Date: 20000114
Docket: CA 160640

NOVA SCOTIA COURT OF APPEAL

[Cite as: Ryan v. Ryan, 2000 NSCA 10]

BETWEEN:

THEODORE AUGUSTINE RYAN	)	Mr. Ryan appeared in person
	)	
Applicant/	)	
Appellant	)	
	)	
- and -	)	
	)	
JOANNE HELEN RYAN	)	Tanya Nicholson
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Application heard:
	)	January 12, 2000
	)	
	)	Decision delivered:
	)	January 14, 2000
	)	
	)	

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,
IN CHAMBERS

PUGSLEY, J.A.:

[1] The appellant, Theodore Ryan, self-represented, appeals from the decision of Robertson, J., of the Supreme Court, sitting in Chambers, delivered orally on December 6, 1999. Justice Robertson dismissed the appellant's interlocutory applications for a variation of custody of the parties' only child, age three, increased access to the child, reduction of child support, disclosure of the child's civic address, adjournment of trial dates set to commence on March 27, 2000, compulsory mediation, and to compel more particulars respecting interrogatories answered by the respondent.

[2] The respondent was successful in her cross-application before Justice Robertson on a number of ancillary issues. The respondent, pursuant to **C.P.R. 55.02(1)** secured leave to apply for contempt proceedings against the appellant respecting the non-payment of court ordered costs.

[3] The appellant applies to set down the appeal for hearing, for an order staying the execution of Justice Robertson's order issued on December 17, 1999, as well for an order whereby this court would appoint counsel at the expense of the province to conduct the present appeal.

[4] The respondent, represented by counsel, applies pursuant to **C.P.R. 62.18** to quash the notice of appeal on the ground that the appeal is frivolous, vexatious, and without merit. Recognizing that such a determination can only be made by a panel of

this court, the respondent requests that the dates for hearing the application to quash be “set down immediately”.

[5] The respondent further applies for an order requiring the appellant to lodge security for costs respecting the appeal, and in the event security is not lodged by a certain date, that the appeal be dismissed,

[6] The respondent contests the appellant’s application for a stay, and if successful, requests solicitor and client costs be paid to her.

[7] The notice of appeal provides that Justice Robertson erred:

- ...by failing to apply sufficient weight to the evidence before her in relation to the financial status of the Appellant;
- ...in overriding the Bankruptcy Act and the Divorce Act;
- ...in granting leave for contempt of court without citing any statute or case law in support of her decision, thus overriding the Bankruptcy Act;
- ...pursuant to s. 7 of the Canadian Charter of Rights and Freedoms;
- ...by restricting the Appellant’s cross examination of the Respondent on all issues before the court.

Background

[8] The parties were married on July 30, 1994, but separated in October 1996, following the birth of their only child, Alexsandria, on September 6, 1996. A petition for divorce was filed by the respondent in December, 1996. A separation agreement was signed on March 24, 1997 which provided that the respondent would have primary care of Alexsandria. Since that time a number of applications have been made to the Supreme Court respecting custody and access pending the hearing of the divorce. An

application to the Supreme Court by the appellant respecting those issues was dismissed March of 1999. A subsequent appeal to this court by the appellant was dismissed on October 6, 1999. On November 23, 1999, the appellant filed with the Supreme Court of Canada, a motion for an extension of time to serve and file an application for leave to appeal from the decision of this court. In noting that the divorce trial was expected to take place at the end of March, 2000, Justice Arbour concluded on December 16, 1999, that it was not in the interest of justice that the extension be granted and accordingly dismissed the application with costs.

[9] There are presently outstanding against the appellant four orders for costs respecting the various applications, all of which remain unpaid.

[10] In one of the affidavits filed by the appellant in support of the applications before me, he deposed:

> 2. I have made an assignment in bankruptcy on May 14, 1999. I have never been bankrupt before. I have lost a small business in the process.
>
> . . .
>
> 4. The current main issue is my inability to meet the amount of child support and child care expense that is required of me and ordered by the courts. I have no resources to cover these costs and the court ordered costs from previous applications for me to pay to the Respondent in these proceedings.
>
> 5. That during the hearing on December 6, 1999, I had asked Justice Robertson to respectfully appoint me counsel for the hearing as there was several issues I felt were on the agenda. Justice Robertson replied “Sorry it is not within my power to do that and have the person financed by the province I’m afraid”.
>
> . . .
>
> 8. Although I was initially refused for legal aid services, I was successful in my appeal to the Legal Aid Commission. Attached as Exhibit “B” is a letter from legal aid that outlines how I am now eligible for representation by council*(sic*). This certificate is for any issue that has to deal with trial and divorce proceedings only.

