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Grand Idea

Category: Custody & Access

“Marriage is grand, divorce is twenty grand”, goes the old saying. But as anyone with recent experience in family court knows only too distressingly well, the actual legal price tag to settle a matrimonial dispute can easily cost many grand more. This is particularly the situation when contested issues of child custody and access are involved. It’s a price which is simply unaffordable to even so called middle class Canadians, let alone the poor or those on limited fixed incomes.

So when I read the recent British Columbia Supreme Court decision in *Jensen v. Mains* on the subject of costs, it only served to reinforce what I’ve always believed, written about, and frequently cautioned my clients, namely, going to court should only be used as a last resort, when all else fails.

Everyone who has retained a lawyer will have experienced paying their own lawyers legal fees, but in *Jensen and Mains* the court was asked if, and when, an unsuccessful party in a custody and access dispute could also be ordered to also pay a portion of the legal fees owed by the successful party to his or her lawyer. This is called an award of costs. This approach is consistent with the usual rule that costs follow the event, meaning that the successful party is generally entitled to be awarded costs.

However, I’ve always believed, because of the great expense, both emotional and financial, typically borne by each party in a family law proceeding involving custody and access, that, barring some form of misconduct, two caring and responsible parties should each bear their own legal costs, but not the other parties.

This was one line of authority, which the court considered, referring to the case of *Morrison v. Morrison*, which “suggests that custody disputes do not involve winners or losers, but instead require an

enquiry into the best interests of the child. As such, it is inappropriate to award costs against caring, equally suited parents, in the absence of conduct worthy of rebuke.”

But the court ultimately rejected this line of authority, and accepted the reasoning adopted by Justice Martinson in several other BC decisions, to the effect that “the legislative scheme in British Columbia does not provide for an exception from the usual rules for custody cases, therefore, the general rule is that costs follow the event in custody cases except as otherwise ordered by the court.”

This decision sends a clear and cautionary message to anyone involved in a court dispute involving custody and access issues. Even if you truly believe that what you are doing, or attempting to achieve, is in your child’s best interests, if you are unsuccessful, you bear the potential risk of being ordered to pay costs to the other party.

Before you risk finding yourself in this position I strongly recommend that you take full advantage of any alternative form of dispute resolution. This could include mediation, collaborative divorce, meeting with Family Justice Counsellors, settlement conferences, judicial case conferences, meetings with, or without, counsel present, or any combination thereof.

It’s wise to remember that while marriage can be exceedingly grand, divorce doesn’t have to cost like it. 🍀