

CANADA / JUDGMENT

White v. Schultz

2022 BCCA 297

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 297 White v. Schultz

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

White v. Schultz,

2022 BCCA 297

Date: 20220818

Docket: CA47826

Between:

David Gordon Bruce White

Appellant

(Claimant)

And

Lindsay Nicole Schultz

Respondent

(Respondent)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated

September 20, 2021 (White v. Schultz, 2021 BCSC 1835,
New Westminster Docket E47052).

Oral Reasons for Judgment

Counsel for the Appellant:

A. James

H.M. Gowans

(appeared on August 15, 2022 only)

Counsel for the Respondent:

J.K. Mangat

Place and Date of Hearing:

Vancouver, British Columbia

August 15, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 18, 2022

Summary:

This is an appeal of a chambers judgment that dismissed the father's application for an order that H. (the child) attend a particular elementary school closer to his residence. The father appeals, arguing that the chambers judge erred: in her consideration of the acceptable level of risk to him due to COVID-19, commute times and his disability; and in her failure to consider Charter values. The father applies to adduce fresh evidence to demonstrate that the mother has a limited ability to fulfill an accommodation ordered by the judge to minimize his commute times. Held: Application to adduce fresh evidence and appeal dismissed. The father failed to adduce evidence that the COVID-19 risk to him of commuting with the child on public transit was unreasonable. The judge did not commit a palpable or overriding error in finding that the child remaining at her current school would minimize total commute times. The judge considered, respected and accommodated the father's disability by requiring the mother to transport the child to school during the father's parenting time. The proposed fresh evidence failed the Palmer test. It could not be expected to change the outcome. The father's Charter argument was a reiteration of his argument that the judge erred in her consideration of his disability.

MARCHAND J.A.:

Introduction

- [1] The appellant, David Gordon Bruce White, and the respondent, Lindsay Nicole Hood (formerly Schultz), are divorced. They are the parents of nine-year-old H. Mr. White is disabled and lives in Burnaby. Ms. Hood has remarried, has two children with her husband and lives in East Vancouver. The parties have been involved in a protracted dispute over where H. should attend elementary school.
- [2] Following an initial determination made by a parenting coordinator, H. has attended Thunderbird Elementary School ("Thunderbird") close to Ms. Hood's home in East Vancouver. On September 20, 2021, the chambers judge dismissed Mr. White's application to have H. attend Cameron Elementary School ("Cameron") near his home in Burnaby. The judge's reasons for judgment are indexed at 2021 BCSC 1835.
- [3] Mr. White appeals, arguing that the chambers judge erred in:
- impermissibly speculating about his COVID-19 risk levels;
 - concluding that H.'s commute time is minimized by remaining at Thunderbird;
 - failing to consider evidence about his disability; and
 - failing to consider Charter values.
- [4] In support of his submission that the judge's order did not adequately accommodate his disability, Mr. White seeks to adduce fresh evidence to establish that Ms. Hood has a limited ability to drive H. to school during his parenting time as ordered by the judge.
- [5] For the reasons that follow, I would dismiss the application to adduce fresh evidence and the appeal.

Background

- [6] The parties entered a comprehensive consent order on January 30, 2017 (the "Final Order"). Under the Final Order, they are both guardians and largely share parental responsibilities equally. They also have equal parenting time with H. on a 4-4-3-3 schedule. H. is always with her mother on Sundays, Mondays, and Tuesdays and her father on Wednesdays, Thursdays, and Fridays. Saturdays alternate.
- [7] Where H. attends school has always been a point of contention.
- [8] Mr. White has chronic musculoskeletal pain from a motor vehicle accident in 2012. He also has diabetes. He is disabled from working, walks with a cane, and does not drive. He wants H. to attend Cameron, which is approximately 850 meters from his home and 14 kilometers from Ms. Hood's home. Mr. White says he can walk from his home to Cameron in about 10-15 minutes.

