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Gingrich v. Gingrich

Nathan Troy Gingrich, Appellant (Plaintiff) and Anika Gingrich, Respondent (Defendant)

Alberta Court of Appeal

Clifton O'Brien J.A., Frans Slatter J.A., Patricia Rowbotham J.A.

Heard: December 3, 2012
Judgment: December 6, 2012
Docket: Calgary 1201-0068-AC

Counsel: D.P. Castle, for Appellant

D.L. Harms, for Respondent

Subject: Contracts; Family

Family law

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 3.35 — considered

R. 9.2 — considered

R. 9.2(1) — considered

R. 9.2(2)(c) — considered

R. 9.6 — considered

Per curiam:

1 This appeal concerns the status of an order intended to reflect an agreement said to have been arrived at during a judicial dispute resolution session, where the parties do not agree on the proper content of the order.

Facts

2 The parties engaged in a judicial dispute resolution session on November 29, 2011. The principal issues related to the parenting arrangements for their three children. At the judicial dispute resolution session the parties believed that they had arrived at a settlement, and agreed to reduce that settlement to a consent order.

3 A few days later, the respondent's trial counsel drafted a consent order to implement the settlement, and on December 15, 2011 sent it to the appellant's counsel. It was labelled a "without prejudice consent order". The order recited several previous parenting orders that were being replaced by this order, and recited it arose from the parties "negotiating and consenting to the terms of the within order within a JDR ...".

4 In subsequent conversations, the appellant's counsel advised the respondent's trial counsel that she was having trouble contacting her client to review the contents of the draft order. It subsequently turned out that because of communication problems the appellant was not receiving any of his e-mails. Counsel for the appellant was also on vacation during this time, creating some delay.

5 On January 23, 2012, the respondent's trial counsel sent a letter to the JDR judge invoking R. 9.2(2)(c), stating that the consent order had been drafted, and that "there has been no request for changes". That rule reads:

> 9.2(1) The Court may direct which party is to prepare a draft of the judgment or order pronounced by the Court, but if the Court does not do so, the successful party is responsible for preparing the draft.
>
> (2) The following rules apply, unless the Court otherwise orders:
>
> (a) within 10 days after the judgment or order is pronounced, the responsible party must prepare a draft of the judgment or order in accordance with the Court's pronouncement and serve it on every party in attendance at the hearing, but if the responsible party does not prepare and serve the draft then any other party may do so;
>
> (b) within 10 days after the draft judgment or order is served, each party served may
>
> (i) approve the draft, or
>
> (ii) object to the draft, providing particulars of the objection;
>
> (c) if a party does not approve or object to the draft judgment or order within the 10 days described in clause (b) but all other requirements are met and service of the draft is proved, the judgment or order may be signed and entered.

At some point the JDR judge signed the order. On February 17, 2012 the appellant's counsel, having finally received instructions, wrote requesting some changes to the proposed consent order. She alleged that the order was missing a key component of the settlement (regarding French immersion schooling), and misstated another key item (regarding custody). On February 21, 2012 the signed order was filed, and it was served on the appellant's counsel.

6 The matter was taken back before the JDR judge, and the circumstances were explained to him. He declined to set aside or open up the order. He noted that the order was intended to be a "without prejudice" order. The JDR judge also noted that there was substantial agreement about many parts of the order, that either party was entitled to bring an immediate application to vary, and that the best interests of the children dictated that

there be some parenting arrangement in place in the interim. Alternatively, he noted the ability of the parties to appeal the order to the Court of Appeal.

7 The appellant also had the alternative of bringing an application in the proceedings to enforce any settlement that had been achieved. However, the appellant elected to appeal to this Court. The respondent has retained new counsel to support the order.

Status of the Order

8 It is clear that the order is irregular, and should not have been signed by the JDR judge. Undoubtedly, if the JDR judge had been aware of all of the circumstances, he would not have signed it.

9 Rule 9.2 by its terms only applies to orders and judgments that are "pronounced", in other words those that involve an adjudication by the court; once an order is pronounced, R. 9.2 governs how it is written down and recorded. A consent order arises from the agreement of the parties, and is not "pronounced" by the court. Under R. 9.6 an order that is pronounced is effective from the moment of pronouncement; a consent order is not an order, and does not exist, until it is agreed to by the parties. Consent orders are specifically dealt with by R. 3.35, which confirms that such orders must be approved by the parties or their counsel, depending on the particular circumstances.

10 In any event, the order should not have been sent to the JDR judge for signature without a full explanation of the circumstances. Rule 9.2(2)(c) is a type of *ex parte* procedure, and as with all *ex parte* applications counsel (as officers of the court) are expected to make full disclosure of the relevant circumstances to the judge. Further, once objections to the form of order were received (after it had been signed), it would have been prudent to withhold filing the order until the dispute was resolved. Given that the order did not have the endorsement of counsel for the appellant, it should also not have been characterized as a "consent" order.

11 Notwithstanding the irregularities of procedure, given what had happened the ultimate question is whether the order should just be treated as an interim provision. The objective of the JDR judge, being the protection of the best interests of the children, cannot be criticized. However, the integrity of the JDR process, as well as the process for entering orders was also in play. It was possible to accommodate all.

12 It was theoretically unobjectionable to leave the order in place, and to say that the order would be an interim parenting order only, pending the parties' reappearance in chambers. However, the reality is that family law orders tend to create a *status quo*, and the party seeking to upset an existing order always faces a tactical burden. Even a so-called "without prejudice" order will carry some weight. (Although court orders are always "with prejudice", by using this terminology the parties appear to have intended that it was "temporary", and that either one of them could apply to vary it without showing a change of circumstances.) This order on its face purported to be a consent order, entered into by the parties after a judicial dispute resolution session. That was inaccurate and misleading. It was unfair to the appellant to expect him to appear in chambers and seek to displace what, on its face, appeared to be an order he had recently agreed to.

13 This appeal should therefore be allowed, and the order set aside. The parties are left with the option of bringing applications to enforce the settlement, or as the JDR judge directed they are entitled to reapply to have the parenting issues resolved.

14 In the interim, some order needs to be made respecting the parenting of the children. A new order to that

effect should be drafted as follows:

- The recitals to the order must make it clear that it is an temporary order, entered into because of the dispute about the contents of a settlement apparently or possibly reached at a judicial dispute resolution setting;
- The recitals must not refer to it as a consent order;
- Paragraph 1 of the order, which is one of the disputed items, must be removed;
- Those portions of the order which relate to the undisputed aspects of parenting (as reflected in appellant counsel's letter of February 17, 2012) should temporarily remain in place;
- The order should not reflect that it replaces the previous orders, merely that it is a temporary arrangement until there can be a further adjudication or settlement;
- The order should specifically provide that the parties are to return to court to seek such remedies as they are advised, and should specifically list the outstanding items that are known not to be resolved in the order (e.g. Custody, French immersion schooling, etc.).

15 The appeal is allowed, and the order is set aside on the terms outlined above. The central issue on this appeal was the status of the order and the appellant was successful on that issue. He is entitled to taxable costs of the appeal.

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