

CANADA / JUDGMENT

Kapoor v. Makkar

2020 BCCA 132

COURT

British Columbia Court of Appeal

DECIDED

30 April 2020

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2020 BCCA 132 Kapoor v. Makkar

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kapoor v. Makkar,

2020 BCCA 132

Date: 20200430

Docket: CA46702

Between:

Sapna Kapoor also known as Sapna Makkar

Appellant

(Claimant)

And

Sonam Makkar and Saroj Makkar

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

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

January 20, 2020 (Kapoor v. Makkar, New Westminster Docket E-054162).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

J.E. Shragge

E.S. White

The Respondent, appearing in person

(via teleconference):

Sonam Makkar

Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2020

Summary:

This application arises from an order of the Supreme Court, granting the respondent interim sale of the former matrimonial home and exclusive occupancy as of March 1, 2020 (the "First Order"). The appellant's application to postpone the First Order was dismissed (the "Second Order"). The appellant filed a notice of application for leave to appeal from the Second Order (the "Notice"), was denied a stay of the First Order by a justice of this court, and then obtained a temporary stay in the Supreme Court. Subsequently, the judge who made the First Order dismissed her application to extend the temporary stay and varied the First Order by extending the vacant possession date to May 1, 2020 (the "Third Order"). The appellant seeks, inter alia, leave and an extension of time to appeal the First Order, leave to amend the Notice to include the First Order and Third Order, and a stay of the First Order and Third Order pending appeal.

Held: Application allowed. Leave to appeal the First Order is not required. The Notice--amended to include the First Order and Third Order--shall stand as the notice of appeal, and the time to appeal the First Order is extended. Finally, the Court exercises its limited jurisdiction to stay an order of the Supreme Court refusing to grant a stay of an order under the Family Law Act, S.B.C. 2011, c. 25 pending appeal. There is some merit to the appeal. Given the inextricable link between the First Order and Third Order, the appellant would suffer irreparable harm if a stay is not granted. On balance, the inconvenience to the respondent is mitigated by expediting the appeal.

ABRIOUX J.A.:

I. Introduction

- [1] The appellant, Sapna Kapoor, seeks relief arising from orders initially made on December 9, 2020, in a high conflict family proceeding, including:
- a) this application be heard on short notice;
 - b) the time for bringing an appeal from the order of the Supreme Court of British Columbia pronounced December 9, 2019 (the "First Order", as defined below) is extended;
 - c) the notice of application for leave to appeal the order of the Supreme Court of British Columbia pronounced January 20, 2020, (the "Second Order", as defined below) is amended;
 - d) leave to appeal the First Order is not required, or in the alternative, is granted;
 - e) the execution of the First Order is stayed until further order of this court; and
 - f) the appeal is expedited, and within seven days of this order, the parties shall establish a schedule for filing their materials.
- [2] The application was heard on April 29, 2020. There is urgency in having the Court's decision rendered in that there is a Supreme Court of British Columbia order in effect, which provides that the appellant vacate the former matrimonial home by midnight tomorrow, May 1, 2020.

II. Background

- [3] The parties were married on May 9, 2016, and separated on September 6, 2017. The parties have one child, born on June 26, 2017, whom they co-parent on an equal basis.
- [4] On November 3, 2017, Riley J. made an ex parte order, granting the appellant, inter alia, exclusive occupancy of the former matrimonial home (the "Riley Order").
- [5] On February 5, 2018, Dardi J. directed that the action be tried over 10 days commencing September 24, 2018. It was later rescheduled to April 1, 2019, for seven days.
- [6] In November 2018, the respondent applied to vary the Riley Order to grant him sole occupancy of the matrimonial home. On December 3, 2018, Morellato J. adjourned the issue of exclusive occupancy of the matrimonial home to the trial (the "Morellato Order").
- [7] The trial was rescheduled from April 1, 2019, to November 18, 2019, for 10 days.
- [8] The matter first came before the judge on November 18, 2019, being the rescheduled trial date. The trial was then adjourned at Ms. Kapoor's request, in part because she was unrepresented by counsel and was not prepared to proceed. In subsequent written reasons, the judge stated that while granting the adjournment, he noted that Mr. Makkar had made numerous attempts to reduce his support obligations and to argue for a sale of the home, all

of which had been adjourned to trial: Kapoor v. Makkar (January 20, 2020), New Westminster E054162 (B.C.S.C.) at para. 10 (the "January Reasons"). He also noted, at para. 12, that various judges on interim applications had adjourned requests of Mr. Makkar on the understanding that the matter would be proceeding to trial in November 2019, which did not occur.

