

In the Court of Appeal of Alberta

Citation: TS v TMW, 2022 ABCA 399

Date: 20221206
Docket: 2201-0181AC
Registry: Calgary

Between:

TS

Respondent
(Plaintiff)

- and -

TMW

Appellant
(Defendant)

The Court:

**The Honourable Justice Elizabeth A. Hughes
The Honourable Justice Bernette L. Ho
The Honourable Justice Anne Kirker**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Decision of
The Honourable Justice D.A. Labrenz
Dated the 6th day of July, 2022
Filed the 19th day of August, 2022
(Docket: 2210-00501)

**Memorandum of Judgment
Delivered from the Bench**

Kirker J.A. (for the Court):

[1] The appellant appeals an interim restraining order. He argues the chambers judge did not apply the correct test for determining whether an interim restraining order was appropriate and failed to consider the evidence or that it was conflicting.

[2] The respondent did not file a factum or attend the appeal hearing.

[3] We agree with the appellant that the interim restraining order ought to be set aside.

[4] In *Schaerer v Schaerer*, 2021 ABCA 104, this Court provided the following guidance with respect to common law restraining orders in the family context. The principles apply equally here and inform the analysis whether the restraining order sought is interim or permanent:

- (a) The applicant has the burden of proof to show that a restraining order is warranted: at para 19.
- (b) An order restraining a party's liberty is an extraordinary remedy and it is inappropriate to grant a restraining order as a matter of routine or "out of an abundance of caution": at paras 20, 21.
- (c) Issuing a restraining order requires a careful balancing of the need to protect vulnerable applicants while not unreasonably interfering with the liberty of the other party. The risk being ameliorated must be objectively reasonable. The hyper-vigilance of one party is not a basis for unreasonably restraining the liberty of the other party: at para 19.
- (d) When dealing with an order that restrains someone's liberty, allowing sufficient time to consider the issues and supporting evidence is crucial: at para 18.

[5] Upon review of the affidavit evidence and the transcript of proceedings, we are of the view that the chambers judge imposed the interim restraining order without considering the legal test or evidence before him. He provided no reasons for the order, only the terms of it, and it is difficult to discern the basis for his decision. There was no evidence the appellant had made any contact with the respondent since February 2022. Additionally, the respondent's application was based on an apparent misapprehension that a "no-contact order" had been lifted. The appellant's evidence confirmed that an undertaking prohibiting him from communicating, directly or indirectly, with the respondent, and from attending any place of education, work or worship the respondent is known to attend, was still in force. In granting the interim restraining order, the chambers judge did what *Schaerer* warns against: he failed to consider what objectively reasonable risk the interim

restraining order was intended to ameliorate. Where no such risk is established by the applicant's evidence, the tripartite test governing interlocutory injunctive relief is not met: see *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) and *RP v RV*, 2012 ABQB 353 at paras 14 and 22. On this record, it seems the chambers judge restrained the liberty of the appellant out of an abundance of caution.

[6] The appeal is allowed, and the interim restraining order dated July 6, 2022, is set aside.

[7] Having heard the submissions of counsel, we award taxable costs to the appellant to be calculated on Column 1 of Schedule C of the *Alberta Rules of Court*, Alta Reg 124/2010, plus reasonable disbursements.

Appeal heard on December 5, 2022

Memorandum filed at Calgary, Alberta
this 6th day of December, 2022



A handwritten signature in blue ink, written over a horizontal line. The signature is stylized and appears to read "Kirker J.A.". Below the signature, the name "Kirker J.A." is printed in a black, sans-serif font.

Appearances:

Respondent, TS (No Appearance)

L.M. Handfield
For the Appellant