper examines the general nature of costs, interim costs, and enhanced costs as well as how positive misconduct, formal offers of settlement, and *Calderbank* offers can affect the calculation of enhanced costs.

Costs arise in every family law trial and are always subject to judicial discretion. No special exceptions exist for family law trials: matters involving custody, access, child support, spousal support, and division of matrimonial property are all subject to general costs principles. As a result, counsel should be prepared to make submissions to the Court about costs at the conclusion of every family law trial. In some circumstances, interim costs may also need to be addressed to assist a party to get a matter to trial.

GENERAL NATURE OF COSTS

Black's Law Dictionary defines costs as the expenses of litigation, prosecution, or other legal transaction, especially those allowed in favour of one party against the other.¹ In *B. (R.) v Children's Aid Society of Metropolitan Toronto*, Justice L'Heureux-Dubé summarized the general principles of costs as follows:²

The long-standing rule regarding costs is that they are *generally* awarded to a successful party, absent misconduct on his or her part. A successful litigant has a reasonable expectation that his or her costs will be paid by the unsuccessful party. The rationale for this rule is based on the fact that, had the unsuccessful party initially agreed to the position of the successful one, no costs would have been incurred by the successful party. Accordingly, it is only logical that the party who has been found to be wrong must be ready to support the costs of a litigation that could have been avoided.

Court costs have a variety of purposes. An award of costs is meant to serve as discipline and to promote reasonableness.³ The existence of costs helps the parties to focus on the reasonableness of their positions.⁴ Further, a costs award is ordinarily not meant to recover the full amount that a

¹ *Black's Law Dictionary*, 9th ed, *sub verbo* "costs".

² *B. (R.) v Children's Aid Society of Metropolitan Toronto* [1995], 1 SCR 315, 1995 CarswellOnt 105 at para 155.

³ *Herman v Delong*, 1999 ABQB 745 at para 17.

⁴ *Ibid.*

successful litigant incurs.⁵ The economic consequence that each party bears helps to serve as a check on their behaviour throughout the process.⁶ The Alberta Court of Appeal noted that an award of costs is not a fine or other punishment; it is simply what it says: costs.⁷ In other words, an award of costs is the reimbursement of the expense of the proceeding.⁸ Absent exceptional circumstances, the unsuccessful party pays the successful party's costs.⁹

General costs principles apply in custody, access, child support, spousal support, and division of matrimonial property proceedings including the laws on offers and misconduct.¹⁰ The Alberta Court of Queen's Bench recently affirmed that costs Rules clearly apply to access and custody fights.¹¹ In fact, strong public policy reasons militate in favour of an award of costs in custody cases.¹² There are no special rules for family law matters.¹³ Costs in matrimonial matters should not, as a general rule, be treated any differently than costs in any other matter, subject to the exercise of judicial discretion, which cannot be codified or patterned into rules.¹⁴

The Court has overarching jurisdiction to deal with costs in matters brought before it.¹⁵ Although costs are discretionary, limits do exist: costs cannot be awarded or withheld on legally irrelevant grounds, such as sympathy, wealth, dislike of proper conduct, or to give the loser a consolation prize.¹⁶

In *Mitrovic v Mitrovic*,¹⁷ the Court provided that substantial success rather than absolute success is the test for awarding costs:

⁵ *LDM v KDM*, 2011 ABQB 800 (CanLII) at para 44.

⁶ *Ibid.*

⁷ *Cartledge v Veterinary Medical Assn. (Alberta)*, 1999 ABCA 131, 1999 CarswellAlta 337, at para 15.

⁸ *Ibid.*

⁹ *Fraser-Tabak v Tabak*, 2016 ABCA 79 at para 103.

¹⁰ *Adams v Adams*, 2011 ABQB 812 (CanLII) at paras 6, 7, 22, 57 [*Adams*].

¹¹ *Busch v Busch*, 2016 ABQB 184 (CanLII) at para 16 [*Busch*] (our emphasis).

¹² *Metz v Weisberger*, 2004 ABCA 151 (CanLII) at para 30.

¹³ *Busch*, *supra* note 11 at para 16.

¹⁴ *Cador (Chichak) v Chichak*, 1998 ABQB 881 (CanLII) at para 9 [*Chichak*].

¹⁵ *Court of Appeal Act*, RSA 2000, c C-30, s 12; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21; *Alberta Rules of Court*, Alta Reg 124/2010, r. 10.30(1), *Family Law Act*, SA 2003, c F-4.5, *Provincial Court Procedures (Family Law) Regulation*, Alta Reg 149/2005.

¹⁶ *M. (N.) v Weisgerber*, 2004 ABCA 151 (CanLII) at para 15.

¹⁷ *Mitrovic v Mitrovic*, 2007 ABQB 107 at paras 7 and 8.