- [9] The judge also seized himself of the pre-trial proceedings and ordered that the trial be reset for 15 days commencing July 13, 2020. He also reduced the respondent's spousal support obligation from \$4,500 to \$3,000 per month and granted the respondent leave to apply to vary the Riley Order and Morellato Order.
- [10] On November 20, 2019, the respondent, represented by counsel, filed a notice of application for interim sale of the former matrimonial home (the "Interim Sale Order") and exclusive occupancy of that home (the "Occupancy Order"). On December 2, 2019, the appellant, who was then self-represented, filed a cross-application for various forms of relief, the various applications set to proceed on December 9, 2019.

III. The First Order

- [11] The hearing on December 9, 2019, proceeded without the appellant being present. On December 8, 2019, her counsel had advised the respondent's counsel that Ms. Kapoor would be representing herself the next day. Moments before the hearing was set to proceed at 9:00 a.m., Ms. Kapoor notified opposing counsel by email that she was unwell and would not be appearing.
- [12] The applications proceeded in her absence. The judge granted the Interim Sale Order, ordering that the former matrimonial home be listed for sale as of March 1, 2020, with the respondent having exclusive conduct of sale, subject to the approval of the court. He also granted the Occupancy Order, which stipulated as follows:
2. The Claimant shall provide vacant possession of the Former Matrimonial Home to the Respondent on March 1, 2020 and thereafter, paragraph 3 of the Order of Mr. Justice Riley made November 3, 2017 and the Order of Madam Justice Morellato are varied such that the Respondent, Sonam Makkar shall have exclusive occupancy of the Former Matrimonial Home thereafter pending sale of the Former Matrimonial Home.
- [13] The Interim Sale Order and Occupancy Order, collectively, constitute the First Order.

IV. The Second Order

- [14] On January 2, 2020, Ms. Kapoor filed a notice of application in which she sought, inter alia, to postpone the sale of the home pursuant to the First Order. That application was heard concurrent with certain applications filed by the respondent and was heard by the judge on January 20, 2020. At that time, the judge noted certain aspects of the appellant's conduct to date including the basis upon which the trial had been adjourned in November 2019. He also found that the appellant had been untruthful to the court in relation to whether she had

been working.

- [15] The judge dismissed Ms. Kapoor's application to postpone the sale of the home, finding that the order for the interim sale was made for "very real reasons": January Reasons at para. 48. He found that on the evidence before the court, it appeared that Mr. Makkar contributed the entirety of the purchase price with funds from selling a townhouse he owned prior to the marriage. The judge reasoned that Mr. Makkar had a greater claim to the value of the home, less Ms. Kapoor's share of any growth in the equity, and nothing suggested that Ms. Kapoor could buy out his larger interest. Since the home must be sold, it ought to be done expeditiously. The dismissal of this application forms part of the Second Order.
- [16] In the January Reasons, at paras. 20-21, the judge also explained his understanding as to what had occurred on December 9, 2019, when the First Order was made:
- [20] On that date, Mr. Makkar's counsel appeared with him in court. Mr. Makkar's counsel read to me, shortly after 9:00 a.m., an email he had received from Ms. Kapoor. As I recall matters, the email was sent minutes before the court was to start at 9:00 a.m. The email said Ms. Kapoor was not coming that day as she was not well. It stated that she was at the family home in Surrey. Of note she had had counsel until Sunday December 8th, but counsel advised late that night he would not be appearing.
- [21] Having considered the matter and considered the late notice of the request for an adjournment, and being suspicious of another delay tactic, noting a "last minute" end of counsel retainer, I proceeded on the application and I granted the order for an interim sale of the home. I was later advised at 9:45 a.m., after court had stood down, after Mr. Makkar and his counsel had likely left, that Ms. Kapoor arrived at the Vancouver Courthouse.
- [Emphasis added.]
- [17] In Ms. Kapoor's absence, and for these reasons, the judge had proceeded to hear the application and granted the orders in question.

