NOVA SCOTIA COURT OF APPEAL

Citation: Quigley v. Willmore, 2007 NSCA 122

Date: 20071212
Docket: CA 287370
Registry: Halifax

Between:

Karen Agnes Quigley

Appellant

v.

Gary Willmore

Respondent

Judge: The Honourable Justice Elizabeth Roscoe

Application Heard: December 6, 2007, in Halifax, Nova Scotia, in Chambers

Held: Application for a stay pending appeal is dismissed with costs in the cause.

Counsel: David Bright, Q.C., for the appellant
Gordon R. Kelly, for the respondent

Decision:

[1] The appellant appeals from and applies for a stay of execution of an order setting aside her petition for divorce made by Justice Darryl W. Wilson of the Supreme Court (Family Division). On an application by the respondent to set aside the divorce petition on the basis that Nova Scotia lacked jurisdiction, Justice Wilson determined that the appellant had not been ordinarily resident in Nova Scotia for at least one year immediately preceding the filing of the petition, as required by s.3 of the **Divorce Act**, R.S.C. 1985, (2nd Supp.), c. 3.

[2] In the decision under appeal, Justice Wilson set out the history of the relationship between the parties and made several findings of fact respecting the residence of the appellant during the marriage and for the year prior to the commencement of the divorce proceedings. See: 2007 NSSC 305. The judge concluded that the appellant was ordinarily resident in Texas for at least seven of the twelve months prior to November 7, 2006 when the petition was filed in Nova Scotia. The order of Justice Wilson sets aside the petition for divorce and declares that all interim orders, interlocutory orders, execution orders, and judgments in the proceeding are void. Included in the orders declared void are interim orders giving custody of the eight year old child of the marriage to the appellant, and providing for access, child support and spousal support. As well an order has issued releasing the respondent's interest in the Nova Scotia matrimonial property, subject to accounting at a later date.

[3] The respondent commenced divorce proceedings in Texas on November 9, 2006. A temporary order issued in Texas on March 30, 2007 states that the District Court for the 253rd Judicial District in Liberty County Texas has jurisdiction of the case and of all the parties. It also appoints both parents as "temporary joint managing conservators of the child of the marriage" and provides that the appellant mother has "... the exclusive right to designate the primary residence of the child within Hantz (sic) County, Nova Scotia or Liberty County, Texas". The respondent is obligated to pay child support.

[4] The appeal of Justice Wilson's decision has been scheduled to be heard by this court on April 10, 2008. It is acknowledged by counsel that a stay of the order under appeal would not operate to stay the on-going proceedings in Texas.

[5] The **Rule** under which the application is brought states:

Stay of execution

62.10. (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.

(2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.

(3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just.

(4) Interest for such time as execution may be delayed by an appeal shall be allowed on the judgment at the rate of six per cent (6%) per annum from the filing of the notice of appeal, unless otherwise ordered by the Court or a Judge, and the interest shall be added to the judgment on execution without an order for that purpose.

(5) Nothing herein prevents the staying of execution or proceedings by the court appealed from, as authorized by rule of court or by an enactment.

(6) Where an execution has been issued and is thereafter stayed as provided in this rule 62.10 the appellant is entitled to obtain a certificate from the Registrar that the execution has been stayed pending the appeal, and, upon the certificate being lodged with the sheriff, the execution shall be superseded, but the execution debtor shall pay the sheriff's fees and the sum so paid shall be allowed to him as part of the costs of the appeal.

(7) Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action other than the issue and recording of the judgment in the office of the Registrar of Deeds and the taxation of costs thereunder, shall be stayed unless otherwise ordered by the Court or a Judge.

[6] Counsel for the appellant submits that the effect of a stay would be to allow the appellant's divorce action in Nova Scotia to remain active, allow her to continue enforcement proceedings of the Nova Scotia courts' interim orders, and most importantly, to use these orders as justification for not complying with any conflicting orders from the Texas courts. It is not suggested that the appellant

would seek to have the Family Division proceed with the divorce hearing or grant any final orders pending the appeal of the jurisdiction order.

