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2010 CarswellAlta 1378, 2010 ABCA 219

M. (J.D.) v. L. (A.M.)

Linda V. Goold (Appellant / Appellant) and A.M.L. (Respondent / Respondent)

Alberta Court of Appeal

Constance Hunt J.A., Jean Côté J.A., and Keith Ritter J.A.

Heard: June 2, 2010
Judgment: July 14, 2010
Docket: Calgary Appeal 0901-0155-AC

Proceedings: reversed *M. (J.D.) v. L. (A.M.)* ((May 8, 2009)), Horner J. ((Alta. Q.B. [In Chambers]))

Counsel: D.P. **Castle** for Appellant, Linda V. Goold

A.M.L, Respondent for himself

Subject: Civil Practice and Procedure; Family

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Negligence of solicitor

Trial judge in Provincial Court heard matter — As part of judgment, trial judge found that solicitor had performed poorly when drafting formal order to record earlier oral decisions — Trial judge ordered costs against solicitor personally — Solicitor appealed order of costs — Appeal allowed — Provincial Courts had jurisdiction to award costs against solicitor personally — Section 93 of Family Law Act, which authorized Provincial Court to award costs "at any time in a proceeding before [it] and on any conditions ... appropriate" was not to be read narrowly — However, power was not exercised properly in case at bar — It was difficult for solicitor or anyone to draft accurate order flowing from first hearing as decision was purely oral and there was no transcript at time — There was little or no negligence underlying draft order submitted by solicitor and even if there was carelessness it was slight and caused no permanent harm — Trial judge's findings were based partly on oblique motives and there was no proper evidentiary foundation for one trial judge's two factual findings — Judge breached some aspects of natural justice and order for costs payable personally by solicitor was quashed.

Civil practice and procedure --- Costs — Appeals as to costs — General principles

Trial judge in Provincial Court heard matter — As part of judgment, trial judge found that solicitor had performed poorly when drafting formal order to record earlier oral decisions — Trial judge ordered costs against

solicitor personally — Solicitor appealed order of costs — Appeal allowed — Provincial Courts had jurisdiction to award costs against solicitor personally — Section 93 of Family Law Act, which authorized Provincial Court to award costs "at any time in a proceeding before [it] and on any conditions ... appropriate" was not to be read narrowly — However, power was not exercised properly in case at bar — It was difficult for solicitor or anyone to draft accurate order flowing from first hearing as decision was purely oral and there was no transcript at time — There was little or no negligence underlying draft order submitted by solicitor and even if there was carelessness it was slight and caused no permanent harm — Trial judge's findings were based partly on oblique motives and there was no proper evidentiary foundation for one trial judge's two factual findings — Judge breached some aspects of natural justice and order for costs payable personally by solicitor was quashed.

Family law --- Costs — Support

Trial judge in Provincial Court heard matter — As part of judgment, trial judge found that solicitor had performed poorly when drafting formal order to record earlier oral decisions — Trial judge ordered costs against solicitor personally — Solicitor appealed order of costs — Appeal allowed — Provincial Courts had jurisdiction to award costs against solicitor personally — Section 93 of Family Law Act, which authorized Provincial Court to award costs "at any time in a proceeding before [it] and on any conditions ... appropriate" was not to be read narrowly — However, power was not exercised properly in case at bar — It was difficult for solicitor or anyone to draft accurate order flowing from first hearing as decision was purely oral and there was no transcript at time — There was little or no negligence underlying draft order submitted by solicitor and even if there was carelessness it was slight and caused no permanent harm — Trial judge's findings were based partly on oblique motives and there was no proper evidentiary foundation for one trial judge's two factual findings — Judge breached some aspects of natural justice and order for costs payable personally by solicitor was quashed.

Cases considered by *Jean Côté J.A.*:

M. (J.D.) v. L. (A.M.) (2008), 20 Alta. L.R. (5th) 333, 2008 CarswellAlta 2296, 2009 ABPC 386 (Alta. Prov. Ct.) — referred to

Markevich v. Canada (2003), 223 D.L.R. (4th) 17, [2003] 2 C.T.C. 83, [2003] 1 S.C.R. 94, *(*sub nom. *Markevich v. Minister of National Revenue)* 239 F.T.R. 159 (note), *(*sub nom. *Markevich v. Minister of National Revenue)* 300 N.R. 321, *(*sub nom. *R. v. Markevich)* 2003 D.T.C. 5185, 2003 CarswellNat 446, 2003 CarswellNat 447, 2003 SCC 9 (S.C.C.) — referred to

Nowegijick v. R. (1983), *(*sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 1983 CarswellNat 520, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123 (S.C.C.) — referred to