> 9. As a result of the December 6 hearing, the Respondent in this proceeding has been given leave to make application for contempt. Such a proceeding will be ruinous of my career in the capacity of law enforcement and if so found in contempt I will not have a career thereafter. This will not in the least benefit Alexsandria or myself. It is unfortunate that I am in this current situation of undue hardship.
>
> . . .
>
> 12. I am a private investigator/security officer licensed through the Department of Justice for the Province of Nova Scotia. In the course of my duties I gather evidence and discard fiction. ...
>
> . . .
>
> 15. That I currently have approximately $80.00 in my bank account after cheques for rent and child support clear. This I plan to be used for Alex's activities while in my care and groceries.
>
> . . .
>
> 17. As I am obviously unable to represent myself in these proceedings (according to the courts) that I respectfully request that the court under s. 7 of the *Canada Charter of Rights and Freedoms* and any other applicable laws Provincially and Federally appoint me council for this appeal.

[11] The appellant also deposed in a further affidavit:

> 3. I am currently in bankruptcy and am not expected to be discharged until February, 1999.
>
> 4. I currently am employed by Stealth Security Inc. and work out of my own home where an office and detached kennel are located. My annual salary is $14,560 per year. I own no shares in this company.

Submissions on Behalf of the Respondent

[12] Counsel for the respondent submits in the written material filed:

> If the dates are set for an appeal hearing, it will in all likelihood lead to an adjournment of the trial. The parties set these trial dates more than nine months in advance. Any delay will result in an unreasonable interference with Joanne Ryan's right to obtain a resolution to the outstanding corollary matters. We respectfully submit that a further appeal is not in the best interests of the child.
>
> The respondent is a person of limited financial means. As she is the parent with primary care and interim sole custody, her financial setbacks impact on the child. Because the appellant is in arrears of child care expenses and court ordered costs, all further litigation has a financial impact on the mother and child. By allowing the appellant to set appeal dates and continue without payment of the above arrears, he has the ability to "wear down" the respondent on grounds that have no merit. If there is to be any accountability for the actions of the appellant, he must be ordered to put up security for costs. If he is

> not in a position to do so, as stated in his January 4th affidavit, he should be denied the right of appeal at the very earliest opportunity. The history of this litigation proves that Mr. Ryan has no intention of making a payment on costs after he gets a decision that he is not pleased with.

Setting the Date

[13] I determined that the earliest convenient date for hearing of the appeal was April 13, 2000. The respondent's counsel expressed concern that this date would necessarily involve an adjournment of the trial scheduled to commence on March 27, 2000. I am not convinced that such a conclusion follows. Without presuming to trespass on the discretion of the trial judge to determine the trial process, it is a reasonable inference to conclude that the majority of the issues raised in this appeal will be determined at the trial of the action, thus rendering the later issues for appeal to be moot.

[14] I therefore set down the respondent's application to quash the appeal to commence on April 13, 2000, at 10:00 a.m. The appellant's appeal will be scheduled to commence immediately thereafter.

Assignment of Counsel

[15] The appellant has applied to the government funded legal aid program for legal assistance. Legal Aid, according to the appellant, has agreed to fund the cost of counsel to defend the divorce petition but has refused the appellant's request to fund the appeal from Justice Robertson's decision.

[16] I am not aware of any statute authorizing me to appoint counsel for the appellant in these circumstances, and to require the Province of Nova Scotia to pay for counsel's services.

[17] The appellant has directed me to Justice Freeman's decision in **Innocente v. The Queen** (Sept. 23, 1999, CAC155817).

[18] There is no provision similar to that expressed in section 684 of the **Code**, in any statute of this province, which provides for government funding of counsel in civil cases.

[19] Mr. Innocente was convicted on two counts of conspiracy to traffic in narcotics and sentenced to seven years' incarceration on each, to run concurrently. The application to assign counsel to him to be paid by the Attorney General of Canada was made under the provisions of s. 684 of the **Criminal Code.** Justice Freeman concluded that it was desirable in the interests of justice that Mr. Innocente should have legal assistance.

[20] The dispute between the parties in this case, however, is a private one, to which the state is not joined.