[7] Counsel for the respondent argues that since the appellant is not required to do anything pursuant to Justice Wilson's order, a stay of execution is not appropriate. There is no pending execution order to be stayed. He submits that the appellant is essentially asking for an interim order temporarily allowing the appeal.

[8] I tend to agree with the respondent that the order under appeal is not one which lends itself to being stayed in accordance with **Rule** 62.10 and that the application for a stay should be dismissed for that reason. In **Prince Edward Island (Director of Child Welfare) v. M. (H.)**, [1989] P.E.I.J. No. 167; 81 Nfld. & P.E.I.R. 93, Mitchell, J.A., as he then was, in a case where the appeal was from a declaratory judgement, said:

> It is my opinion that Rule 62.15 has no application in this case because the decision of Campbell, J. was merely declaratory and does not call for or contemplate any consequential relief or require the taking of any further steps to enforce it. This rule does not provide for staying a "decision", rather it calls for "stay of proceedings under the order appealed from". In other words, the stay contemplated by Rule 62.15 applies to proceedings to enforce or give effect to a decision not to the decision itself which has already been rendered.
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> Rule 62.16 generally provides that where an order is stayed under 62.15, no steps may be taken under the order appealed from for its enforcement. Here there are no proceedings that follow from the judgment of Campbell, J. which could be the subject of a stay. His decision is merely declaratory as to the state of the law. There is nothing that has to be done to enforce or to give effect or to carry out his decision. No steps have to be taken to enforce his declaration. There simply are no "proceedings under the order appealed from" to be stayed. Accordingly, I would dismiss the application for a stay.

[9] The wording of the Nova Scotia **Rule** is different from that in Prince Edward Island, but in my view the intent of our **Rule** is to provide for a stay that stops further proceedings or suspends the payment of funds. In **R. v. Jewitt**, [1985] 2 S.C.R. 128, Dickson, C.J. described a stay of proceedings as follows at p. 137:

> A stay of proceedings is a stopping or arresting of a judicial proceedings by the direction or order of a court. As defined in Black's Law Dictionary (5th ed. 1979), it is a kind of injunction with which a court freezes its proceedings at a particular

> point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the proceedings.

[10] In this case, what is sought by the appellant would have the opposite effect. A stay does not normally have the effect of permitting a matter that has been dismissed to continue pending an appeal.

[11] In the event however that I am taking too narrow a view of the **Rule** and thus in error with respect to the appropriateness of a stay of execution in this proceeding, I will assume without deciding that a stay is an available remedy and proceed to deal with the application on the usual basis.

[12] The notice of appeal sets out the following grounds:

1. That the Learned Trial Judge erred in his determination as the Appellant's residency status within the meaning of *Section 3* of the *Divorce Act*;

2. That the Learned Trial Judge failed to properly consider the relevant facts related to the issue of residency when determining the legal issue of residency;

3. That the decision of the Learned Trial Judge is perverse and unreasonable in that it is not supported by the evidence; and

4. Such other grounds of appeal as may arise upon review of the transcript of the evidence.

[13] The test to be applied in determining whether or not to grant a stay is set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.

In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

(1) satisfy the court on each of the following:

(i) that there is an arguable issue raised on the appeal;

(ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and

(iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so- called balance of convenience or:

(2) failing to meet the primary test, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[14] In **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171, Justice Freeman explained what is meant by an "arguable issue" at ¶ 11:

'An arguable issue' would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right of appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to

> contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[15] The grounds of appeal appear to raise issues of fact and a question of mixed fact and law which typically require palpable and overriding error before this court would interfere with the judgment under appeal. However, the threshold necessary to demonstrate an arguable issue is not high nor is it dependent upon a detailed assessment of the likelihood of success on appeal. See: **Royal Bank of Canada v. Saulnier**, 2006 NSCA 108 ¶ 10. Although not specified in the notice of appeal, one of the arguments made in support of the stay application is that the judge erred in not severing the applications made under other legislation, namely the **Matrimonial Property Act** and the **Maintenance and Custody Act** from those under the **Divorce Act** before declaring all interim orders to be void. That possibility does not appear to have been suggested as an alternative to the judge. Although it does not appear that any order was made pursuant to the **Maintenance and Custody Act**, I suppose this court could amend the order of Justice Wilson to preserve whatever rights might have accrued to the appellant pursuant to her applications under provincial legislation joined with the divorce petition. This argument might be of sufficient substance to allow the appeal at least in part on that basis. I find therefore that there is an issue that meets the arguable standard.

