

CANADA / JUDGMENT

R.L.M. v. FMEP

2007 BCSC 1790

COURT

Supreme Court of British Columbia

DECIDED

29 November 2007

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2007 BCSC 1790 R.L.M. v. FMEP IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R.L.M. v. FMEP, 2007 BCSC 1790 Date: 20071129 Docket: E074019 Registry: Vancouver Between: R.L.M. Appellant And: Family Maintenance Enforcement Program Respondent Before: The Honourable Mr. Justice Curtis Oral Reasons for Judgment In Chambers November 29, 2007 Counsel for the Appellant: J.A. Adelaar Counsel for the Respondent: A.M. Accettura Place of Hearing: Vancouver, B.C.

- [1] THE COURT: Well, Mr. M is currently in jail for 30 days because he failed to pay \$50,000 on child support arrears ordered by Judge Challenger. He is in arrears some \$225,000 for child support payments. Apparently he works as a roofer. I have not seen all of the evidence before Judge Challenger, and I am not in a position to say whether the decision is right or wrong. He has served some time in jail, and his lawyer has made an application to have a stay pending the hearing of an appeal. The application for a stay is vigorously resisted.
- [2] Whether there should be a stay is discussed in the decision of Madam Justice Martinson in the case of R.S.M. v. M.S.N. On page 4, paragraph 18, she said:
- [18] The three-stage approach outlined above should generally be followed in determining if a stay should be granted in a family law matter. I will repeat the factors for convenience of reference:
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 refusing of the stay pending a decision on the merits (the balance of convenience)?
- [19] However, there may also be "special circumstances" or additional factors to consider in determining whether to grant a stay in the family law context... I leave out the citations. The application of the test should be informed by the nature of the matter before the court...

- [3] First of all, it is submitted that the application for a stay must be heard in the Provincial Court. Mr. Adelaar, Mr. M's counsel, applied to Judge Challenger immediately and asked for a stay. Judge Challenger said that she would not hear the application at that time. I think that I have jurisdiction in the Supreme Court to hear this application and I am going to proceed on the basis that I do.
- [4] The first issue is, is this a frivolous appeal or not. Naturally, I do not have all the material concerning the appeal but I do not think it can be fairly characterized as frivolous. Orders that people who have not paid child support go to jail for 30 days do happen but they are not that common. Obviously, Judge Challenger concluded on the evidence that this man had \$50,000 readily available or which he could obtain some way to make the payment that was required to avoid going to jail. I just do not know the facts, but I would be surprised if there is not some argument that the evidence may not have supported that conclusion.
- [5] Any conclusion of fact by a judge hearing the evidence, of course, is hard to upset and his appeal may fail but I think in the application of my experience in family law to the circumstances of this case as I know it, I think that it would be unfair to characterize this appeal as frivolous and I think there is probably an issue to be tried. In saying that, I must note I do not have a copy of Judge Challenger's reasons because they have not been prepared yet, so obviously I cannot speak with precision about the nature of the appeal, nor should I really.
- [6] Two, "Would the applicant suffer irreparable harm if the application were refused." Well, Mr. M says he is in the business of roofing. He says he has employees and he has bills to pay and contracts to honour. If the children for whom the child support order is made have any hope of getting money out of his business, it is important that his business continue. There are lots of civil cases that hold that interfering with a business can be irreparable harm. Having the owner of a business sent off to jail for 30 days, it is very likely causing harm that could well be characterized as irreparable. It may well be justified as the appeal may be unsuccessful and the order may very well be perfectly proper, but on a stay application, I would conclude that jailing a person in the roofing business in the circumstances would very likely cause irreparable harm.
- [7] "Which of the parties would suffer greater harm from the granting or refusing a stay pending a decision on the merits, (the balance of convenience)." Well, I am not so sure that both parties will not suffer harm by him being in jail but, of course, Judge Challenger has obviously decided that this man has readily available money and he is just not coming up with it and the 30 days in jail will perhaps convince him to pay.

- [18] On the other hand, I do not intend to grant a stay without making terms for payment. In light of the very little that he has paid to date and in light the amount his counsel suggests that he would pay as a condition of getting the stay, it seems to me that although the amounts do not pay up the amount owing for arrears, they do substantially address the amount that is accumulating on a monthly basis. The important thing here is to get such money as Mr. M has the ability to pay within his means to these children for their support.
- [19] I grant the stay but the stay is conditional upon Mr. M paying \$5,000 on or before the close of business on the 22nd of December, 2007, and \$1,500 on the 22nd of January, on or before the close of business on that date, and each and every month thereafter until otherwise ordered. So, \$5,000 on the 22nd of December, \$1,500 per month on the 22nd of each and every month thereafter until otherwise ordered. And the payments are to be made where, counsel?
- [10] MS. ACCETTURA: Sorry, My Lord, is this per file or is this in total?
- [11] THE COURT: No, that is in total. And where are they to be made?
- [12] MS. ACCETTURA: Payments are to be made to the Director of Maintenance Enforcement.
- [13] MR. ADELAAR: In the way that he has been making them. In other words, \$750 to Ms. Francisty and fifteen -- sorry, seven --
- [14] THE COURT: Well, I am not going to sort that out. The payments will be \$5,000 and \$1,500 and they will be to the Director of Maintenance Enforcement. And what does he do, give cheques to the Director of Maintenance Enforcement?
- [15] MS. ACCETTURA: Yes, normally they are made payable to the recipients, in respect of recipients, and then forwarded to the program so they are monitored that they have been made.
- [16] THE COURT: Well, in this case they are going to be made -- can they be made to your office?
- [17] MS. ACCETTURA: They can be, to the Director of Maintenance Enforcement --
- [18] THE COURT: All right.
- [19] MS. ACCETTURA: -- and then we can cash them and then divide them.
- [20] THE COURT: All right. I would just say a cheque is conditional payment. If it bounces, the payment is not made, off to jail, right, to serve the rest of the 30 days. So, a money order or a certified cheque might be a good idea.
- [21] MR. ADELAAR: Or a trust cheque.
- [22] THE COURT: Yes, or a trust -- you know, any -- I am just saying that the point is if the cheque, it is fine, if it is not, it is not the payment. Miss one payment, go to jail.
- [23] MR. ADELAAR: Is that a term of the order or should --

- [24] THE COURT: Well, the order is that --
- [25] MR. ADELAAR: It's understood.
- [26] THE COURT: The order is that the money be paid.
- [27] MR. ADELAAR: Right.
- [28] THE COURT: A bouncing cheque does not pay the money. So, as soon as the cheque bounces there is a default and he would be arrested. All right?
- [29] And now, you wanted directions about the appeal. [DISCUSSION BETWEEN COURT AND COUNSEL]
- [30] THE COURT: Well, listen, the directions for appeal will be agreed upon by counsel and filed with the court. All right?
- [31] MR. ADELAAR: That's fine.
- [32] THE COURT: Is that agreeable?
- [33] MS. ACCETTURA: Yes. Curtis J.

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