

Date: 20001114
Docket: CA 167144

NOVA SCOTIA COURT OF APPEAL
[Cite as: Ffrench v. Ffrench, 2000 NSCA 129]

BETWEEN:

ROBERT FFRENCH

Appellant

- and -

KERRI (MUNROE) FFRENCH

Respondent

DECISION

Counsel: Appellant in person
Respondent in person

Application Heard: November 9th, 2000

Decision Delivered: November 14th, 2000

BEFORE THE HONOURABLE JUSTICE BATEMAN IN CHAMBERS

BATEMAN, J.A.:

[1] Robert Andrew Ffrench has appealed the October 17, 2000 Order of Justice Merlin Nunn of the Supreme Court directing, *inter alia*, that he pay maintenance for Ellis Robert Ffrench born April 2, 1990. The appeal hearing has been set for early February 2001.

[2] Mr. Ffrench seeks a stay of the maintenance order pending the appeal hearing. Neither Mr. Ffrench nor the respondent Kerri (Munroe) Ffrench is represented by counsel.

[3] Mr. Ffrench asserts six grounds of appeal, both substantive and procedural in nature. The documentation filed in support of the stay application included: the Notice of Application; a copy of Justice Nunn's Order; the Notice of Appeal; a copy of an August 15, 2000 Order from Justice Boudreau "staying the garnishee order until further order of the court"; a letter of October 24, 2000 from the Maintenance Enforcement Program to Mr. Ffrench advising him that he is required, pursuant to the recent court order, to "continue to pay \$200.00 per month" and noting that

his current arrears were \$1347.59; and a Notice of Garnishment, dated October 24, 2000, directed to Mr. Ffrench's employer, the Annapolis Valley Regional School Board, directing a pay deduction for the arrears of maintenance.

[4] I expressed my concern to Mr. Ffrench that the application lacked the usual supporting material. In particular I suggested that he might wish to file an affidavit in support and review the law on applications for a stay. I offered to adjourn the matter, however, Mr. Ffrench elected to proceed with the application.

[5] This application for a stay is made pursuant to **Civil Procedure Rule 62.10** which provides in relevant part:

62.10. (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.

(2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.

[6] The test generally applied on an application for a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

. . . stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

(1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. . . . and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:

(2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[7] Summarizing the parties' oral submissions, this is a split custody situation. Mr. Ffrench has custody of the parties' daughter, Whitney Jayne born January 25, 1985, and Ms. Ffrench has custody of their son, Ellis Robert. Mr. Ffrench is prepared to contribute to the support of Ellis Robert but maintains that he cannot do so if he is fully responsible for Whitney's expenses, without contribution from Ms. Ffrench. Ms. Ffrench says that she is not in a financial position to contribute to Whitney's care. Whitney,

apparently attends a preparatory school in the United States. In Ms. Ffrench's view the decision for Whitney to attend that school was made solely by Mr. Ffrench and without consultation with Ms. Ffrench. Mr. Ffrench disagrees with that and says that Ms. Ffrench was involved in the process. It is Ms. Ffrench's view that, although attending the preparatory school benefits Whitney, Mr. Ffrench should not have made the decision that she do so if he could not then attend to his maintenance obligations for Ellis Robert. Mr. Ffrench is of the view that Ms. Ffrench is intentionally underemployed and, inferentially, would not need maintenance for Ellis Robert or could contribute to Whitney's support if she would gain more lucrative employment. Ms. Ffrench says that she would gladly have full time employment in her field, which is teaching, if available to her. I take it to be Mr. Ffrench's position, as well, that irrespective of Ms. Ffrench's need for support for Ellis Robert, he is not in a financial position to pay. There have been many court proceedings and there is much acrimony between the parties.

[8] There is no evidence before me upon which I could grant a stay of the order for maintenance. The oral submissions of the parties provide

some background, but, even if accepted as evidence, which they are not, that information is not sufficient to justify a stay. I do not know the respective financial positions of the parties. I do not know what evidence was presented to Justice Nunn. I am prepared to accept, without deciding, that there is an arguable issue raised on the appeal, to the extent that the grounds of appeal do not appear frivolous on their face, but I am unable to assess the other two requirements of the primary **Fulton** test, nor can I say that there are exceptional circumstances here which would warrant the granting of a stay.

[9] Accordingly, the application for the stay is dismissed without costs.

Bateman, J.A.