

2006 CarswellAlta 99, 2006 ABCA 32, [2006] A.W.L.D. 1037, [2006] A.W.L.D. 1058, [2006] A.W.L.D. 987, [2006] W.D.F.L. 932, 263 D.L.R. (4th) 410, 384 A.R. 69, 367 W.A.C. 69

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Darr v. Darr

Tamara Ruth Darr also known as Tamara Ruth Martin (Appellant / Plaintiff) and Douglas Stewart Darr (Respondent / Defendant)

Alberta Court of Appeal

Conrad J.A., O'Leary J.A., and Picard J.A.

Heard: January 16, 2006

Judgment: January 16, 2006

Docket: Calgary Appeal 0501-0182-AC

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

L.M. Sparling for Respondent

Subject: Family; Public; Civil Practice and Procedure

Family law --- Costs — In family law proceedings generally — General principles

Costs against lawyer personally.

Professions and occupations --- Barristers and solicitors — Relationship with client — Conflict of interest — Miscellaneous

Costs against lawyer personally.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — General principles

Requirement to offer adjournment before awarding costs.

**Cases considered by Conrad J.A.:**

*Kirkeby (Next Friend of) v. Waddell* (1998), 1998 CarswellAlta 876, (sub nom. *Kirkeby v. Waddell*) 228 A.R. 113, (sub nom. *Kirkeby v. Waddell*) 188 W.A.C. 113, 1998 ABCA 307 (Alta. C.A.) — followed

**Conrad J.A.:**

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1 This appeal arises from an application to remove counsel for conflict reasons in a matrimonial cause. The appeal asks this question: "Does a chambers judge have an obligation to offer an adjournment before awarding costs against a lawyer personally?" The answer to that question is "yes". Costs orders against lawyers should not be made casually.

2 This court dealt with a similar order in *Kirkeby (Next Friend of) v. Waddell (1998)*, 228 A.R. 113, 1998 ABCA 307 (Alta. C.A.), and held that where a court is seriously considering an order of costs against a lawyer personally, it had an obligation to grant an adjournment. The court found that mere notification during the proceedings that an application of this nature was being made was not sufficient. The rationale for this decision was succinctly stated by Russell J.A. at para. 3, where she said that the reason a positive duty to offer an adjournment exists is because ". . . counsel was placed in an untenable position of attempting to advocate his client's interests in a hearing which had suddenly become co-mingled with his own."

3 Accordingly we allow the appeal, and direct the matter back for a rehearing.

4 We also note that applications to remove counsel contain their own potential for conflict between the client bringing, or defending, such an application and his or her own lawyer. As a result, these applications raise many interesting issues concerning the duties of counsel. Those issues include the extent of the obligation of a lawyer to give full advice about the potential for success of such an application, the need to inform a client about the potential fees and costs apt to be incurred, as well as questions relating to the need to receive full instructions before bringing, or defending, such an application and whether such instruction should be in writing and include a waiver of solicitor-client privilege. It is unnecessary to resolve these issues here, and accordingly we leave them to another day.

5 The appeal is allowed. No costs on this application.

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