V. Proceedings in the Court of Appeal

- [18] On February 19, 2020, Ms. Kapoor, acting on her own behalf, filed a notice of application for leave to appeal in this court from the Second Order (the "Notice"). The Notice seeks a "stay" of the First Order, as well as clauses of the Second Order pertaining to the dismissal of Ms. Kapoor's application to vary orders relating to the occupancy and sale of the home.
- [19] On February 28, 2020, Ms. Kapoor appeared without notice before a justice of the Court (in Chambers), who granted an interim stay of the First Order and Second Order until March 6, 2020, or a further order of this court (the "Interim Stay").
- [20] On March 5, 2020, in reasons indexed at 2020 BCCA 81 [Kapoor CA], Justice Saunders (in Chambers) dismissed Ms. Kapoor's application to extend the Interim Stay, referring, in part, to case law which provided that s. 234 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] gives

exclusive jurisdiction to the Supreme Court of British Columbia to stay an order made by that court pending an appeal absent extraordinary circumstances. She noted, at para. 5, that the parties were scheduled to appear before the judge the next day and "they will thus have an opportunity to make whatever submissions they consider appropriate in favour of a stay or in opposition to a stay".

- [21] On March 6, 2020, the parties appeared before a different judge of the Supreme Court of British Columbia who granted a stay of execution of the First Order until March 27, 2020 (the "Stay Order").

VI. The Third Order

- [22] On March 27, 2020, the parties reappeared before the judge. The appellant sought an extension of the Stay Order. The judge varied the First Order by extending the vacant possession date to May 1, 2020 (the "Third Order"). According to the terms of the order, he also directed the Supreme Court registry to issue an order of possession "any time after May 2 if there is evidence that Mrs. Kapoor has not moved out". The Third Order has not been appealed. Counsel for the appellant submitted that if an extension of time is granted then, subject to the Court's direction, he would prepare an amended notice of appeal which would reference all three orders.

VII. Discussion

Abridgment of Time

- [23] Ms. Kapoor seeks an order that this application be heard on short notice. Pursuant to s. 10(2) (d) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act] and R. 52 of the Court of Appeal Rules, B.C. Reg. 297/2001 [Rules], a justice in chambers can abridge any time limits in the Act or the Rules. Ms. Kapoor was required to serve one filed copy of the notice of motion and supporting material on Mr. Makkar at least five business days before the date of this hearing: Rules, R. 33(1). These materials were filed on April 24, 2020, only three business days in advance. As the respondent filed responding materials and was prepared to proceed in chambers on April 29, 2020, I am satisfied that a short abridgment of time is appropriate.

Amendment of Notice of Application for Leave to Appeal

- [24] Ms. Kapoor seeks an order granting leave to file an amended notice of application for leave to appeal. As I have noted, the Notice filed on February 19, 2020, was drafted by the appellant herself. The Notice states it is an appeal from the Second Order, although there is a reference to the First Order in the introductory paragraph, which is deleted by hand. The body of the Notice, however, in part, seeks a stay of the First Order.

- [25] Under R. 4 of the Rules, a notice of application for leave to appeal may be amended after the filing of the appellant's motion book with leave of a justice. The appellant's counsel on this application submits that, although in-artfully expressed, the Notice indicates an intention to appeal the First Order. In the circumstances of this case, when I consider the Notice in its entirety, I consider it appropriate to grant leave to file an amended notice that includes the First Order.
- [26] The Third Order has not been appealed but emanates from the same matter. This court has held that the notice of appeal engages the Court's jurisdiction, and "once that jurisdiction is engaged in a cause, there is no need for a separate notice of appeal to address issues that arise in the cause, unless they are completely discrete": *Dunn v. Vicars*, 2009 BCCA 477 at para. 40. Accordingly, in my view, subject to the other relief which is sought, in particular an extension of time, an amended notice that includes the First Order and Third Order is appropriate.