- [9] Ms. Hood has many responsibilities and a busy schedule. She has a car and is able to drive. She wants H. to remain at Thunderbird, which is approximately one kilometer from her home and 15 kilometers from Mr. White's home. Mr. White says his commute to Thunderbird involves a combination of walking and public transit, takes approximately 45-60 minutes, and aggravates his pain to such an extent that he has no remaining energy to spend meaningful time with H.
- [10] The parties retained Bob Finlay as their parenting coordinator around March 2017, for a period of 12 months. On January 31, 2018, Mr. Finlay determined that H. would attend kindergarten at Thunderbird starting in September 2018. H. had attended Thunderbird for pre-school. In Mr. Finlay's view, attending kindergarten at Thunderbird would give H. a familiar environment and allow for a smoother transition to school given her shyness and anxiety. He determined that Mr. White could withstand the commute to take H. to Thunderbird during his parenting time but recognized it would be too much for Mr. White to make two trips a day. So, Mr. Finlay required Ms. Hood to take H. from school to Mr. White's residence after school on Wednesdays, Thursdays, and Fridays.
- [11] It turned out that Thunderbird was oversubscribed so the Vancouver School Board placed H. at Sir Matthew Begbie Elementary School ("Begbie") and waitlisted her at Thunderbird. The parties filed cross-applications to determine where H. would attend school if a spot did not become available for her at Thunderbird. Specifically, Mr. White applied for an order that H. attend kindergarten at Cameron and Ms. Hood cross-applied for an order that H. remain at Begbie.
- [12] On June 15, 2018, Justice Verhoeven dismissed Mr. White's application and ordered that: (1) H. remain registered at Begbie for kindergarten and remain on the waitlist for Thunderbird; and (2) H. attend kindergarten at Begbie if she was not admitted at Thunderbird. In the end, a spot at Thunderbird became available and H. has attended school there since.
- [13] The parties entered a consent order on March 29, 2019 that required Ms. Hood to pay for the parties to retain Katherine Fraser as a parenting coordinator. The parties subsequently asked Ms. Fraser to address the issue of H.'s school, but she declined to do so. In her view, the issue had already been decided by Justice Verhoeven.

Chambers Judgment

- [14] The judge reviewed the jurisprudence regarding whether a court can make an order for choice of school, or whether that is a matter to be decided only by someone with parental responsibilities. In *N.R.G. v. G.R.G.*, 2017 BCCA 407, this Court said:

- [32] [W]e consider that the [Family Law] Act expects parental responsibilities to be assigned to a guardian or guardians, or be guided by a parenting coordinator, rather than having the judge make the specific decisions at first instance. In other words, the Act does not contemplate that the details of parenting will be directed by the court; the legislation does not provide for the court to step into a guardian's role.
- [15] Although the case law following N.R.G. is divided as to whether a court can order the choice of school, in the judge's view, the court has this power.
- [16] The judge was also of the view that the choice of school had already been decided by Justice Verhoeven, making the matter *res judicata*. Mr. White would have to demonstrate a material change in circumstances in order for the court to consider varying the order made by Justice Verhoeven.
- [17] The judge concluded that the circumstances created by the COVID-19 pandemic, combined with their effect on Mr. White's compromised immune system and his reliance on public transportation, constituted a material change in circumstances that affected H. In her view, this change could not have reasonably been contemplated by Justice Verhoeven when he made his order in May 2018.
- [18] On the merits of Mr. White's application, the judge concluded that "the best interests of the child mandate that the child continue to attend a school close to the mother's residence, which in this case, is Thunderbird." The judge recognized Mr. White's disability and reliance on public transit and the impact of the COVID-19 pandemic. But, in view of public health protocols and the widespread availability of vaccines, the judge considered the risk to Mr. White to be "within reasonably tolerable levels, such that his ability to meet H's needs is not seriously compromised if she continues to attend Thunderbird."
- [19] The judge noted the benefit to H. of attending school closer to the parent who is capable of driving. This would allow short-notice pick-up in case of emergency. H. remaining at Thunderbird would also provide her more stability in her social and educational relationships. Further, she would soon have a brother entering Thunderbird where they would overlap in attendance for several years.
- [20] The judge noted that Ms. Hood offered during the hearing to drop H. off at school on Thursdays and Fridays (days that Mr. White has parenting time) "to address COVID-19 concerns." The judge considered Ms. Hood's offer to be inconsistent with Mr. Finlay's pre-pandemic determination that Ms. Hood should assist Mr. White with driving to accommodate his physical disability. The judge ordered Ms. Hood to take H. to school on Thursdays and Fridays, even in the absence of COVID-19. In the event that Ms. Hood was unable to personally transport H. to school on Thursdays and Fridays, the judge ordered that she could arrange for someone else known to H. and Mr. White to "do the transportation." The result is that, at most, Mr. White will make one trip per day three days per week to Thunderbird.

- [21] Mr. White (when he had responsibility for morning transport) had not been consistently taking H. to school during his parenting time. The judge found there was no reasonable justification for that to continue and ordered that H. attend school in person, subject to public health guidelines and protocols regarding in-class learning.
- [22] Finally, the judge dismissed a cross-application filed by Ms. Hood that Mr. White obtain leave from the court before making further applications regarding schooling. Ms. Hood has not appealed the order dismissing her cross-application.

