
CANADA / JUDGMENT

Stav v. Stav

2012 BCCA 420

COURT

British Columbia Court of Appeal

DECIDED

15 June 2012

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2012 BCCA 420 Stav v. Stav

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Stav v. Stav,

2012 BCCA 420

Date: 20120615

Docket: CA039325

Between:

Lilach Stav

Respondent

(Claimant)

And

Gil Stav

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Low

(In Chambers)

On appeal from Supreme Court of British Columbia, August 5, 2011

(Stav v. Stav, Vancouver Docket No. E103335)

Oral Reasons for Judgment

Counsel for the Appellant:

L.A. Kahn, Q.C.

Counsel for the Respondent:

B. Ingram

Place and Date of Hearing:

Vancouver, British Columbia

June 13, 2012

Place and Date of Judgment:

Vancouver, British Columbia

June 15, 2012

[1] LOW J.A.: This is an application by the respondent under s. 65.1 of the Supreme Court of Canada Act, R.S.C. 1985, c. S-26 for a stay of execution of an order made by this court on 4 April 2012 reversing a child custody order made in the trial court. Section 65.1 reads:

65.1 (1) The [Supreme] Court [of Canada], the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

[2] The respondent's notice of motion is for a stay pending determination of an application she has filed in the Supreme Court of Canada for leave to appeal this court's order and, if that Court grants leave, until that Court can determine an application to continue the stay until disposition of the appeal.

[3] The order of this court contains the following provisions:

1. The parties shall have joint custody and joint guardianship of the three children of the marriage, with primary residence to be with Mr. Stav in Vancouver.

2. Mr. Stav is entitled to move with the children to Vancouver on June 30, 2012 or as soon thereafter as flight arrangements can be made; 3. Ms. Stav shall have access to the children in Vancouver on a shared parenting basis, and her access shall include one month each summer, as well as two weeks during the holidays in December; and one week during the children's spring break. Ms. Stav's access in the summer of 2012 shall be exercised in Vancouver.
 4. Ms. Stav shall be entitled to regular contact with the children by telephone and any electronic means.
 5. If Ms. Stav visits Vancouver, she shall have shared access to the children during her stay, upon providing advance written notice to Mr. Stav of the dates and times she proposes to exercise access.
 6. Mr. and Ms. Stav may agree to further periods of access.
 7. Ms. Stav shall pay the costs of the trial and the appeal, but excluding the costs of the stay application, which was not appealed.
- [4] Both parents were born and raised in Israel. They married there in 1995 and their now 15-year old son, Tomer, was born there in 1997. In 2002, the family moved to Vancouver. Twins, a boy and a girl, were born in August 2005 and are almost seven years old.
- [5] The parties separated a few years ago but remained living in the same residence where they shared parenting of the three children. There is no dispute that each of the parties is a loving, caring and capable parent. The respondent applicant has bipolar disorder that is stabilized by medication and professional attention.
- [6] The litigation seems to have been spawned by the respondent expressing a desire to return to Israel with the children to visit her family. The appellant became concerned that she would leave Vancouver with the children and not return. This led to a consent order dated 10 March 2010 declaring for the purposes of the Family Relations Act, R.S.B.C. 1996,c. 128, of this province and The Hague Convention that Vancouver, British Columbia was the habitual residence of the children. In the same order, both parties attorned to the jurisdiction of the British Columbia courts if either sought in the future to move from here with the children.
- [7] The respondent brought divorce proceedings in Vancouver in October 2010 in which she included a claim for an order permitting her to move to Israel with the children. There was a ten-day trial in June 2011 during which the trial judge made an order of divorce to take effect on 18 July. The parties are divorced.
- [8] On 5 August 2011, the trial judge delivered reasons with respect to the remaining issues in the trial. Her order included provisions that custody and guardianship would be joint with the respondent mother's residence to be the primary residence of the children. There was a provision that she could move to Tel Aviv, Israel with the children.

- [9] A week later the trial judge dismissed an application of the appellant father for a stay of the provision in the order permitting relocation pending appeal to this court.
- [10] Later in August 2011, the whole family travelled to Tel Aviv but not before the father commenced this appeal. The three children have now lived in Israel for almost ten months. Their father took up temporary residence there and has continued to share parenting with their mother. The oldest child, Tomer, lives primarily with his father. Each parent has extended family in Israel. The appellant has a sister living in Vancouver with her family.
- [11] It is against this background that I must consider whether to grant the stay of execution of this court's order. The law to be applied was thoroughly stated by Mr. Justice Smith in *A.A. v. S.N.A.*, 2007 BCCA 375 as follows:
- [9] The factors to be considered on an application for a stay are the same as those governing interlocutory injunctions. A stay will be granted when the applicant has a serious question to be tried, as opposed to a frivolous or vexatious claim; the applicant would suffer irreparable harm (harm not compensable or not easily compensable in damages) if the stay were not granted; and the applicant would, on the balance of convenience, suffer more harm if the stay were not ordered than the respondent would suffer if it were: *RJR-Macdonald Inc. v. A.G. (Can.)*, [1994] 1 S.C.R. 311 and *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 at 126-29.
- [10] As to the first criterion, *Hollinrake J.A.* suggested in *Salama Enterprises (1988) Inc. v. Grewal* (1992), 12 B.C.A.C. 112 that it requires the Court to consider whether there is a serious question of public importance. He said:

I take that phrase, is there a fair question to be tried in the circumstances before me, as raising the question of whether or not there is any likelihood that the Supreme Court of Canada will grant leave to appeal.... I think what I must direct myself to is the issue of public importance in deciding whether or not there is any likelihood of leave being granted by the Supreme Court of Canada.