Leave to Appeal

- [27] I will first deal with the issue of whether leave to appeal is required before considering the well-settled criteria that pertain to whether an extension of time should be granted.
- [28] Ms. Kapoor seeks to appeal the First Order, including both the Interim Sale Order and the Occupancy Order in favour of Mr. Makkar. In essence, she intends to challenge the judge's decision to require her to provide vacant possession of the home to Mr. Makkar, who will then have exclusive occupancy of the home and control over its court-supervised sale. The First Order provided a vacant possession date of March 1, 2020. The Stay Order extended this date to March 27, 2020, and then the Third Order further extended this date to May 1, 2020.
- [29] Pursuant to s. 7(2) of the Act, leave of a justice is required for a "limited appeal order". Rule 2.1(c) of the Rules lists as a limited appeal order "an order granting or refusing interim relief under the Family Law Act".
- [30] Mr. Makkar's notice of application in the court below which sought the Interim Sale Order and Occupancy Order sets out the legal basis of those orders. The Interim Sale Order, which also granted Mr. Makkar conduct of sale, was sought under R. 15-8(3) and (4) of the Supreme Court Family Rules, B.C. Reg. 169/2009. The Occupancy Order was sought pursuant to ss. 90 and 97(1) of the FLA. Absent any indication to the contrary in the record, I accept that the orders were made on these legal bases.
- [31] Ms. Kapoor submits that leave to appeal is not required for the Interim Sale Order made pursuant to R. 15-8 of the Supreme Court Family Rules, since it was not made pursuant to the FLA. The Supreme Court Family Rules is a regulation under the Court Rules Act, R.S.B.C. 1996, c. 80. Further, she argues that leave to appeal the Occupancy Order is not required because it is inextricably tied to the Interim Sale Order, from which she has an appeal as of right.

- [32] In *Tomic v. Tough*, 2013 BCCA 212, Justice Chiasson (in Chambers) held that an order for sale of the family home pursuant to R. 15-8 of the Supreme Court Family Rules is not a "limited appeal order" and thus can be appealed as of right. In addition, other orders (including making a joinder application under the former Family Relations Act) did not require leave because they were connected to orders from which leave was not required. This principle was also expressed in *Dunn* at para. 40, as well as *Hiebert v. Millar*, 2018 BCCA 216 at para. 24.
- [33] Accordingly, in my view, the authorities establish that Ms. Kapoor does not require leave to appeal, as she has an appeal as of right from the Interim Sale Order and thus may also appeal another order which is connected to that order, being the Occupancy Order.
- [34] Pursuant to the Civil Practice Directive entitled *Commencing an Appeal When Uncertain if Leave to Appeal is Required*, which went into effect on May 8, 2017, if leave to appeal is not required, the presiding justice may order that the notice of application for leave to appeal stand as a notice of appeal along with any necessary extensions of time. In light of my decision regarding an extension of time, I make that order.

Extension of Time

- [35] Ms. Kapoor seeks an extension of time to appeal the First Order. Pursuant to s. 14(1) of the Act, a notice of appeal or an application for leave to appeal must be brought within 30 days after the order appealed from is pronounced. The Notice was filed on February 19, 2020. To appeal the First Order, it ought to have been filed on January 8, 2020.
- [36] Section 10(1) of the Act empowers a justice to extend the time within which an appeal to the court may be brought. The disposition of an application for an extension of time is discretionary: *Perren v. Lalari*, 2009 BCCA 564 at para. 9.
- [37] The criteria governing whether an extension of time ought to be granted are set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.):
- 1) Was there a bona fide intention to appeal?
 - 2) When were the respondents informed of the intention?
 - 3) Would the respondents be unduly prejudiced by an extension of time?
 - 4) Is there merit in the appeal? and
 - 5) Is it in the interest of justice that an extension be granted?
- [38] The burden is on the party seeking the extension of time, and the balance of authorities indicate that the interests of justice is decisive: *Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 at para. 19 (Garson J.A. in Chambers).

Was there a bona fide intention to appeal? / When were the respondents informed of the intention?

[39] The appellant concedes that she did not form a bona fide intention to appeal within the required time. However, this is not necessarily fatal: Rapton at para. 21. I accept that the appellant formed an intention to appeal the First Order by the time the notice of application for leave to appeal was filed on February 19, 2020, and the respondent was advised of this intention at this time.

[40] I would add that on January 3, 2020, Ms. Kapoor filed the notice of application to which I referred above in which she sought, inter alia, to postpone the sale of the home. That application was heard on January 20, 2020.

Would the respondent be unduly prejudiced by an extension of time?

[41] I find that the respondent would not be unduly prejudiced by the delay itself, which is relatively short and in the context of many overlapping proceedings and challenges to the order of sale and possession of the former matrimonial home. The Second Order, which was appealed in time, engages the same facts and underlying dispute.

Is there merit in the appeal?

[42] I am not prepared to say that the appeal is without merit or "doomed to fail": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 5 (*Goepel J.A. in Chambers*). On April 27, 2020, two days before this chambers hearing, the judge's transcribed oral reasons for the First Order were filed: *Kapoor v. Makkar* (December 9, 2019) New Westminster Docket E054162 (B.C.S.C.) (the "December Reasons"). Those reasons provide the judge's analysis for granting the First Order and, hence, are of significant assistance in considering the merit to an appeal. This is particularly relevant in this case since the Second Order and Third Order have, as their source, the First Order.