Positions of the Parties

- [23] Mr. White accepts that the standard of review over discretionary orders in family law cases is deferential. However, he says the judge made "material errors" in her treatment of the evidence and "speculative findings of fact that were not supported by the record."
- [24] Mr. White argues that the judge erred by speculating the COVID-19 risks to him were within "reasonably tolerable levels, such that his ability to meet H's needs is not seriously compromised if she continues to attend Thunderbird." He says the evidence demonstrates he is at a higher risk than the baseline population for severe infection if he were exposed to COVID-19, such as on public transit.
- [25] Mr. White also argues that the judge's order leaves him with three round-trips to Thunderbird--up to two hours per day total. He argues that the judge gave insignificant weight to the muscle pain and strain he will experience during these commutes. He says the required commuting time exceeds his activity tolerance as established by affidavit evidence. He says this leaves him with less energy available to be actively engaged in H.'s life.
- [26] Mr. White submits that Charter values should be considered in his context. He relies on this Court's re-affirmation that "Charter values are not to be ignored by courts" when making decisions in private family law disputes: *A.B. v. C.D.*, 2020 BCCA 11 at para. 203, citing *Young v. Young*, [1993] 4 S.C.R. 3 and *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141. He asks that the Court not allow a situation that results in "artificially keep[ing] one of the parents down": *Duggan v. White*, 2019 BCCA 200 at para. 68.
- [27] Mr. White estimates that H.'s "weekly time in transit" would be approximately one hour and 40 minutes per week if she were to attend Cameron versus four hours and five minutes if she continues at Thunderbird. He says the judge erred by concluding that H. will "benefit from the shorter commute when attending after-school activities" and "will spend less time commuting" to Thunderbird.
- [28] Finally, Mr. White emphasizes that no accommodation would be needed if H. were to attend Cameron. He worries that the current arrangement will not be sustainable into the future. He relies on fresh evidence in the form of an affidavit sworn by Ms. Hood on July 6, 2021 that attests to her many responsibilities.

- [29] Ms. Hood responds that the only factor accepted by the trial judge to be a material change in circumstances is the COVID-19 pandemic. She maintains that any resulting variation order should not be the product of a de novo hearing and that the court should "limit itself to making only the variation justified by that change": *L.M.P. v. L.S.*, 2011 SCC 64 at para. 62. Although *L.M.P.* was decided in the context of an application to vary spousal support, Ms. Hood argues the same principle applies here.
- [30] Given the limited scope of review, Ms. Hood argues that the judge did not err or speculate with respect to Mr. White's risk level due to COVID-19 and its intersection with his disabilities. She emphasizes that Mr. White relies on a doctor's note that only says "he is thought to be at higher risk."
- [31] Ms. Hood argues that Charter values have no applicability to questions that turn on the best interests of the child, as s. 37 of the Family Law Act, S.B.C. 2011, c. 25 is not ambiguous and even directs that the court shall take into consideration the best interests of the child "only."
- [32] Ms. Hood maintains that the remainder of Mr. White's arguments are beside the point, but in any case, were understood and balanced by the judge through a thorough and fresh assessment of what is in H.'s best interests.

Standard of Review

- [33] Deciding what is in the best interests of a child "is a highly contextual and fact-driven exercise that involves a high level of judicial discretion": *B.J.T. v. J.D.*, 2022 SCC 24 at para. 53. As a result, "an appellate court is not entitled to intervene unless there has been 'a material error, a serious misapprehension of the evidence, or an error in law': *B.J.T.* at para. 52. The standard of review is "highly deferential": *Callaghan v. Charbonneau*, 2022 BCCA 167 at para. 8.

Scope of Review on a Material Change of Circumstances

- [34] The judge found that the COVID-19 pandemic gave rise to a material change in circumstances. She then undertook a broad-ranging inquiry concerning H.'s best interests. The judge's finding of a material change in circumstances is not in issue but the scope of her review following that finding is.
- [35] In my view, it is unnecessary to resolve the appropriate scope of the judge's review in the circumstances of this case. The broad-ranging review undertaken by the judge could only have benefitted Mr. White and, as will be seen, he has not established any error within that review.

Merits of the Appeal

[36] On the merits, Mr. White submits the judge erred in her inquiry into the best interests of H.: by misapprehending the evidence regarding his COVID-19 risk levels, commute times, and disability; and by failing to consider Charter values. I will address each of these alleged errors in turn.