[21] The appellant also submits that he has a constitutional right to state funded counsel and directs my attention to the recent decision of the Supreme Court of Canada

in **New Brunswick (Minister of Health and Community Services) v. G. (J.)** (File No. 26005 released September 10, 1999).

[22] That case involved the issue of the removal of three children from their mother by agents of the Minister of Health and Community Services of the Province of New Brunswick.

[23] The court concluded that the mother's rights protected by s. 7 of the **Canadian Charter of Rights and Freedoms** were violated if she did not have counsel to assist her.

[24] The issues in the present case are entirely dissimilar. S. 32(1) of the **Charter**, and I paraphrase, restricts the application of the **Charter** to the Government of Canada and the government of the provinces.

[25] The Government of Nova Scotia is not involved in the action between the two parties to this litigation. In short, the **Charter** does not apply in these circumstances to assist the appellant.

[26] Although not necessary to my decision respecting the above, I conclude on the basis of the representations both written and oral that have been submitted by the appellant, that he is quite capable of articulating the issues involved in the appeal.

[27] I would accordingly deny the application for appointment of counsel.

Application for Stay

[28] The appeal of an order of the Supreme Court does not constitute an automatic stay. As noted by Justice Freeman in **Coughlan v. Westminer Canada Limited** (1993), 125 NSR (2d) 171, at 174:

> Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the parties seeking the stay must satisfy the court it is required in the interests of justice.

[29] Pursuant to the principles set out by Hallett, J.A. in **Fulton Agencies Ltd. v. Purdy** (1990), 100 NSR (2d) 341, an applicant for a stay may meet either the primary test, so called, by satisfying the court there is an arguable issue raised on the appeal, that the applicant will suffer irreparable harm if the stay is not granted, and that the balance of convenience between the two parties favours the granting of the stay, or, the secondary test, that there are exceptional circumstances which would make it fit, and just, that the stay be granted.

[30] The appellant directs my attention to paragraph 9 of the order of December 17, 1999, which provides in part:

> Leave for the application of contempt proceedings has been granted under Rule 55.02(1) to deal with the non-payment of court ordered costs.

[31] The appellant argues that the commencement of contempt proceedings will adversely affect his ability to carry on his employment as a private investigator/security officer, and thus cause him irreparable damage.

[32] **Civil Procedure Rule 55**, however, requires that before a contempt citation can be issued, a further application must be made to the Supreme Court and an order must be obtained authorizing the contempt order. This proceeding could only be made with appropriate notice being given to the appellant. The appellant advised, during the course of submissions, that Legal Aid had indicated to him that if an application were made for a contempt order, that Legal Aid would issue a certificate to enable him to obtain counsel.

[33] I conclude the appellant has failed to establish that irreparable damage would occur if the stay is not granted.

[34] There was no evidence to establish any “exceptional circumstances” under the second branch of the **Fulton** Rule.

[35] I would accordingly deny the application for the stay of Justice Robertson’s order of December 17.

Respondent’s Application for Security for Costs

[36] The respondent applies for security for costs pursuant to **CPR 62.13:**

> (1) A judge on application of a party to an appeal may at any time order security for costs of appeal to be given as he deems just.
>
> (2) If a party fails to give security for costs when ordered, a judge on application may dismiss or allow the appeal, as the case may require.

[37] Counsel for the respondent frames her submission in these words:

> The respondent is concerned that Mr. Ryan is being allowed to escape the consequences of frivolous court actions and will continue to abuse the process unless he suffers a sanction for his poor judgment on past litigation.

[38] I am satisfied that the material before me demonstrates that the appellant has no money to provide security for costs.

[39] In **Frost v. Herman** (1976), 18 NSR (2d) 167 (NSCA) Macdonald, J.A. said at p. 168:

> In my view, however, discretion given a judge under the present Rule 62.13 to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for so doing.

[40] The appellant entered into voluntary bankruptcy in May of 1999. His present income is approximately $14,000.00 per annum. While he has failed to pay costs in response to orders made in May, October, November and December of 1999, there is no evidence before me to suggest that he has secreted assets or that he has access to funds in order to respond to those orders.

[41] I conclude that the respondent has not demonstrated "special circumstances" sufficient to warrant security for costs.

[42] I would accordingly dismiss the respondent’s application.

[43] In view of the divided success on these applications, I would not award costs to either party.

Pugsley, J.A.