[43] The December Reasons consist of 12 paragraphs over two pages, the principal findings being:

- a) there is one asset, the home, that is subject to division;
- b) the marriage was very short;
- c) the home was essentially bought by Mr. Makkar just prior to separation with funds from selling his pre-marriage townhouse; and
- d) Ms. Kapoor's non-attendance at the hearing, together with the prior adjournments of the proceedings, led the judge to be "satisfied on the information before me, not having heard from Ms. Kapoor on this point that she is playing games" (at para. 8) and "suspect she has been less than frank with the court about her inability to attend today" (at para. 9).

[44] The Riley Order was an interim order made pursuant to the FLA. Accordingly, the applications before the judge on December 9, 2019, engaged, in part, s. 216 of the FLA which provides:

Court may make interim orders

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
 - (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
 - (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[Emphasis added.]

[45] In the December Reasons, the judge appears to have focussed on the appellant's conduct and, what he considered to be the "bottom line", being the fact that the home was the only real asset subject to division. I recognize that both the Interim Sale Order and the Occupancy Order are discretionary and attract a high degree of deference. But there is no mention in the December Reasons of s. 216 of the FLA and in particular the mandatory factors set out in (4). Accordingly, I accept the appellant's submission that varying the Riley Order--which had provided exclusive possession of the home to the appellant--such that the

respondent would have exclusive possession as of March 1, 2020, without, it would appear, having considered s. 216 of the FLA, and in particular subsection (4), is indicative that the appeal is not bound to fail.

[46] Furthermore, in so far as the Interim Sale Order is concerned, R. 15-8 of the Supreme Court Family Rules provides that the court may order the sale of a family residence where it appears necessary and expedient to do so. In *Reilly v. Reilly*, [1992] B.C.J. No. 2561 (B.C.C.A.), this court confirmed the court's authority to order the sale of a former matrimonial home on an interlocutory application where it is necessary or expedient, meaning it is advantageous to both parties. More recently, in *A.B. v. C.D.*, 2015 BCSC 2134 at paras. 63-64, the court reviewed the jurisprudence and summarized the core factors on an application under R.15-8:

[63] The courts have discretion to order the interim sale of a family asset where it is necessary and expedient. The courts have considered a number of factors in doing so. These include:

- Whether the sale is necessary. This is an important factor. If the sale is not necessary, any sale should be advantageous to both parties. Another factor is whether the sale will promote early settlement (as per *Reilly v. Reilly*, [1992] B.C.J. No. 2561 (C.A.)), and/or whether the sale will defeat a spouse's claim for reapportionment (*Head v. Head*, [1994] B.C.J. No. 1503 (S.C. Master); *R.(L.M.) v. R.(J.F.)*, 2009 BCSC 1332 (Master));
- In addition, a question may arise as to whether the sale of the family home is inevitable, or whether a spouse might be able to retain it on a division of assets (*Pierce v. Pierce* (1994), 2 B.C.L.R. (3d) 31 (B.C. S.C.); *Lede v. Lede*, [1994] B.C.J. No. 1655 (S.C. Master); *Wilson v. Wilson*, 2009 BCSC 1834 (Master), *aff'd* 2009 BCSC 1600); and
- Another important consideration may arise as to whether a sale would effectively eliminate accommodation for a spouse and children or whether alternative accommodation is available (*Leask v. Leask*, [1994] B.C.J. No. 1821 (S.C. Master); *Matheson v. Matheson*, [1995] B.C.J. No. 441 (S.C. Master).

[64] Finally, any doubt should be resolved in favour of the status quo (*Bodo v. Bodo* (1990), 25 R.F.L. (3d) 295 (B.C.S.C.)).

[47] It is not clear from the December Reasons if the judge concluded that the interim sale was necessary and there is no mention of the other factors cited in the jurisprudence. Accordingly, I cannot say that the appeal of this order is bound to fail.

Is it in the interest of justice that an extension be granted?