COVID-19 Risk

[37] Mr. White's evidence about his COVID-19 risk status was a "Certificate of Health Status" from Dr. Chan. It said:

To Whom this may concern:

RE: WHITE, DAVID

Dear Sirs, Madames,

This letter is to certify that this patient has been diagnosed with a chronic medical condition that could result in decreased immune status. As a result, he is thought to be at higher risk than the baseline population for severe infection if he were exposed to COVID-19 such as while riding public transit.

[Emphasis added.]

[38] No evidence was adduced to establish his actual immune status or meaningfully quantify his risk levels as a result of that status.

[39] A concern about the reliability of "To Whom It May Concern" letters was expressed in *Taylor v. Taylor*, 2010 BCSC 1539 at paras. 32-34:

[32] That question brings me to the next basis on which the plaintiff seeks a reduction in child support and cancellation of the arrears owing. The plaintiff says he has health issues and is unable to work. In support of this assertion, he relies on the Medical Note from his family physician, which is reproduced above.

[33] In my view, the Medical Note from Dr. Hughan is unreliable and self-serving. It was not provided pursuant to the Supreme Court Family Rules, B.C. Reg. 169/2009 (Court Rules Act) (the "Rules"), which prescribe a procedure for putting expert opinion evidence before the court. It does not meet even the most rudimentary requirements to be admitted as expert opinion evidence. While the plaintiff is a lay person and is not acquainted with the Rules or law concerning the admission of expert opinion evidence. That fact does not make [admissible] evidence which is not admissible. This Medical Note does not meet the necessary requirements.

[34] Medical notes such as that provided by the plaintiff in this case are often made, at the request of a patient to a busy medical practitioner, for a purpose directed by the patient. They often reflect symptoms described by the patient to the physician rather than a considered diagnosis and prognosis by the physician. In that sense, they are self-serving self-reports by the patient under the guise of the physician's opinion. I find this note, addressed "To Whom It May Concern" to fall in such a category.

[Emphasis added.]

[40] In this case, based on the uncontroverted evidence that Mr. White is diabetic and suffers from various chronic pain syndromes, the judge accepted that he is at greater risk than the general public if he contracts COVID-19.

[41] As can be seen, even on the minimal evidence provided by Mr. White, the judge recognized his heightened risk. In my view, she then appropriately took judicial notice of public health protocols and the availability of vaccines. While there was no evidence linking public health protocols and the availability of vaccines to Mr. White's specific situation, more importantly, there was also no evidence that would have compelled the judge to find that Mr. White would be exposed to unreasonable risk levels with H. continuing to attend Thunderbird.

[42] I would dismiss this ground of appeal.

Commute Times

[43] Mr. White says the judge misapprehended the evidence regarding commute times. In his factum, he says:

47. Under the Chamber Judge's Order, H's weekly time in transit to and from Thunderbird is approximately 4 hours, 5 minutes, including on the Respondent's school parenting days, 5 trips of 5 minutes drive; and on the Appellant's school parenting days, 2 trips of approximately 20 minutes drive with the Respondent and 3 trips of approximately one hour on public transit with the Appellant.

48. Were H attending Cameron, H's weekly time in transit would be approximately 1 hour, 40 minutes including on the Respondent's school parenting days, 5 trips of approximately 20 minutes drive with the Respondent. On the Appellant's school parenting days H would walk to and from school, transit is not required.

[Emphasis added.]

[44] I note that when Mr. White says "including" in his calculation of commute times, he really means "comprised of". His calculation of commute times is comprised only of H's travel time in Ms. Hood's car and on public transit with him. Moreover, the times used by Mr. White in his factum are not based on findings of fact made by the judge.

- [45] On my reading of the reasons for judgment, when the judge found that H. would benefit from shorter commute times, she was not thinking only of H.'s time in a car or on public transit. She was thinking of the entire commute time from her mother and father's homes to school and back.
- [46] Mr. White's accounting of time in para. 47 of his factum uses the top end of the 45-60-minute range he provided to estimate his commute time with H. to Thunderbird. At the lower end of the range, the total commute times to Thunderbird are reduced to three hours and 20 minutes.
- [47] Mr. White's accounting of time in para. 48 of his factum leaves out the 10-15-minute walk from his house to Cameron. At the upper end of the range, the total commute times to Cameron are two hours and 55 minutes.
- [48] Although these revised calculations demonstrate shorter overall commute times to Cameron, the judge was not obliged to accept Mr. White's time estimates and there is no indication that she did. Notably, the judge referenced some determinations made by Mr. Finlay:
- [17] After examining the route himself, Mr. Finlay determined that the father's physical disability could withstand the commute required to take H. to Thunderbird during the father's parenting time. According to Mr. Finlay, the route from the father's home to Thunderbird should take approximately 35 minutes from the father's house, using public transit, and 20 minutes by car. This was comparable to the mother's expected 30 minute journey to Cameron by car.
- [Emphasis added.]
- [49] Mr. Finlay's determinations estimated a shorter commute time for Mr. White to Thunderbird and a longer commute time for Ms. Hood to Cameron than Mr. White's estimates. By my calculations, using Mr. Finlay's determinations plus the time Mr. White estimates it would take him to walk H. to Cameron, the result is an overall commute time to Thunderbird of three hours and 10 minutes (five trips of five minutes and two trips of 30 minutes for Ms. Hood and three trips of 35 minutes for Mr. White) and to Cameron of three hours and 20 minutes to three hours and 45 minutes (five trips of 30 minutes for Ms. Hood and five trips of 10 to 15 minutes for Mr. White).
- [50] I review all of the above to say that it was not a palpable error for the judge to conclude that H. will spend less time commuting by attending Thunderbird. The judge was not obliged to show her math and she made a finding that was open to her.
- [51] In any event, even using Mr. White's time estimates, I would not find the judge to have made an overriding error. In my respectful view, the outcome did not turn on the minutiae of the judge's calculation of commute times.

