

Date: 20150225
Docket: 13/89
Citation: *Power (Re); Yetman v. Yetman*, 2015 NLCA 10

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

IN THE MATTER OF:

A proceeding in the
Supreme Court of Newfoundland
and Labrador, Trial Division (Family) styled:

BETWEEN:

VICTORIA YETMAN

APPLICANT

AND:

GARY YETMAN

RESPONDENT

AND IN THE MATTER OF

an Order made in the aforementioned
proceeding against Keri-Lynn Power, a
non-party on November 14, 2013
(hereinafter the Intended Appellant)

Coram: White J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (Family) 201302F0716

Application Heard: January 27, 2015

Reasons Rendered: February 25, 2015

Reasons for Decision by White J.A.

Counsel for the Intended Appellant: Robert Regular and Sarah Clarke
No appearance by the Applicant or Respondent

White J.A.:

[1] Keri-Lynn Power, Mr. Yetman's former solicitor, seeks leave to appeal a costs award that was made against her in her personal capacity. She was not present at the hearing in which the order was made and was not solicitor of record at that time.

BACKGROUND

[2] Mr. and Ms. Yetman commenced divorce proceedings in August 2013. Ms. Yetman filed an application to have the parties' cabin appraised and sold. She also filed an affidavit setting out that she had asked Mr. Yetman to purchase her interest or to have the property appraised and sold but he had refused.

[3] Mr. Yetman filed a response affidavit setting out that the cabin was of limited value and that, after deducting fees, there would be almost no equity remaining. He expressed his desire to retain the property. He also claimed that he was waiting for outstanding disclosure of marital assets and debts from Ms. Yetman. Mr. Yetman requested his costs on the application. This application was set to be heard on October 11, 2013.

[4] On October 4, 2013, Mr. Yetman, through his then counsel, Ms. Power, filed an access and custody application in which he sought interim shared custody of the parties' child, with the child's primary residence being with Mr. Yetman, as the parent most likely to adhere to access arrangements. Ms. Power asked for the custody application to be heard at the already-scheduled October 11, 2013 hearing.

[5] On October 9, 2013, the Family Division called Ms. Power and informed her that the custody application could not go ahead on October 11, 2013 as she had failed to request and or obtain leave. This was not communicated to Ms. Yetman's counsel and he only learned at the hearing

that the custody application would not be heard. Upon learning of the same, Ms. Yetman's counsel requested costs on the basis that he had not received notice that leave had not been given to hear the custody application (despite prior correspondence between counsel demonstrating that Ms. Power understood the need to seek leave in these circumstances). The trial judge responded that she would consider costs at the next hearing, being November 14, 2013.

[6] In early November 2013, Mr. Yetman changed solicitors. On November 8, 2013, Ms. Yetman's solicitor sent Ms. Power a letter acknowledging the change of counsel but put Ms. Power's office on notice that he would be seeking costs against her personally at the November 14, 2013 hearing. On November 12, 2013, Ms. Yetman's counsel had a letter and affidavit supporting his request for solicitor-client costs served on Ms. Power. He requested that Ms. Power prepare a response affidavit. She failed to do so. Ms. Power disputes that the amount of time she was given to provide a response was adequate.

[7] Costs were addressed at the November 14, 2013 hearing. Ms. Power was not in attendance. Ms. Yetman's solicitor requested costs in regard to the abandoned custody application. Mr. Yetman's new counsel, while suggesting to the Court that Ms. Power ought to have an opportunity to be heard, asked that if costs were awarded, the award be against Ms. Power personally and not her client. The trial judge made a lump sum costs award of \$750 against Ms. Power personally.

[8] Ms. Power learned of the outcome of the November 14, 2013 hearing when the order was filed November 20, 2013.

[9] On November 29, 2013, Ms. Power filed an application to set aside the costs order in the Family Division. However, her application was refused and was returned to her with a post-it note explaining that the costs order she wished to appeal was a final order and must be heard by the Court of Appeal. (See comments of Green C.J.N.L. in *Meadus v. Meadus*, 2011 NLCA 57, 313 Nfld. & P.E.I.R. 353, relative to use of post-it notes by a court registry.)

[10] On November 29, 2013, Ms. Power also filed a notice of application for leave to appeal with this Court.

ISSUES

[11] Ms. Power raises several issues in support of her application for leave to appeal including that the proposed appeal considers an order regarding cost consequences arising from a custody and access application that was originally set by the court and subsequently revoked by the court (because of a lack of leave); the proposed appeal raises questions of law regarding the interpretation of Court rules; the proposed appeal concerns questions of law involving costs awards and the need that the discretion to award costs is exercised judicially according to fixed legal principles; the trial judge has made a conflicting decision; the proposed appeal includes a question of correctness regarding a final costs award against a non-party, a former – and absent – solicitor; and the interests of justice demand that leave be granted.

[12] While these are issues frequently raised in seeking leave, in my analysis, the real issue on this application is the nature and effect of the order made against Ms. Power.

ANALYSIS

[13] The trial judge made an eight part order in the course of a proceeding, which is interlocutory in nature in all parts save the last.

[14] Section (viii) is clearly a final order:

THAT the Applicant is awarded lump sum costs in the amount of \$750.00 arising from the disposition of an access/custody application filed by the Respondent on October 4, 2013, and that these costs shall be paid personally by the former solicitor for the Respondent, Keri-Lynn Power.

[15] Further, the order was made against a non-party, the former solicitor of one of the parties. This Court has determined that an appeal can be taken by a non-party. (See *Carroll (Re)*; *Kent v. Kent*, 2010 NLCA 53, 301 Nfld. & P.E.I.R. 152.)

[16] As section (viii) of the order is final in nature, it is *prima facie* appealable as of right.

[17] Nevertheless, as the subject matter of the order is “costs only”, it is necessary to consider the applicability of rule 57.02(1):

57.02. (1) Leave to appeal shall be obtained by application to the Court where

- (a) during the course of a proceeding or prior to a final order, a party seeks to appeal from an interlocutory order, or
- (b) a party seeks to appeal from an order
 - (i) as to costs only,
 - (ii) made by the consent of the parties, or
 - (iii) made by the Supreme Court, Trial Division regarding the stay of an order pending appeal.

(Emphasis added.)

[18] The rule refers to a “party”. The part of the order for which leave to appeal is sought is specifically directed to a non-party. In my view, the rule is not applicable to these circumstances. While its subject matter is costs the part of the order directed to Ms. Power is better characterized as a final order, arguably punitive in nature, directed to a non-party and therefore not within the ambit of the rule.

[19] Accordingly, part (viii) of the order is appealable as of right.

[20] In coming to such a conclusion, there is no prejudice to the parties to the ongoing action (the Yetmans) as the costs order does not touch on any matters in dispute. Their litigation is not affected by Ms. Power’s appeal and can proceed in the normal course. I note that both parties had notice of the application to this Court and declined to participate.

[21] If I am wrong in the above analysis and leave is necessary, I would grant it. An order granting solicitor-client costs to be paid personally by a former solicitor, in the circumstances of this case, merits consideration and review by a panel of the Court.

CONCLUSION

[22] The appeal may proceed.

[23] As the application is by a non-party and there has been no appearance by either of the parties to the ongoing matter, no order as to costs on this application is appropriate.

C. W. White J.A.