[48] Finally, it is clear that the fifth criterion--the interest of justice--is decisive: *Rapton* at para. 19. The factors weighing in favour of Ms. Kapoor, and thus granting the extension, include:

- a) Ms. Kapoor has to vacate the home by tomorrow at midnight;

- b) although the child will stay in the home 50 percent of the time due to the equal co-parenting arrangement since Mr. Makkar intends to move in, there will still be some disruption with Ms. Kapoor having to vacate;
- c) Ms. Kapoor's elderly father lives with her in the home;
- d) the circumstances of the coronavirus pandemic raise some concerns about Ms. Kapoor's ability to arrange alternative housing; and
- e) the trial is scheduled for mid-July 2020. Although it is not clear there will be a trial then due to the coronavirus pandemic, if trials are scheduled to take place, it would appear this trial may proceed, as it has already been adjourned several times.

[49] The factors weighing in favour of Mr. Makkar, and thus against an extension, include:

- a) the length of time Mr. Makkar has attempted to have this matter proceed to trial and get these issues resolved;
- b) although he earns a significant income, his financial circumstances include: paying the mortgage on the home, spousal and child support, and rent for his current residence;
- c) Ms. Kapoor has known since December 9, 2019, that she would have to move by March 1, 2020, which then changed to May 1, 2020, and she has not made any arrangements;
- d) from the materials Mr. Makkar has filed, there is suitable accommodation for Ms. Kapoor at a rent well within her means in the vicinity where she currently resides. He has provided her with the names of landlords, agreed to help her move, and she still has not done anything;
- e) the home is the only real asset subject to division, apart from an RRSP; and
- f) this was a marriage of short duration.

[50] While I have considerable sympathy for Mr. Makkar's circumstances, it is my view that the interests of justice militate in favour of the extension being granted because:

- a) the appeal is not bound to fail;
- b) the Second Order was appealed on time and engages the same underlying facts and dispute;
- c) Ms. Kapoor has an appeal as of right from the First Order, and she only requires a short extension of time; and
- d) in my view, the prejudice to Mr. Makkar flows from the existence of litigation and not from the delay in filing the Notice with respect to the First Order.

[51] Accordingly, I conclude that an extension of time is appropriate in this case.

Stay of Execution

[52] I will first consider whether the Court has the jurisdiction to make the stay orders that the appellant seeks.

[53] In Kapoor CA, referred to at para. 20 above, Saunders J.A. dismissed the appellant's application to extend the Interim Stay of the First Order and Second Order, which had been made on an ex parte basis by a single justice of the Court on February 26, 2020.

[54] In doing, so she stated:

[1] ... In any case, I understand what was intended to be stayed was the order requiring Ms. Kapoor to vacate the premises by March 1, 2020. In doing so, there was mention in the hearing of s. 234 of the Family Law Act, S.B.C. 2011, c. 25. That section provides:

234 Despite any other enactment, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless the court that made it orders otherwise.

[2] Section 234 has been considered by single justices in this court in several cases including: Bennett v. Bennett, 2002 BCCA 580; Stasiewski v. Stasiewski, 2006 BCCA 53; and Sharifpour v. Rostami, 2018 BCCA 458. In particular, Mr. Justice Donald said in Bennett v. Bennett:

[12] I do not rest my decision on jurisdiction because there may arise a case in which this Court will have to act on an obviously wrong exercise of the Supreme Court's stay jurisdiction. This is not such a case. Here Mr. Justice Wilson gave careful consideration to the matter and concluded that he should not interfere with the liquidation of the assets. With the benefit of hearing eight days of trial he was well placed to decide that the parties could not afford to hold on to the assets pending the appeal because their creditors were closing in. Since the Act gives exclusive jurisdiction to the Supreme Court in this area, I do not think the legislature's intention should be finessed by means of an appeal of this kind. No extraordinary circumstances or egregious error have been shown to override the trial judge's decision to refuse a stay.

[3] Stasiewski is a case that dealt with property. Stasiewski referred to Bennett v. Bennett and said:

[10] The unusual framing of Ms. Stasiewski's application today to include a request for an order for leave to appeal the stay, and for an order amending the notice of appeal to include that issue is directed to the sliver of jurisdiction that exists in this Court in respect to staying orders made under the Family Relations Act which is discussed in Bennett v. Bennett. The real object of Ms. Stasiewski's application, however, is a stay in respect of the sale of the matrimonial home.

[11] Notwithstanding the able submissions of Mr. Rose on behalf of Ms. Stasiewski, I am not persuaded that this is one of those cases described by Mr. Justice Donald as extraordinary, or demonstrating egregious error.

[4] Sharifpour is to the same effect.