See also *Nova Scotia (Minister of Community Services) v. F. (B.)* (2003), 219 N.S.R. (2d)67, 2003 NSCA 125 (Chambers) *Cromwell J.A.* at ¶ 11.

- [11] In this regard, the Supreme Court Act provides ins. 40,
40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and

leave to appeal from that judgment is accordingly granted by the Supreme Court.

[12] Also apt are the remarks of Hall J.A. in *Van de Perre v. Edwards*, 2000 BCCA 236 at ¶7:

[7] I was referred by counsel to a number of cases, including *Tearoe v. Sawan*, June 25, 1993 (B.C.C.A.) Victoria Registry V101916. In the course of that judgment Prowse J.A. set out what I believe is the applicable starting point for consideration in these cases at paragraph 4 of her reasons on p. 3:

Generally speaking, the first principle to be applied on a stay application is that the successful party is entitled to what are usually called "the fruits of the judgment". That language is obviously ill-suited to a case involving custody of or access to a child. Rather, I would say that this Court should start from the proposition that Ms. Sawan is entitled to custody of the child pursuant to the order of Mr. Justice Melvin, subject to the Tearoes 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. ...

[13] In *Nova Scotia (Minister of Community Services) v. F. (B.)*, supra, at IT 13, Cromwell J.A. observed 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. To similar effect, in *MacPhail v. Karsek*, 2006 ABCA 320 (Chambers), Conrad JA. refused a stay on the ground that no risk of harm to the child had been shown should she do so.

[12] For several reasons, I have concluded that I should exercise my discretion against ordering a stay of execution.

[13] I consider that the status quo in this case rests with the children living in Vancouver pending the outcome of the leave application in the Supreme Court of Canada. The parties are Canadian citizens by choice. The two youngest children were born here. Any disruption of the lives of the children caused by the move to Israel was initiated by the respondent mother.

[14] The oldest child did not want to move to Israel, maintained contact with his high school friends here, was delighted by the outcome of the appeal and looks forward to returning to Vancouver. Upon his return to Vancouver, he will continue to live with the parent he has been living with in Tel Aviv.

[15] I consider it important that the children remain together pending final resolution of the mobility issue. The two younger children will be returning to a familiar environment in which they have lived for six years and to an extended family they know.

- [16] It is also important to note that there is no evidence that any of the three children would be unduly disrupted by moving back to Vancouver, even if further down the judicial road the order of this court should be reversed so that they would return to Israel. There is no suggestion that these children are not adaptable to the changing circumstances as most children are in these cases.
- [17] I cannot predict whether the respondent will or will not obtain leave in the Supreme Court of Canada. However, with reference to s. 40 of the Supreme Court of Canada Act quoted above, it is difficult to see that this case raises an issue of public or national importance. The leading case on parental mobility is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The case at bar is but an application of the factors set out in that case to be applied in considering removal of children by a parent to live in another community, province or country. This case does not appear to raise any considerations outside the *Gordon v. Goertz* factors and it seems unlikely that the Court will grant leave to permit reconsideration of the law stated in that case. An academic newsletter on family law matters reports that since 1996 the Court has dismissed applications for leave to appeal in at least 14 mobility cases.
- [18] Finally, I consider it important to observe again that in 2010 the respondent formally agreed that the courts in this province would have jurisdiction as to the future residency of the children. I am concerned that the respondent did not reply to the appellant's request that she undertake to comply with this court's order setting out the date of 30 June for return of the children to Vancouver. Of greater concern is the fact that in proceedings brought in Israel by the appellant under The Hague Convention, the respondent took the position that the B. C. Court of Appeal has not imposed any "operative duty" on her to take action with regard to the children. I do not have any knowledge of Israeli law and do not presume to interfere with legal process in that country, but I feel obliged to state, as a matter of caution at least, that there is a positive duty on the respondent to comply with both the letter and the spirit of this court's order of 4 April 2012. This means she must take the necessary steps to facilitate the appellant moving with the children from Tel Aviv to Vancouver at the time he is entitled to do so under the order. If she fails to cooperate with the implementation of the order without lawful excuse, she will be in contempt of court in this jurisdiction and will be at risk of being fined or losing her liberty, or both. An order of a court in this province is a law that must be complied with in accordance with its terms.
- [19] For these reasons the application for a stay of execution of the order of 4 April 2012 is dismissed.
- [discussion with counsel re. costs]
- [20] LOW J.A.: The appellant will recover costs of this application.

"The Honourable Mr. Justice Low"

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Prepared on 29 October 2026 · Esheria