NOVA SCOTIA COURT OF APPEAL
Citation: *Green v. Green*, 2022 NSCA 30

Date: 20220407
Docket: CA 507407
Registry: Halifax

Between:

Jamie Todd Green

Appellant

v.

Tara Leah Green

Respondent

Judge:	Van den Eynden J.A.
Motion Heard:	January 26, 2022 in Halifax, Nova Scotia in Chambers
Held:	Motion for stay dismissed
Counsel:	Jamie Todd Green, appellant in person Charlotte Edwards, for the respondent

Decision:

[1] Mr. Green appeals a corollary relief order ("order") granted by Justice Diane Rowe of the Nova Scotia Supreme Court (Family Division).

[2] Following completion of the parties' divorce hearing, the judge delivered an oral decision. The resulting order addressed parenting arrangements, child support, spousal support, and the division of matrimonial property. The apportionment of the parties' debts was factored into the judge's division of matrimonial property.

[3] Mr. Green applied to this Court seeking to stay the provisions of the order related to retroactive and prospective child support and the division of matrimonial property and debt. The contested motion was heard in tele-chambers with the consent of the parties.

[4] Having considered the parties' respective submissions and the materials filed, I determined Mr. Green's motion must be dismissed. The following explains why.

[5] The order under appeal requires Mr. Green to pay child support to Ms. Green for the two children of their marriage [ages 20 and 18]. The judge determined Mr. Green to have an annual income of $87,024 and Ms. Green to have an annual income of $54,041. Mr. Green was ordered to pay Ms. Green monthly child support of $747.21. That amount is reduced to $373.61 per month during the time when one of the children attends university and, therefore, is not residing with Ms. Green. Mr. Green was also ordered to pay retroactive child support of $37,767.57, repayable at the rate of $786.82 per month.

[6] Regarding the division of property, attached to the order is a balance sheet setting forth the division of matrimonial assets which the judge apparently balanced equally between the parties. In determining the division of assets, the judge took the parties debts into consideration and ordered certain debts to be paid from the matrimonial home sale proceeds.

[7] The judge summarized her balance sheet determinations as follows:

> a. The Joint Line of Credit ($34,000) the RBC Credit Card of Tara Green ($14.900.32) and the Scotiabank Credit Card of Tara Green ($6,031.28) shall be paid from the proceeds of the matrimonial home.

b. Tara Green shall retain the proceeds from the matrimonial home ($49,821.44) and her mutual funds.

c. Jamie Green shall retain responsibility for his RBC Credit Card.

d. The LIRA held in Jamie Green's name shall be divided equally based on its present value by way of spousal rollover.

e. To equalize the division of property, Jamie Green shall retain $48,518.64 of the RRSP in his name, and by way of spousal rollover Tara Green will receive $87,544.30.

f. The parties shall retain the vehicle in their possession and sign any applicable paperwork to effect the transfer effective immediately. …

g. The parties shall retain bank accounts held in their name alone, …

h. The parties agree that the household effects in the matrimonial home have been divided to the satisfaction of the parties.

i. The pension of the parties be divided at source pursuant to a separate Pension Division Order.

[8] In support of his stay motion, the only evidence Mr. Green provided was a very brief affidavit. He deposed:

1. THAT I am the Appellant on this appeal and make this Affidavit in support of my motion for a stay of execution from the lower court verbal decision given by Justice Diane Rowe, in the proceedings in the Supreme Court of Nova Scotia, 1203-004180 Green v. Green.

2. THAT the decision of Justice Rowe, in the division of matrimonial debts and assets will cause irreparable harm to the Appellant.

3. THAT the decision of Justice Rowe, regarding retroactive child support and current child support obligations, creates an undue hardship to the Appellant.

4. THAT should the decision of Justice Rowe be enforced prior to the pending appeal, that some assets, specifically cash, would be irretrievable once placed in possession of the Respondent, should a successful appeal create cause for change in the original decision, and the money already spent.

5. THAT should the decision of Justice Rowe be enforced prior to the pending appeal, that the splitting of investments (RRSP/LIRA) would incur unnecessary fees and tax consequences, should a successful appeal create cause for change in the asset allocation from the original decision.

[9] Mr. Green's submissions were also brief. He claimed a stay should be granted because:

> The appellant's financial situation has changed since the court decision has been received. The appellant has since been forced into bankruptcy due to the inability to meet financial obligations of both households during the divorce and as a result of the court decision itself.
>
> Part of the appeal is to show the inequity in the division of matrimonial assets and not taking into account the matrimonial debt.
>
> One need only look at the current living situations of both parties to show there is a huge disparity in buying new cars going on shopping trips, vs having to declare bankruptcy.
>
> At issue is the large cash amount sitting in trust from the sale of the matrimonial home. The appellant argues that an agreement was signed to show where proceeds were to go, however with the change in the appellants financial circumstance since, the numbers no longer work.
>
> Further, the division of investments, should the decision be executed, the appellant argues that potential tax consequences and the removal of the cash component in trust, would be irreversible.
>
> The appellant wishes to simply hold off on the division of assets and debts until the appeal can be heard and decision made by the appeal court.

[10] The exercise of my discretion in whether to grant a stay is governed by these legal principles:

1. The filing of a Notice of Appeal does not operate as a stay of execution of the judgment being appealed. That is because a successful party is entitled to the benefit of the judgment obtained. This is in keeping with the companion proposition that an order, although under appeal, is presumed correct unless and until it is set aside.

2. The power to grant a stay is discretionary. Nova Scotia *Civil Procedure Rule* 90.41(2) provides:

> 90.41 (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

3. To succeed on his stay motion, Mr. Green had to establish, on a balance of probabilities:

   i. There is an arguable issue raised by his appeal;

ii. If a stay is not granted and the appeal is successful, he will have suffered irreparable harm; and

iii. He will suffer greater harm if the stay is not granted than Ms. Green will suffer if the stay is granted.