Slattery (Trustee of) v. Slattery (1993), 21 C.B.R. (3d) 161, 106 D.L.R. (4th) 212, [1993] 3 S.C.R. 430, [1993] 2 C.T.C. 243, *(*sub nom. *Slattery (Bankrupt) v. Slattery)* 158 N.R. 341, *(*sub nom. *Slattery (Bankrupt) v. Slattery)* 357 A.P.R. 246, *(*sub nom. *Slattery (Bankrupt) v. Slattery)* 139 N.B.R. (2d) 246, *(*sub nom. *Slattery v. Slattery (Trustee of))* 93 D.T.C. 5443, 1993 CarswellNB 122, 1993 CarswellNB 152, [1993] 2 C.T.R. 243 (S.C.C.) — referred to

Statutes considered:

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 93 — considered

Interpretation Act, R.S.A. 2000, c. I-8

s. 10 — considered

Provincial Court Act, R.S.A. 2000, c. P-31

s. 8 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 602 — referred to

Regulations considered:

Family Law Act, S.A. 2003, c. F-4.5

Provincial Court Procedures (Family Law) Regulation, Alta. Reg. 149/2005

s. 10 — referred to

s. 10(1) — considered

APPEAL by solicitor from Provincial Court judge's decision to order costs personally against her.

***Jean Côté J.A.*:**

1 This is an appeal from a Court of Queen's Bench judge's decision of May 8, 2009 which affirmed a decision by the Provincial Court, *M. (J.D.) v. L. (A.M.)*, 2009 ABPC 386 (Alta. Prov. Ct.). The Provincial Court assessed costs personally against the appellant solicitor. The Provincial Court judge concluded that the appellant had performed poorly when drafting a formal order to record an earlier oral decision in Provincial Court under the *Family Law Act*, S.A. 2003, c. F-4.5.

2 One ground of appeal suggests that the Provincial Court has no power to assess costs against a solicitor. It is conceded that a superior court has inherent power to do so, quite apart from R. 602. However, it is argued that the Provincial Court has no such inherent power because it is a statutory court. In my view, s. 93 of the *Family Law Act* is an answer to the objection, since the proceedings at issue were under that Act.

3 Section 93 permits the Provincial Court "at any time in a proceeding before [it] and on any conditions . . . appropriate [to] award costs in respect of any matters coming under [the] Act." Section 10(1) of Regulation 149/2005 under that Act is virtually identical.

4 The order now appealed is for costs, not directly for parenting or access to a child, nor for someone's sup-

port; but the underlying proceedings were about child support and had to be brought under that Act, and were. If the Court of Appeal were to hold that a proceeding and the costs of it were entirely separate from each other, then it would virtually repeal s. 93 of the Act (and s. 10 of the Regulation). The section would then rarely, if ever, have any subject matter. The court cannot do that. Besides, the words "in respect of" have the widest possible scope, and do not imply identity, nor even require a close causal connection. See *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), 39, (1983), 46 N.R. 41 (S.C.C.) (para. 26); *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, 158 N.R. 341 (S.C.C.), 355-56 (para. 22); *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, 300 N.R. 321 (S.C.C.), 340 (para. 26).

5 Should one read s. 93 narrowly, as not encompassing costs against a solicitor or against someone else who is not formally a party? Is legislation on costs presumed to have a certain confined scope? I see no reason for that. Modern rules of interpretation call for interpretation of the words of an Act in the light of the scheme and object of the legislation. Similarly, s. 10 of the *Interpretation Act* calls for a fair, large, and liberal interpretation of an enactment treating it as remedial. Costs are vital tools for two purposes. First, to redistribute the burden of litigation expense, and so provide true relief. And second, to influence future conduct, rewarding good conduct and discouraging not-so-good conduct. Both are as true of costs against those who are not formal parties, as they are of costs against formal parties. Money from a solicitor compensates the opposite party just as well as money from the solicitor's client. And it is often far easier to collect.

6 Then again, the references in s. 93 to "any time" and "any conditions" are intended to broaden the costs power, and to introduce indirect connections. That would not be consistent with limiting the payor of the costs to someone named in the style of cause. After all, courts today sometimes spare a client from bearing the brunt of his or her solicitor's slips. If solicitors could never be ordered to pay costs, the combination of those two legal rules would in effect be a one-way ratchet which would often deny innocent parties any costs, even as terms of an indulgence to the other party.

7 Therefore, the Provincial Court had jurisdiction to make this order under the *Family Law Act*. Because of that, I need not express any opinion about whether the Rules of Court applied or could be applied, under s. 8 of the *Provincial Court Act*, R.S.A. 2000, P-31.

8 However, I stress that the criteria (tests) for costs against solicitors may not be the same in the Provincial Court and in a superior court with inherent powers. The Provincial Court has only the powers given by legislation, and no general supervision over solicitors. As will be seen below, the precise test need not be decided in this case. Nor need I decide whether the Provincial Court could properly impose costs merely as punishment of counsel for misconduct, e.g. where the opponent incurred little or no expense.

