

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

BETWEEN:

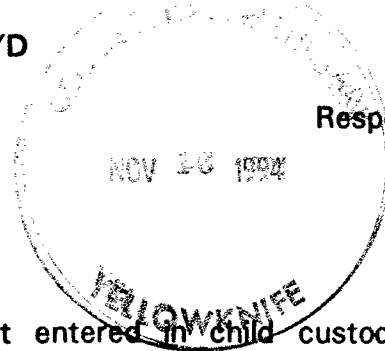
GARY JOSEPH ROBERT BOYD

Appellant

- and -

KATHERINE ANN BOYD

Respondent

MEMORANDUM

1 A stay of execution of the judgment entered in child custody and matrimonial property proceedings between the parties in the Supreme Court of the Northwest Territories (File 6101-02015) on January 4th 1994 is sought by the appellant former husband pursuant to s.21 of the **Judicature Act, R.S.N.W.T. 1988, c. J-1**, which states:

21. Execution of a judgment appealed from shall not be stayed except under order of the judge of the Supreme Court who gave the judgment or the Court of Appeal, or a judge of the Court of Appeal, and on the terms that the judge or court making the order considers just.

2 The stay application came before me last Friday in Chambers, the applicant having filed a notice of appeal from the judgment on April 25th 1994. No attempt has been made to obtain a stay of execution of the judgment from the judge of the Supreme Court who gave the judgment now under appeal. Nor has any reason been given for coming instead to this Court for that relief.

Neither s.21 of the **Judicature Act** nor Rule 7 of the Rules of this Court

respecting civil appeals requires that applications for a stay of execution shall be made in the first instance to the judge of the Supreme Court who gave the judgment whose execution is sought to be stayed. At times judgments and orders are made by judges of that Court subject to a temporary stay pursuant to s.21. And where an appeal has been brought there is no reason, other than a practical one, to prefer bringing an application for a stay of execution in this or the other forum. The greater familiarity with the background of the judgment which is likely to be possessed by the judge who gave it may of course suggest that the application will ordinarily be made in the first instance to that judge with greater facility than to a judge of this Court who does not have any knowledge of that background.

4
Rule 7 states:

7. An appeal does not operate as a stay of execution or of proceedings under the decision appealed from except so far as a judge of the Supreme Court or of the Court may order and no intermediate act or proceedings is invalidated except so far as the court appealed from may direct.

5
The application in this instance is not only for a stay of execution of the judgment above mentioned pending determination of the appeal; the following additional relief is also requested in the notice of motion before the Court:

- (a) a direction that the applicant shall pay maintenance in an amount of \$500 per child per month pending determination of the appeal; and
- (b) a direction that the Office of Maintenance Enforcement of the Government of the Northwest Territories shall cease enforcement of any amount greater than \$1,000.00 a month and to cease collection of any arrears of maintenance which may have accumulated prior to the judgment under appeal.

6 The judgment under appeal grants sole custody of two children to the respondent former wife, subject to certain access provisions there mentioned. It requires the applicant to pay child support or maintenance to the respondent in a monthly amount to be calculated, after allowing for the impact of taxation on the respondent so as to yield \$1,320.00 a month to the respondent. And it reduces the arrears of child support as of October 15th 1993 to \$10,000.00. Furthermore, the various items of matrimonial property are attributed dollar values; and directions are made for their division between or allocation to the parties, details of which need not here be mentioned.

7 The applicant's notice of appeal lists numerous grounds of appeal, among which are grounds attacking the custody award made in the judgment under appeal, the valuation of the various items of matrimonial property made in that judgment, and various other matters dealt with in the judgment including the amount of child support or maintenance ordered to be paid.

8 The decision of a trial judge as to child custody, more especially after a trial in which he has had the opportunity to hear in some detail from the parties competing for such custody, will not be lightly disturbed on appeal: **Talsky v. Talsky**, [1976] 2 S.C.R. 292, 21 R.F.L. 27, 62 D.L.R. (3d) 267, 7 N.R. 246; and see **Bijowsky v. Caicco** (1985) 3 C.P.C. (2d) 295, 45 R.F.L. (2d) 527 (Ont. C.A.); and **A. v. B.** (1983) N.W.T.R. 1, 148 D.L.R. (3d) 247, 45 A.R. 88 (C.A.) (affirmed on appeal *sub nom.* **King v. Low**, [1985] 1 S.C.R. 87, [1985] N.W.T.R. 101 *sub nom.* **K. (K.) v. G.(L.)**, 44 R.F.L. (2d) 113, [1985] 3 W.W.R. 1, 16 D.L.R. (4th) 576, 58 A.R. 275, 57 N.R. 17 *sub nom.* **King v. B.**).

9 Apart altogether from other considerations, such as the undesirability of

introducing a harmful degree of uncertainty into the situation of the children in the period leading up to the determination of the appeal, a stay of execution of a child custody judgment or order will not be granted other than in exceptional circumstances; and no such circumstances have been revealed in the present application. No doubt recognizing this, the applicant indicated, at the hearing of this application last Friday, that he is not, after all, seeking a stay of the custody award or of the related access provisions made in the judgment under appeal. Nor does he ask for a stay of the remainder of the judgment under appeal other than in respect of the child support and the collection of arrears of maintenance mentioned in that judgment.

10

As to the child support requirements of the judgment under appeal, what is sought is to reduce these to a maximum of \$1,000 a month pending determination of the appeal. Even if I, as a judge of this Court, could lawfully vary the judgment under appeal in that manner, or in some other manner so as to achieve the effect which the applicant seeks, there is nothing in the material filed in support of the present application which persuades me that the monthly child support requirements of the judgment should be interfered with pending the determination of the appeal.

11

Regarding the arrears of child support or maintenance mentioned in the judgment under appeal, an order shall issue directing the Maintenance Enforcement authorities to cease their efforts to enforce payment of or otherwise to collect these arrears and that all such arrears collected to date shall be paid to the Registrar of this Court to be held in an interest bearing trust account for payment out as the Court in due course may direct. This order shall be subject to the further order of the Court. I understand that this is consented to on behalf of the respondent.

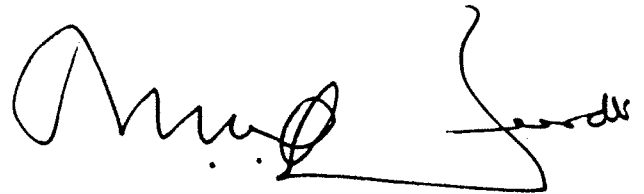
The above mentioned order shall furthermore direct that upon the disposition of any property mentioned in the judgment under appeal any proceeds of the disposition payable to the applicant shall, up to the total amount of the arrears I have mentioned, be deposited in the above mentioned account for payment out as there mentioned. I understand that this is also consented to on behalf of the respondent.

13

The applicant should note that the relief mentioned in the closing words of Rule 7, earlier quoted, may be obtained in "the court appealed from", not this Court. The point was not argued, but I assume (and do not decide) that the relief which I have granted does not fall within the scope of those words of Rule 7.

14

The costs of this application shall abide the determination, in due course, of the Court.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', written in a cursive style.

M.M. de Weerd
J.A.

Yellowknife, Northwest Territories
May 24th 1993

Gary Boyd, Esq., the Applicant in person.

Counsel for the Respondent: Adrian Wright, Esq.

CA 00470

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MEMORANDUM
HONOURABLE MR. JUSTICE M.M. de WEERDT