[5] I do not express a definitive opinion, but this situation may have been considered by the justice on February 28, 2020 as an extraordinary situation requiring some action by the court, because it appeared that the appellant had landed in the wrong court when asking for a stay of the British Columbia Supreme Court order. It is accepted that the order that deals with the property is one that is made under the Family Law Act and thus, in general terms, this court would not be able to deal with a stay application. A stay is something that should be dealt with by the Supreme Court of British Columbia. I understand that the judge who made the order has seized himself of the file and that the parties are scheduled on the court list to appear tomorrow in chambers before him. They will thus have an opportunity to make whatever submissions they consider appropriate in favour of a stay and in opposition to a stay.

[Emphasis added.]

[55] It is helpful to set out what occurred in certain of these cases in greater detail.

[56] In *Stasiewski v. Stasiewski*, 2006 BCCA 53, Saunders J.A. dismissed an application for a stay, pending determination of the appeal, of orders relating to sale of the matrimonial home. The application was dismissed on the basis that s. 14 of the Family Relations Act (now s. 234 of the Family Law Act) grants the primary jurisdiction to order a stay of an order made under that Act to the Supreme court within the context of the comments in para. 10 of the reasons set out at para. 54 above.

[57] Notwithstanding her conclusion on the principal stay application, Saunders J.A. proceeded to find that she did have jurisdiction to stay the order for costs because it was not made under the Family Relations Act, but under the Rules of Court (although she declined to exercise that jurisdiction).

[58] In *Bennett*, Justice Donald considered whether he had jurisdiction to order a stay of execution of an order refusing to grant a stay in the lower court. Like this case, the appellant filed the principal appeal and then returned to the trial court to seek a stay of execution of the order under appeal. Once that was denied, the appellant filed an application for leave to appeal the order refusing the stay. Justice Donald held that s. 14 of the Family Relations Act provided exclusive jurisdiction to the Supreme Court to order a stay pending appeal of an order made under that Act. The purpose of the second appeal was solely to provide a jurisdictional basis for the appellate court to order the stay that the trial court refused. In the result, Donald J.A. refused the stay on the grounds as set out in para. 12 of his reasons, which are reproduced at para. 54 above.

[59] More recently, in *Kong v. Song*, 2018 BCCA 472, Saunders J.A. refused an application for a stay of an order made under the FLA on the basis of s. 234 of that Act. The trial judge had refused a stay of the order pursuant to R. 15-4(31) of the Supreme Court Family Rules, and that order was appealable as of right, although it appears the appellant did not seek a stay of that order.

[60] Accordingly, following Stasiewski, a justice of this court has the jurisdiction to stay an order for interim sale made under R. 15-8(3) and (4) of the Supreme Court Family Rules, but not a related exclusive occupancy order made pursuant to ss. 90 and 97(1) of the Family Law Act unless the Bennett test is met.

[61] If the Court does have the jurisdiction to order a stay, then the applicant must satisfy the following three-part test, as summarized in *B.C. (Milk Marketing Board) v. Grisnich* (1996), 70 B.C.A.C. 142 at para. 7 (Hinds J.A. in Chambers):

7 The three stage test enunciated in *Metropolitan Stores (M.T.S.) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 and re-affirmed in *RJR - Macdonald* [[1994] 1 S.C.R. 311] has frequently been interpreted as requiring an applicant to show the following:

- (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
- (2) that irreparable harm would be occasioned to the applicant if the stay was refused;
- (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[62] The test for a stay of execution is the same as the test for an interim injunction: *Coburn v. Nagra*, 2001 BCCA 607 at para. 3. This test presumably also applies if the Court exercises its "sliver of jurisdiction" to staying orders made under the FLA.

[63] I have concluded that the Court should exercise this limited jurisdiction with respect to the Occupancy Order.

[64] In doing so, I am mindful of s. 9(6) of the Act, which provides that "the court may discharge or vary any order made by a justice other than an order granting leave to appeal under section 7" (emphasis added).

[65] In my view, the decision I have made to have the Court now exercise its limited jurisdiction to consider a stay of the Occupancy Order does not contravene the Act. That is because the following has occurred since the decision in *Kapoor CA* was made on March 5, 2020:

- a) the Stay Order and the Third Order have been made;
- b) the December Reasons have recently become available for review;
- c) I have extended the time for filing an amended notice, which is now to stand as a notice of appeal, including the First Order and Third Order.