9 The question is whether that power was properly exercised here.

10 The first hearing by one Provincial Court judge was simply to give some relief on a support application. The second hearing was by a different Provincial Court judge, to fix the terms of the formal order from the first hearing. The third hearing was by the second judge, and it awarded personal costs against the appellant solicitor, which are appealed.

11 To describe fully the test or criteria for granting costs personally against a solicitor in Alberta in the Provincial Court, or in the Court of Queen's Bench, would require one to analyze a number of reported cases. It is both unnecessary and difficult to do so in this case.

12 In my respectful view, the solicitor's work here would not properly ground such personal costs, no matter which of the possible tests suggested in the various reported cases one adopted. As which test one uses cannot affect the result here, it is not necessary to adopt the precise test.

13 What is the strongest arguable criticism here about the properly-proven acts of the appellant solicitor? It is that she made some errors of interpretation of oral reasons by a different Provincial Court judge, when she was drafting a formal order to record that earlier judge's decision. Conversely, it is at least arguable that on some of the disputed points, her draft was right.

14 It was difficult for her (or anyone) to draft an accurate formal order flowing from the first hearing, for several reasons.

15 The most important reason is that the substantive decision had been purely oral, and there was no transcript at the time. (The tape of the whole motion has since been transcribed and we have it.) Almost as important, the first Provincial Court judge's decision was not a discrete set of reasons after the end of all argument and submissions. As is fairly common in chambers, parts of the decision evolved a step at a time, and are found in the interstices of discussion with counsel. And in the third place, the previous judge recognized that he had not tied down all the details. During the substantive hearing, he told counsel that if they could not agree on some of those details, they should raise them with him at the next hearing, which was already scheduled. That somewhat blurred the line between argument and outcome, making somewhat flexible the boundaries between what was decided and what was still open to discussion.

16 Therefore, I see little or no negligence underlying the draft order submitted by the appellant. Even if there was any carelessness, it was slight and caused no permanent harm. That is no ground for personal costs against the solicitor.

17 The tape of the first hearing, plus the draft order from the appellant, could not found any suggestion of oblique motives. Yet the Provincial Court judge based the personal costs partly on oblique motives, a second reason for his decision. That conclusion needed more than a mere comparison of the tape recording of the original oral decision with the appellant's draft order. The judge thought that he had more. He was handed a letter and marked it as an exhibit, and heard factual submissions from opposing counsel.

18 But there was no affidavit, no oath of any kind, and no notice of motion or other document giving notice of the evidence to be adduced. Maybe the judge could take judicial notice of the tape recording of a hearing in open court (even though he was not the judge recorded); but that is not true of the letter or other alleged facts. They needed proper evidence. The appellant argues that her counsel on the costs hearing was taken by surprise, and that appears to be true. The appellant herself was not present then. Her counsel did object to several parts of this "evidence" when it was tendered.

19 There was no real chance for rebuttal evidence, nor any exploration of privilege.

20 Therefore, there was no proper evidentiary foundation for one of the judge's two factual findings.

21 Furthermore, it appears that the appellant and her counsel had no notice of one of the findings against her. One allegation against her (one paragraph of the draft) had been mentioned by the Provincial Court judge six months before his decision, when he told the appellant in May that he was contemplating costs against her personally. He said that was the reason for the personal costs motion. However, I have found no mention in that

earlier transcript, nor in any court document, of the other ground for personal costs upon which the trial judge later relied (refusal to approve any draft). Yet the written reasons emphasize the ground not notified: they were largely based upon the appellant's letter later made an exhibit. The ground earlier notified received much briefer mention in the reasons.

22 So there were breaches of some aspects of natural justice.

23 In theory, the remedy for these procedural problems might be to send all this back for a new hearing. But the personal costs awarded were only $250 (exclusive of costs of the costs hearing, or costs of the appeal). Even though the respondent has no lawyer, it would not be economical for him to relitigate the matter, still less economical for anyone else to do so.

24 Besides, as noted, the flaws which the Provincial Court judge thought that he found in the appellant's draft order are not enough to found a personal costs order. Holding a new hearing on the chance that new admissible evidence next time would found a different ground for personal costs, is not ordinarily the appropriate appellate cure. And it would be even more uneconomical.

25 Therefore, the only fair and practical remedy for the various flaws here is to simply quash the orders in the Provincial Court and the Court of Queen's Bench ordering costs payable personally and ordering costs to the respondent of the costs proceeding. I would so order, so there would be no new hearing.

26 The appellant succeeded on this appeal, but her counsel very fairly told us that a costs order against the respondent himself would be unfair and counterproductive; she sought no such order. Therefore, each side should bear its own costs of this appeal.

***Constance Hunt J.A.*:**

I concur.

***Keith Ritter J.A.*:**

I concur.

Appeal allowed.

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