2003 CarswellAlta 1732, 2003 ABCA 358, 1 R.F.L. (6th) 416, 346 A.R. 51, 320 W.A.C. 51

White v. White

John Charles White (Appellant / Plaintiff) and Kimberly Anne White (Respondent / Defendant)

Alberta Court of Appeal

Berger J.A., Kenny, Hawco JJ. (ad hoc)

Heard: October 21, 2003
Judgment: December 10, 2003
Docket: Calgary Appeal 0201-0128-AC, 0201-0295-AC

Proceedings: reversing (2002), 2002 ABQB 775, 2002 CarswellAlta 1050 (Alta. Q.B.)

Counsel: D.P. **Castle** for Appellant / Plaintiff

E.L. Lenz, Q.C. for Respondent / Defendant

Subject: Family; Civil Practice and Procedure; Corporate and Commercial; Public

Family law --- Support — Child support — Enforcement of award — General

After rendering judgment in family law trial, trial judge retained jurisdiction to provide advice and directions to mother if child support was not paid by father — Parties subsequently met with trial judge in attempt to resolve outstanding issues by means of judicial dispute resolution — Mother later invited father to participate in further meeting with trial judge, but after father refused, mother met alone with trial judge in chambers — During meeting in chambers, mother sought order that final matrimonial property instalment, payable to father as result of original trial judgment, be withheld pending father's fulfilment of child support obligation — During meeting in chambers, trial judge declined to make any order but suggested that mother was open to make application seeking order — Father brought application seeking, in part, variation of child support and mother brought cross-application for same order that she sought in chambers — Same trial judge who heard original trial and conducted subsequent judicial dispute resolution heard both application and cross-application — After trial judge dismissed father's application on issue of varying child support and granted mother's cross-application, father appealed — Appeal allowed — Section 9 of Guidelines for Judicial Dispute Resolution states that unless parties consent, judge involved in judicial dispute resolution will not hear any applications respecting matter — Meeting in chambers between trial judge and mother was incompatible with adjudicative role and consent of father, notwithstanding s. 9 of Guidelines, did not have curative effect since obligation to recuse lay with judge.

Family law --- Custody and access — Access — Variation of order — General

After rendering judgment in family law trial, trial judge retained jurisdiction to provide advice and directions to mother if child support was not paid by father — Parties subsequently met with trial judge in attempt to resolve outstanding issues by means of judicial dispute resolution — Mother later invited father to participate in further meeting with trial judge, but after father refused, mother met alone with trial judge in chambers — During meeting in chambers, mother sought order that final matrimonial property instalment, payable to father as result of original trial judgment, be withheld pending father's fulfilment of child support obligation — During meeting in chambers, trial judge declined to make any order but suggested that mother was open to make application seeking order — Father brought application seeking, in part, variation of child support and mother brought cross-application for same order that she sought in chambers — Same trial judge who heard original trial and conducted subsequent judicial dispute resolution heard both application and cross-application — After trial judge dismissed father's application on issue of varying child support and granted mother's cross-application, father appealed — Appeal allowed — Section 9 of Guidelines for Judicial Dispute Resolution states that unless parties consent, judge involved in judicial dispute resolution will not hear any applications respecting matter — Meeting in chambers between trial judge and mother was incompatible with adjudicative role and consent of father, notwithstanding s. 9 of Guidelines, did not have curative effect since obligation to recuse lay with judge.

Alternative dispute resolution --- Mediation — Powers and duties of mediators

After rendering judgment in family law trial, trial judge retained jurisdiction to provide advice and directions to mother if child support was not paid by father — Parties subsequently met with trial judge in attempt to resolve outstanding issues by means of judicial dispute resolution — Mother later invited father to participate in further meeting with trial judge, but after father refused, mother met alone with trial judge in chambers — During meeting in chambers, mother sought order that final matrimonial property instalment, payable to father as result of original trial judgment, be withheld pending father's fulfilment of child support obligation — During meeting in chambers, trial judge declined to make any order but suggested that mother was open to make application seeking order — Father brought application seeking, in part, variation of child support and mother brought cross-application for same order that she sought in chambers — Same trial judge who heard original trial and conducted subsequent judicial dispute resolution heard both application and cross-application — After trial judge dismissed father's application on issue of varying child support and granted mother's cross-application, father appealed — Appeal allowed — Section 9 of Guidelines for Judicial Dispute Resolution states that unless parties consent, judge involved in judicial dispute resolution will not hear any applications respecting matter — Meeting in chambers between trial judge and mother was incompatible with adjudicative role and consent of father, notwithstanding s. 9 of Guidelines, did not have curative effect since obligation to recuse lay with judge.