[66] I would emphasize the fact that the December Reasons were not available until two days ago. Contrary to Donald J.'s conclusions in *Bennett* at para. 12, these reasons raise, in my view, a real issue as to whether extraordinary circumstances exist and whether the judge "gave careful consideration to the matter" in the sense that the Occupancy Order originally

made on December 9, 2019 was not stayed as a result of the Third Order past midnight on May 1, 2020. Accordingly, the issue becomes whether either or both the Interim Sale Order and the Occupancy Order satisfy the test for a stay.

- [67] I will not repeat the factors for and against each of the parties that I referred to above at paras. 48-49.
- [68] There is arguable merit to the appeal of both orders.
- [69] Furthermore, when I consider the factors of irreparable harm and balance of convenience, it is apparent that both orders are inextricably linked. That is because the interim order that Mr. Makkar have sole conduct of the sale is based on his having exclusive possession of the home. And there is nothing in the evidentiary record to suggest, nor did the parties submit, that a stay of the Occupancy Order could be granted without staying the Interim Sale Order, or vice versa.
- [70] I have considerable sympathy for the situation in which Mr. Makkar finds himself. He has been making concerted efforts to have these issues resolved and regain occupancy of the home since 2017. He is also prepared to assist the appellant in finding suitable accommodation since that is also in his child's best interests. And should he wish to accept what the appellant considers to be an improvident offer in these difficult times, she will have the opportunity to oppose the sale when court approval is sought.
- [71] But in the exercise of my discretion, the factors of irreparable harm and balance of convenience, when viewed within the rubric of the interests of justice, militate in Ms. Kapoor's favour. If the stay of the Occupancy Order is not granted, then she will be obliged to vacate the home by tomorrow night and the issue may be moot by the time the appeal is held.
- [72] And this would occur within the backdrop of the recently obtained December Reasons. Furthermore, while the judge may have been correct on December 9, 2019, that the appellant, by not appearing in court, was "playing games", from his comments in the January Reasons, it is arguable that she was not, at least not that day.
- [73] Notwithstanding Ms. Kapoor's failure to avail herself of the approximately four and a half months to find alternative accommodation, the prospect of a trial in July 2020 is an important consideration. Furthermore, there is the question of an expedited appeal, to which I shall now turn.

Expedited Appeal

- [74] Ms. Kapoor seeks an order that the appeal be expedited, and within seven days of this order, the parties establish a schedule for filing their materials.

- [75] Mr. Makkar submits that an expedited appeal will cause him significant difficulties. His work is already suffering from responding to Ms. Kapoor's various applications and he simply does not have the time or finances to prepare for an appeal.
- [76] In *Kong, Saunders J.A.* ordered an expedited appeal, stating it was the "best that can be done" as she lacked jurisdiction to order a stay: para. 12.
- [77] Although I have decided the Court should assume jurisdiction in relation to the exclusive possession order stay application, I agree that the appeal should proceed on an expedited basis. There is hearing time available over the next few months and it may be that the appeal can be heard even before the scheduled trial date. It is in the parties' best overall interests, in my view, notwithstanding Mr. Makkar's situation, that the appeal be heard as soon as reasonably possible.
- [78] Since the proceeding in this court is under case management, the only additional order I am prepared to make is that the appellant provide the respondent with her proposed schedule by May 4, 2020, and that the respondent provide his response by May 8, 2020.
- [79] For all these reasons, in that I have ordered that an amended notice be filed which is to include the First Order and Third Order, I order that those orders be stayed until further order of this court or upon a decision being rendered following the trial of this proceeding, whichever first occurs.

VII. Conclusion

- [80] In summary, I make the following orders.
- a) the time for filing and serving the motion materials is abridged;
 - b) leave to amend the notice is granted;
 - c) the time for bringing an appeal of the First Order is extended, and the appellant is to file an amended notice of application for leave to appeal, which is to include the First Order and Third Order;
 - d) the application for leave to appeal is dismissed in that leave is not required;
 - e) the notice of application for leave to appeal, as amended, shall stand as the notice of appeal;
 - f) the First Order and Third Order are stayed until further order of this court or until the decision is rendered in the trial, whichever first occurs; and
 - g) as a condition of extending the stay, the appeal is expedited. The appellant must provide the respondent with her proposed schedule by May 4, 2020, and the respondent must provide his response by May 8, 2020.
- [81] I would defer the costs of this application to be decided by the division of the Court that hears the appeal.

"The Honourable Mr. Justice Abrioux"

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Prepared on 27 October 2026 · Esheria