Mr. White's Disability

- [52] Mr. White alleges that the chambers judge failed to account for his physical limitations and lower activity tolerance. Given that this factor was previously considered by Justice Verhoeven and was not altered by the pandemic, arguably, it was not necessary to reassess it in light of the material change in circumstances (COVID-19). Nevertheless, the judge set her mind to the issue and concluded:
- [84] I accept that the father has physical limitations which significantly impact his mobility. However, the evidence does not support a finding that they are of such magnitude so as to prevent him from having a meaningful relationship with H. in the event that she continues to attend Thunderbird.
- [53] Respectfully, this finding was open to the judge. She was not obliged to accept Mr. White's own characterization and estimation of his limitations. Furthermore, she was entitled to conclude that the benefits to H. in remaining at Thunderbird offset any detriments to her associated with Mr. White's physical limitations. I see no error in her analysis.
- [54] With respect to Mr. White's fresh evidence application, it does not meet the fourth criteria of the so-called Palmer test: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8.
- [55] Even in the absence of Mr. White's fresh evidence, the judge was aware that Ms. Hood has many responsibilities and contemplated what would happen in the event Ms. Hood was unable to transport H. from Mr. White's home to Thunderbird on Thursdays and Fridays. She ordered Ms. Hood to make arrangements with someone known to H. and Mr. White to fulfill her obligation to get H. to school during Mr. White's parenting time.
- [56] The proposed fresh evidence provides new details about just how busy Ms. Hood is. But, having those details could not be expected to have affected the result. Regardless of how busy Ms. Hood is, it is her responsibility to get H. to school on Thursdays and Fridays.
- [57] I would dismiss Mr. White's application to adduce fresh evidence and this ground of appeal.

Charter Values

- [58] Mr. White's argument regarding Charter values is, in my view, a reiteration of his argument that his disability was not appropriately considered by the judge.
- [59] Understandably, Mr. White seeks to be treated with dignity and respect and in a way that promotes equality.
- [60] This Court's decision in *A.B.* recognized that "Charter values are not to be ignored by courts" when making orders in private family law disputes: at para. 203. At the same time, this Court went on to hold "that there are limits on a consideration of Charter values in this context": at para. 205.

- [61] In my view, Mr. White's disability was considered, respected and accommodated, not for its own sake, but in relation to H.'s best interests and Mr. White's ability to continue to participate in H.'s life and meet her needs.
- [62] There was a spectrum of accommodations available to maintain the primacy of the best interests of H. while minimizing the toll of commuting on Mr. White. The judge chose one point on that spectrum in light of the all of the evidence, including the evidence regarding Mr. White's disability. Specifically, she required Ms. Hood to transport H. from Mr. White's home to Thunderbird on Thursdays and Fridays so that Mr. White would be required to commute with H. no more than once per day, three days per week.
- [63] If the judge had failed to consider Mr. White's disability and its effect on his ability to participate in H.'s life, it would have been an error in law. But, that is not what occurred. The judge considered, and was sensitive to, Mr. White's disability. She arrived at a particular accommodation. Her decision is owed significant deference. I see no reversible error.

Disposition

- [64] MARCHAND J.A.: I would dismiss Mr. White's application to adduce fresh evidence and his appeal.
- [65] BAUMAN C.J.B.C.: I agree.
- [66] FITCH J.A.: I agree.
- [67] BAUMAN C.J.B.C.: The application to adduce fresh evidence is dismissed. The appeal is dismissed.

"The Honourable Mr. Justice Marchand"

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