APPEAL by father from judgment reported at (2002), 2002 ABQB 775, 2002 CarswellAlta 1050 (Alta. Q.B.) granting mother's cross-application for order withholding matrimonial property payment.

***The Court*:**

1 A difficult and protracted trial at which custody access, child support and division of matrimonial property were in issue, culminated in Reasons for Judgment on October 5, 2000.

2 Two matters, however, remained extant in connection with which the trial judge retained jurisdiction: a review of access, if necessary, in six months; and the availability of the Court to provide advice and directions to the Respondent if child support was not paid.

3 In April 2001, some six months following the trial judgment, the parties, at their request, met with the trial

judge in an attempt to resolve some of the outstanding issues. The meeting took place in a judicial dispute resolution (J.D.R.) room. Counsel were not present. No record of any kind was made of the proceedings, but a clerk was present.

4 In October 2001, the Respondent took it upon herself to schedule another meeting with the trial judge in chambers. She told the Appellant that she was going to appear before the trial judge and invited him to be in attendance. He declined. The trial judge was so advised at the outset of this October 9, 2001 meeting, at which neither the Appellant nor his counsel was present. The proceedings were, on this occasion, recorded and subsequently transcribed by a clerk. During this meeting, the trial judge summarized that which he recalled had taken place at the April 2001 meeting. He remembered that the Appellant "had some issues and problems to deal with that might be identified for him in this process." (A.B. 7/16-17) The trial judge also recalled that the Appellant was told that his participation was "purely voluntary and that [the judge] was not acting, basically, as a trial judge any more . . . because the trial was concluded, . . . " (A.B. 7/18-21) The judge saw his role in the following terms: "I was to assist you in resolving these matters if I could." (A.B. 7/21-22)

5 The Respondent advised the judge that there were three matters that she wished to address:

1. She wished to obtain the report of the psychological evaluation of the Appellant conducted by Dr. Jon Amundson.

2. She sought child support for her daughter, Kristen.

3. In order to secure child support, she sought an order that the final matrimonial property instalment payable by the Respondent to the Appellant, pursuant to the trial judgment of October 5, 2000, be withheld.

The judge declined to make any order whatsoever. The judge repeatedly cautioned that he was not able to give the Respondent legal advice. The judge did, however, make, *inter alia*, the following observations:

• THE COURT: . . . that [child support] is a reasonably minor matter and I expect that he's going to come to his senses on that and as your lawyer would tell you, and I want to emphasise here, [the Respondent], I'm not able to give you legal advice, okay?

[THE RESPONDENT]: Okay.

THE COURT: But, I'm sure your lawyer would say, look if he's not paying we can bring an application to court to cause him to pay or to subtract it from the money that you are still holding. . . . So, in other words that you might get a ruling from me to say take that money from that now and use it for [Kristen]'s tuition. . . . (A.B. 25/5-21)

• THE COURT: . . . I can not give you legal advice. But, you know, you were right about that. Your lawyer persuaded me, as I indicated in my reasons for judgment . . . that this was a high risk proposition to give that money all to him and that in time he may not be able to make his child support payments. (A.B. 25/25-26/4)

• THE COURT: So, that - - if at that time, your lawyer or you decide, look that same risk was present, from the judge and said money should be frozen for the children's child support payment, that same risk

> exists, in other words he's not settled, he has not reestablished himself in the hair dressing community or in the movie - - makeup community as he wanted to do. Then an application maybe brought. Your lawyer would likely tell you that so I am not giving you any legal advice. (A.B. 26/21-27/3)

The judge added:

> • THE COURT: I found you to be, rather, as I mentioned in my judgment, a very intelligent woman, and I'm sure you realize that the law really is a matter of common sense. Your common sense would guide you as to how could we avoid this situation. In other words, if you say I have to give him $27,000 and I do and he stops making child support the next month, you know there must be some way to address that and I expect that you're right and your lawyer can help you on that or, if you wish, you can decide to do it yourself.
>
> [THE RESPONDENT]: Would it be you we would see again?
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> THE COURT: I expect so that it would come back to me, unless he or his lawyers decide that I should be disqualified from doing that and that may be so because of this meeting with you in the meantime to help you iron out these matters. . . . (A.B. 27/6-23)

6 A hearing was arranged for February 8, 2002 to determine whether the chambers judge was seized with a formal application now brought by the Appellant and originally returnable on November 1, 2001 seeking the following relief:

a) A variation of the child support payable for the child, Kristen; and

b) An increase/normalization of the Appellant's access to the children.

At this point, the Respondent had not brought a cross-motion.

