

CANADA / JUDGMENT

L.J.P. v. R.S.L.G.

2020 BCSC 1724

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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2020 BCSC 1724 L.J.P. v. R.S.L.G. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: L.J.P. v. R.S.L.G., 2020 BCSC 1724 Date: 20201113 Docket: E91681 Registry: Nanaimo Between: L.J.P. Claimant And R.S.L.G. Respondent Before: The Honourable Mr. Justice Punnett Reasons for Judgment on Stay Application Counsel for the Claimant: (via telephone) A. McMeans Counsel for the Respondent: (via telephone) C. Linde Place and Date of Hearing: Nanaimo, B.C. November 4, 2020 Place and Date of Judgment: Nanaimo, B.C. November 13, 2020

- [1] The respondent applies for a stay pursuant to s. 234 of the Family Law Act, S.B.C. 2011, c. 25, of an order made on October 28, 2020 that the nine-year-old daughter of the parties be returned to the custody of the claimant by noon on November 5, 2020. The background is found in reasons for judgment indexed at 2020 BCSC 1594.
- [2] The respondent filed a Notice of Application for Leave to Appeal in the Court of Appeal on October 30, 2020 under filing number CA 47085.
- [3] On November 4, 2020, the stay application was dismissed with reasons to follow. These are those reasons. Position of the Respondent
- [4] The respondent submits his application for leave to appeal establishes that he has arguable grounds for appeal. He further submits the stay requested would not be for an extended period as he intends to proceed with his leave to appeal application as soon as possible.
- [5] He also argues the stay would not cause the child any harm and avoids the potential harm to the child of repeated moves. Position of the Claimant
- [6] The claimant firstly notes she was only served yesterday and, as a result, the matter should be struck. Secondly, she submits that the application fails to provide evidence there is merit to the appeal or a serious question to be determined as there is no supporting evidence other than the contents of the application for leave to appeal which simply lists general grounds for appeal. Law
- [7] Under s. 234 of the Family Law Act, an order made under the Act remains in effect until the determination of the appeal unless the court that made it orders otherwise.

- [8] The test applied on a stay application is:
1. Is there a serious issue to be tried?
 2. Would the applicant suffer irreparable harm if the application were refused?
 3. Which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits? See: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *L.R.N. v. A.A.V.*, 2005 BCSC 649 at para. 29.6
- [9] Specifically, in an application for a stay in custody proceedings, the last two parts of the above test are adapted to consider the interests of the child. In considering whether to grant a stay, the court may consider whether an applicant has established:
1. on a balance of probabilities, that they have a meritorious argument on appeal; and
 2. that the best interests of a child favour the status quo. See: *Sawan v. Tearoe*, [1993] 81 B.C.L.R. (2d) 346 (C.A.) [Sawan].
- [10] While the general principle in stay applications is that the successful party is entitled to the fruits of their judgment and "should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided" (*Voth Bros. Cons. (1974) Ltd. v. National Bank of Canada*, [1987] B.C.J. No. 197 (C.A.) at para. 4), in *Sawan Prowse J.A.* stated that such language is ill-suited to a case involving custody of a child. Rather, the court should start from the proposition that the successful party is entitled to custody of the child pursuant to the order, subject to the appellant party "establishing that they have a meritorious argument on appeal and that the best interests of the child favour the child remaining in their custody pending the appeal" (at para. 4).
- [11] In *Janssen Inc. v. AbbVie Corporation*, 2014 FCA 112, Justice Stratas observed that the three-part test is "aimed at recognizing that the suspension of a legally binding and effective matter is a most significant thing" (para. 20).
- [12] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, the court stated at para. 60: 60 However, there surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation. [Emphasis in original].
- [13] Whether there is a meritorious appeal is a low threshold. An appellant must show an arguable appeal that is not frivolous or vexatious: *A.(A.) v. A.(S.N.)*, 2007 BCCA 375 [A.(A.)] at para. 16.