4. If none of the three criteria are met, there remains discretionary power to grant a stay providing there are exceptional circumstances that would make it fit and just to grant a stay. This latter branch of the test is akin to a safety valve, catching cases that warrant a stay but fall outside the foregoing and primary three-step test.

See *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 and *La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5.

[11] I turn to my application of the governing legal principles.

Has Mr. Green raised an arguable issue?

[12] Ms. Green conceded this issue because of an earlier chambers decision (2021 NSCA 90), wherein Mr. Green's appeal survived a Registrar's motion to dismiss under *Rule* 90.43, for failing to perfect his appeal.

[13] As in a motion for stay, one of several principles that guide a judge's analysis of whether to grant a Registrar's motion to dismiss is whether the appellant's grounds of appeal raise an arguable issue. My colleague, Bourgeois J.A., heard the motion to dismiss and as to the "arguable issue" requirement she concluded:

> [18] The next factor is whether the grounds of appeal raise an arguable issue. This is a low threshold.
>
> [19] In his Notice of Appeal, Mr. Green sets out six grounds of appeal. I will not canvass them in detail. He asserts the judge ignored evidence relating to his payment of matrimonial debts in her overall asset division. Further, he asserts the judge erred by failing to consider the terms of a prior separation agreement. Both of these are arguable issues that, upon a full hearing by this Court, could lead to success on appeal.

[14] In light of the foregoing, I will not address this requirement any further and move on to the remaining factors.

If a stay is not granted and the appeal is successful will Mr. Green suffer irreparable harm?

[15] As Ms. Green properly pointed out, the contents of Mr. Green's affidavit lacked sufficient detail to substantiate his claim for irreparable harm. Rather, his evidence is conclusory in nature—something which falls short of what is needed to discharge his burden of substantiating irreparable harm.

[16] In *Myatt v. Myatt*, 2004 NSCA 124, Fichaud J.A. said:

> [10] The applicant for a stay must prove irreparable harm by evidence. General conclusory statements are insufficient*: Cape Breton (Regional Municipality) v. Cape Breton & Central Nova Scotia Railway Ltd*. (2003), 211 N.S.R. (2d) 368 (C.A.), at para. 17 *per* Oland, J.A.*; Dalhousie University v. Dalhousie Faculty Association* (2001), 195 N.S.R. (2d) 198 (C.A.) at para. 15 *per* Hallett, J.A.; *Leddicote v. Nova Scotia (Attorney General)* (2001), 198 N.S.R. (2d) 101 (C.A.), at para. 11 *per* Roscoe, J.A.

[17] Ms. Green filed a response affidavit. In part, it provides:

> 24. In response to clause 3 of the Appellant's affidavit, Mr. Green withdrew his claim for undue hardship at trial. Attached hereto as Exhibit 11 is a copy of correspondence from him confirming this.
>
> 25. In response to clause 4, should I cash all RRSP or LIRA balances, that would be taxable income for me, and depleting the assets in their entirety would be contrary to my financial interests as a substantial portion would be lost to tax. It is also my intention to use this income for retirement.
>
> 26. In response to clause 5 of the Appellant's affidavit, I have followed-up with my financial advisor at RBC, and I attach true copy of e-mail correspondence confirming there are no tax consequence or fees that would result from the division of the RRSP and LIRA. See Exhibit 12.

[18] I need not make specific reference to the contents of the above-noted exhibits; it is enough to say they confirm what Ms. Green stated in her affidavit.

[19] In her affidavit, Ms. Green also deposed that Mr. Green has not paid child support since June of 2017, hence, the significant award of child support arrears against Mr. Green in the order under appeal. She also set out examples of what she viewed as Mr. Green's depletion of assets, creation of delays and obstacles to her rightful access to assets.

[20] Ms. Green argued, as in *Myatt*, that there has been no offering of evidence she could or would not repay Mr. Green if he were to be successful on appeal. There is also no evidence of any history to support Mr. Green's argument that Ms. Green would cash all investments, the majority of which are held in RRSPs and LIRA accounts, prior to the hearing of the appeal. Further still, should she cash RRSP and LIRA investments, it would be treated as taxable income and be to her detriment. In addition, although she refutes any risk, Ms. Green noted that Mr. Green could later argue for an off-set in responsibility of retroactive child support payments (at present this amount exceeds $40,000.00).

[21] For these reasons, Mr. Green has failed to establish irreparable harm.

Will Mr. Green suffer greater harm if the stay is not granted than Ms. Green will suffer if the stay is granted?

[22] The third branch of the stay analysis is the balance of convenience. However, having determined Mr. Green did not establish irreparable harm, a requirement to succeed on his stay application, I need not determine this issue. That said, even if Mr. Green had established irreparable harm, there is no doubt in these circumstances Ms. Green would suffer greater harm had a stay been granted.

Are there exceptional circumstances that otherwise warrant the granting of a stay?

[23] Having explained why Mr. Green failed to persuade me on a balance of probabilities that he satisfied the three-part *Fulton* test, I now turn to the final consideration—are exceptional circumstances present that might otherwise justify a stay? The answer is no.

[24] As noted, Mr. Green's evidence was lacking and conclusory in nature. His submissions did not compensate for the lack of a persuasive evidentiary base. His stated preference was to simply "hold off on the division of assets and debts until the appeal can be heard and decision made by the appeal court". In short, there was nothing before me to establish any exceptional circumstances.

Conclusion

[25] The motion to stay is dismissed. Mr. Green shall pay costs on the motion to Ms. Green in the amount of $500.00.

Van den Eynden J.A.