[16] The appellant argues that she and her son will suffer irreparable harm if a stay is not granted. Her position is that if the stay is refused and all the Nova Scotia interim orders are voided, the Texas court will be the only court with jurisdiction over all matters of custody, access and child support. It would then be necessary for her to travel to Texas to take part in the proceeding there, leaving her practice of law for an extended period and uprooting her son who is settled in school here now. Then if the order of Justice Wilson is reversed on appeal it will be too late to revive the Nova Scotia action at that point. Since she has, to date, not completely complied with the access orders of the Texas court, she fears that she will be found in contempt and imprisoned. A hearing on that issue and to determine whether custody should be changed is scheduled to be heard in Texas on December 20, 2007.

[17] The problem with the appellant's argument in this respect is that the Texas court is free to continue its proceeding whether the stay is granted or not. Until such time as there is a resolution of the conflicts of law issue, it seems that it would be risky not to participate in the process there. Her decision whether to take part in

the proceedings there is not logically entirely dependant on whether there is a stay of Justice Wilson's order. Ignoring the Texas hearings and orders invites contempt proceedings even if the appeal of the Justice Wilson's order were allowed and whether or not a stay of that order is granted.

[18] The irreparable harm claimed by the appellant is at this point entirely speculative. If the Texas court did grant custody to the respondent, that order would have to be registered in Nova Scotia to be enforced. Since Texas is not a reciprocating state pursuant to the **Reciprocal Enforcement of Custody Orders Act**, 1989, R.S.NS, c. 387, the **Child Abduction Act**, 1989 R.S.N.S., c. 67 which implements the Hague Convention on the Civil Aspects of International Child Abduction would be applicable. Pursuant to that statute, a Nova Scotia court would have jurisdiction to determine whether the child's habitual residence was in Nova Scotia or Texas and if the appellant was wrongfully retaining the child in Nova Scotia. It is unlikely that process would be underway before this court determines the appeal of Justice Wilson's order.

[19] Another consideration is that if the application for a stay is dismissed, the appellant could file a new petition for divorce because she has apparently established the residency requirement now. If the stay were granted, she would not have that option because she would not be able to have two petitions outstanding. See **C.P. Rule** 57.06(6)). If the appellant commences a new divorce action, she would be in a position to apply for a new interim custody order and present her *forum conveniens* and best interests of the child arguments to a Nova Scotia court. For these reasons, I do not accept the appellant's irreparable harm submission.

[20] Having found that there would be no irreparable harm if the stay is not granted, it is not necessary to deal with the balance of convenience factor.

[21] With respect to the secondary test, it is submitted on behalf of the appellant that there are exceptional circumstances making it just and fit that the stay be granted. The appellant says the jurisdictional uncertainties and the child's best interests present exceptional circumstances.

[22] Recently in **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:

> [11] Very few cases have been decided on the basis of the secondary test in Fulton. Freeman, J.A. in Coughlan et al. v. Westminer Canada Ltd. et al. (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in Brett v. Amica Material Lifestyles Inc. (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for Fulton's secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> [12] While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in Fulton itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.
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> [13] While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.

[23] In this case I see no obvious or egregious errors in the decision under appeal, and as indicated above, issuing a stay does not impact upon the Texan proceedings and there is no pending execution order to be stayed. This is not a case where issuing a stay would prevent an injustice. Having considered the submissions made in this case, I am not persuaded that any exceptional circumstances exist here.

[24] I dismiss the application for a stay pending appeal. Costs of this application will be in the cause.

Roscoe, J.A.