- [14] In *Sawan*, the British Columbia Court of Appeal at para. 3 stated: I am concerned here only with the question of whether the circumstances justify a stay of the orders below. In approaching that issue, the over-riding principle which I must consider is the best interests of the child. Ultimately, it is not the rights of the adult parties which must prevail, but the rights of the child.
- [15] In *Nova Scotia (Minister of Community Services) v. F.(B.)*, 2003 NSCA 125, Cromwell J.A. (as he then was) observed at para. 13 that, in cases involving the custody of children, the irreparable harm branch of the test should focus primarily on the interests of the child and that, given the need for stability and finality in child custody cases, the applicant for a stay should usually demonstrate circumstances of a "special and persuasive nature", usually connected to the risk of harm to the child, to justify the granting of a stay. This was followed by the British Columbia Court of Appeal in *A.(A.)*.
- [16] In *D.A. v. H.K.*, 2014 ABCA 361, the court addressed the irreparable harm test and balance of convenience test in relationship to the best interests of a child: 29 The words "irreparable" and "convenience" are awkward in this context if taken in their more common connotations. As to irreparable, the moving finger writes and moves on in human existence, and in the life of a young child it cannot be called back. What is really conveyed by the concept of 'irreparable' harm in this context is that the harm is real and significant and that it is more than the transitory disturbances of growing up. So there is emphasis on the quality of the harm and its potential for lingering effect. Similarly, as to convenience, the matter is not really a balance between two disputants. The concept is a child interest dominated perspective and looks to where the disadvantages or harms may rest more lightly. In family break-down situations, it may well be that none of the available alternatives is desirable in its own right, and therefore the ultimate focus is on choosing the least undesirable, with emphasis on the children's situation. Discussion
- [17] Counsel for the respondent explained the reasons for the late delivery of the application despite efforts to provide proper notice. Given the conclusions I reached on the merits of the application and given the claimant had responded and was prepared to proceed despite the lack of notice, I permitted the application to proceed.
- [18] Regarding the grounds of appeal, they are simply a list of alleged errors in my reasons. It is difficult to assess their weight given the test is the applicant must show an arguable appeal that is not frivolous or vexatious. The respondent argues his listed grounds are sufficient because that is all that was required on his Notice of Application for Leave to Appeal. That, however, fails to recognize the onus on the applicant on an application for a stay. I am not satisfied the onus to show an arguable appeal that is not frivolous or vexatious has been met due to the lack of sufficient information before the court.
- [19] However, even if the test is met, the application fails.

- [20] In this case, the Court must start from the proposition that the mother is entitled to custody of the child under the order, subject to the father establishing that he has a meritorious argument on appeal and that the best interests of the child favour her remaining in his custody pending the appeal: see Sawan at para. 4.
- [21] The child has been in the primary care of her mother, the claimant, since the parties' separation. She has been residing in the U.S. with her mother and her new spouse since July 2, 2019. She attended school there last year and was enrolled to start this August. That followed the parties' agreed plan for this year given their agreement it was desirable their daughter obtain dual citizenship. That was the status quo when the unilateral actions of the respondent disrupted the child's home and school life in New Mexico.
- [22] As I noted in my reasons of October 28, 2020 at paragraph 37:
- a. the Child's health and emotional well-being with the mother who has been her primary caregiver raise no concerns, particularly given the respondent in the agreement agreed to the mother's move with the Child and raised no concerns when planning the Child's return after her visit;
 - b. while the Child has allegedly voiced her views, I note firstly her age and secondly the way matters have unfolded raises concerns regarding their origin and reliability;
 - c. the immigration concern remains as, if the Child's status under the U.S. immigration requirements changes, she may not be able to in future reside with the mother; and
 - d. for the reasons given, I have concerns respecting the Child's psychological and emotional safety.
- [23] I remain concerned respecting the emotional well-being of the child. She has been taken from an apparently stable life with her mother, her primary caregiver, yet, after a short while with her father, no longer wishes to reside with her mother. There is evidence the respondent is overly emotional when it comes to his daughter and that she is aware of and stressed by it. In addition, after agreeing to return the child, the respondent initially sought to delay her return because of Covid, then advised he was keeping her because it was his view that it was in her best interests, and finally that she wished to stay with him.
- [24] Regarding the concern for multiple moves, such is not always the cause of the most disruption of the life of the child. In *Berrie v. Rollins*, [1996] B.C.W.L.D. 1558, the father applied for a stay of an order that the 8-year-old child's principal residence be with the mother. The mother was planning on moving to a town in the U.S. that was 3 1/2 hours away. In refusing the stay, Curtis J. stated that the most important consideration was that the child remain in the primary care of the mother, who was the primary caregiver of the child (at para. 27). It was held that the child's life was least disrupted if he continued to reside with the mother, even if that would likely include a move to the U.S.

- [25] The child has only been with her father now since June 29, 2020. That does not outweigh the significant concerns I have raised respecting what has occurred, the influence of the respondent on her, the importance both parents had given to the immigration issue, the mother being the primary caregiver and the need for the child's relationship with her to be maintained. She is to be returned to what has been her home for the past year as ordered.
- [26] The application for a stay is dismissed with costs to the claimant of \$1,000 for this half-day hearing. "The Honourable Mr. Justice Punnett"

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Prepared on 28 October 2026 · Esheria