7 In any event, counsel for the Appellant expressed her client's concerns for the consequences flowing from the non-recorded "mediation" on April 1. Armed with a transcript of the October hearing, counsel for the Appellant alleged that the chambers judge should not have participated in a meeting with the Respondent in the absence of the Appellant and, further, that the comments of the chambers judge made during the course of the October 9, 2001 meeting gave rise to an apprehension of bias.

8 Counsel for the Appellant did, however, inform the chambers judge that she had advised her client that it was preferable that he hear the access motion. The chambers judge invited counsel for the Appellant to bring an application for recusal if she thought it appropriate. No such application was made. The chambers judge ruled that he should hear the Appellant's motion to vary and put the matter over. The Respondent then brought her cross motion for an order withholding the final matrimonial property payment and permitting the sum in question ($27,609.69 plus interest accruing) to be used as security for ongoing child support payments.

9 Both motions were heard on March 22, 2002. The chambers judge declined to vary his earlier trial disposition with respect to access and reserved his decision relative to the Respondent's application to withhold the final matrimonial property payment. Judgment with respect to the latter issue was later released granting the Respondent's cross-application but, through inadvertence, was not communicated to the parties until October 3,

2002 when counsel appeared before the chambers judge with a proposed consent variation relief order dealing with the outstanding issues between the parties. The consent order was not granted.

10 On November 4, 2002, counsel for the Appellant, accompanied by the Respondent without counsel, again appeared before the chambers judge with a second consent variation order. The chambers judge declined to grant that order. He repeated his concern that the Appellant was a poor risk to pay child support in the future and added "I think there is something very seriously wrong with him and his judgment and his ability to think rationally and it is for that reason that I made the [withholding] order I did . . . " (A.B. 287/7-10) The chambers judge also addressed the Respondent's apparent willingness to agree to the second variation order, stating, in part: "And personally, I think you are being, let me say, snowballed . . . " (A.B. 288/20-21)

11 Ms. Castle argued before this Court that the trial judge's remarks on November 4, 2002 clearly showed a bias against the Appellant or, at the least, were grounds for the Appellant to have a reasonable apprehension of bias. Although the trial judge's post-adjudicative comments may be taken into consideration in determining whether there may have been a reasonable apprehension of bias prior to his decision of August 23, 2002 (which is the decision under appeal), it is unnecessary for this Court to pronounce upon the Appellant's contention that an apprehension of bias on the part of the chambers judge is made out. Those principles that govern disqualification and recusal in consequence of the conduct of J.D.R. proceedings are sufficient to dispose of the appeal.

12 Paragraphs 8 and 9 of the Guidelines for Judicial Dispute Resolution issued by the Alberta Court of Queen's Bench, state:

> 8. The process is confidential. Statements made by counsel or by the parties are confidential and without prejudice and cannot be used for any purpose or referred to at trial, should the matter proceed to trial. After judicial dispute resolution, all briefs, submissions, notes and papers in the judge's possession will be destroyed.
>
> 9. Unless the parties consent, the judge will not hear any applications or the trial of the matter. The judge will not discuss the judicial dispute resolution process with the trial judge, should the matter proceed to trial.

13 We have no doubt whatsoever as to the fairness and impartiality of the learned chambers judge. He is to be commended for attempting to assist the parties to resolve their outstanding issues in this difficult litigation. Although his meeting with the parties in the absence of counsel in April 2001 was directed to that purpose, an examination of the record persuades us that the meeting in question was in the nature of a mediation. Its purpose was to attempt to resolve some of the outstanding issues between the parties by way of agreement. Judicial Dispute Resolution may often require a judge to adopt a posture that, if assumed in one's capacity as a trial judge, might well result in reversible error. Trial judges do not enter the fray. A judge engaged in J.D.R. may do precisely that. Indeed, he or she may well exhort the parties and, on occasion, resort to gentle criticism in order to facilitate a fair compromise of disputed issues.

14 The meeting between the chambers judge and the Respondent in the absence of the Appellant was also directed to that purpose, as were the post-adjudication meetings of the chambers judge recited above. All were well-intentioned, but we are bound to say incompatible with the adjudicative role.

15 In such circumstances, the consent of the aggrieved party, notwithstanding paragraph 9 of the Guidelines, will not have a curative effect. The obligation to recuse lies with the judge regardless of whether or not the litigants consent.

16 For these reasons, the appeal is allowed and the chambers orders are set aside. The motion and cross-application are remitted to the Court of Queen's Bench to be considered afresh by another justice of that Court.

17 There shall be no award of costs in this Court.

Appeal allowed.

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