NOVA SCOTIA COURT OF APPEAL
Citation: *Wintrup v. Adams*, 2021 NSCA 88

Date: 20211229
Docket: CA 509130
Registry: Halifax

Between:

Roberta Lynne Wintrup

Appellant

v.

Bradley Guy Adams

Respondent

Judge:	Bourgeois J.A.
Motion Heard:	December 22, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion for stay dismissed with costs
Counsel:	Richard A. Bureau and Ryan Christen, for the appellant Ashley Donald and Christine Doucet, for the respondent

Decision:

[1] On December 22, 2021, I heard a motion for stay brought by the appellant Roberta Lynne Wintrup. For the reasons to follow, I dismiss the motion.

Background

[2] The parties were married on June 30, 2014. It was a second marriage for both. It would appear the parties spent considerable periods of time apart due to their respective employments. Although they spent some time together in Halifax and Ontario, they primarily resided together in Qatar, where Mr. Adams worked. There were no children of the marriage. Ms. Wintrup filed a Petition for Divorce in 2017.

[3] A trial was held over four days in November 2020 at which time the issues of spousal support and division of property were in issue. Due to the complications associated with the Covid-19 pandemic, the judge permitted Mr. Adams to attend the trial remotely from his current residence in Saudi Arabia.

[4] The judge, Justice Samuel Moreau, rendered a written decision on May 13, 2021 (2021 NSSC 164). He dismissed Ms. Wintrup's claim for retroactive and prospective spousal support. He further made a number of determinations regarding the categorization of assets as either matrimonial or non-matrimonial. From the judge's reasons, it is apparent Ms. Wintrup owned a number of properties in Nova Scotia. Mr. Adams owned a property in Ontario and two properties in Scotland.

[5] An issue of significant contention at the trial involved the circumstances surrounding Ms. Wintrup's withdrawal of funds amounting to $200,000 from accounts held by Mr. Adams jointly with his sister and father and her subsequent purchase of a property on Spinnaker Drive in Halifax. She asserted it was with Mr. Adams' knowledge and consent. He asserted he knew nothing about the removal of funds from these accounts and did not agree to Ms. Wintrup's use thereof.

[6] In his written reasons, the judge said:

> [146] After considering the evidence in relation to the circumstances of the parties' relationship during the relevant time period, and on a balance of probabilities, I find Mr. Adams' evidence as it relates to the withdrawal of the $200,000 from his Scotiabank account (held jointly with his father and sister) to

> be credible and logical. Ms. Wintrup was of the view that the marriage was over, and had a motive to deceive. There is a logical flow to Mr. Adams' evidence as it relates to this issue. I do not accept Ms. Wintrup's evidence with respect to this issue.
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> …
>
> [151] I am satisfied Mr. Adams did not provide Ms. Wintrup with his consent to withdraw $200,000 from the account held jointly with his father and sister and also that he later believed the entire amount was invested in the Spinnaker property.
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> …
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> [153] As regards the Spinnaker property, I find Mr. Adams has substantiated a claim for an unequal division in his favour. Ms. Wintrup withdrew the funds used for the down-payment from Mr. Adams' Scotiabank account held jointly with his father and sister without his consent.
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> [154] But for Ms. Wintrup's surreptitious actions, the Spinnaker property may not be a factor in this case. Mr. Adams may not have agreed to make that investment.
>
> [155] Based on the sum of the evidence, it is not possible to determine with an acceptable degree of certainty the fate of the remaining $120,000. Ms. Wintrup maintains it was invested in the stock market.
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> [156] I am satisfied it would be unfair or unconscionable for Ms. Wintrup to retain one half of the Spinnaker property. I find Mr. Adams is entitled to $268,019 ($200,000 + $68,019, which represents interest at 5% per annum compounded annually since 2014) from Ms. Wintrup with respect to the Spinnaker property. According to Ms. Wintrup's Statement of Property sworn November 20, 2019, 225 Spinnaker was valued at $360,000 as per Mr. Malay's appraisal. The amount due Mr. Adams is approximately 74% of the stated value.

[7] A Corollary Relief Judgment was issued on August 20, 2021. Mr. Adams was directed to remove a number of certificates of pending litigation he had registered against properties owned by Ms. Wintrup, including the Spinnaker Drive property. Mr. Adams has complied with the order. The Corollary Relief Judgment also directed Ms. Wintrup to pay Mr. Adams the sum of $268,019.

[8] Ms. Wintrup filed a Notice of Appeal on September 17, 2021, in which she sets out 17 grounds of appeal.

[9] On December 13, 2021, Ms. Wintrup filed two motions with the Court—a Motion for Date and Directions and a Motion for Stay. Both motions were heard on December 22, 2021.

[10] The Motion for Date and Directions was heard and determined first. Ms. Wintrup's counsel indicated he will likely be making a motion to amend the Notice of Appeal to include the judge's costs decision, just recently released. Alternatively, he may file a Notice of Appeal in relation to the costs order and seek consolidation of the appeals. In any event, Ms. Wintrup did not wish to set a date for the appeal hearing. As a result of her representations, the Motion for Date and Directions was adjourned for further hearing on February 23, 2022.

[11] I then heard the Motion for Stay. Ms. Wintrup seeks to stay the provision of the Corollary Relief Judgment, which directs her to pay the sum of $268,019 to Mr. Adams. In support of her motion, Ms. Wintrup filed her own affidavit, and that of her counsel, Richard Bureau. In opposition, Mr. Adams filed the affidavit of his counsel, Christine Doucet. Neither party sought cross-examination. As such, the matter proceeded by way of a tele-chambers appearance.

The Law

[12] *Nova Scotia Civil Procedure Rule* 90.41(1) and (2) provide:

> (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
>
> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[13] The test to obtain a stay on appeal is not controversial. In *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 241 (S.C.(A.D.), Justice Hallett wrote:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> (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 the damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on

> appeal will be able to collect, 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.

[14] With respect to what constitutes an arguable issue, Justice Freeman explained in *Amirault v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.) at para. 11:

> "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. **But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits**. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.
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> (Emphasis added)

[15] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 the Supreme Court of Canada described "irreparable harm" at page 341 as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. **It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.** Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). **The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will**

> **not ultimately be able to collect damages, although it may be a relevant consideration** (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).
>
> (Emphasis added)

[16] In *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 Justice Cromwell commented on the nature of irreparable harm and how it should be assessed contextually:

> 12 Irreparable harm is not a term capable of exact definition. As Justice Sharpe notes in his treatise, *Injunctions and Specific Performance* (2nd, 1997):
>
> > It is exceptionally difficult to define irreparable harm precisely ... The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case. (at para 2.440 to 2.450)

[17] In *Nova Scotia (Public Service Long Term Disability Plan Trust Fund) v. Wright*, 2006 NSCA 6 Justice Fichaud noted:

> [12] Generally, if the judgment is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. [citations omitted]

[18] This Court has determined an appellant must show a probability of irreparable harm. In *Szendroi v. Vogler*, 2011 NSCA 37 the defendants appealed from a damages award of $464,245. The plaintiff lacked assets in Nova Scotia and resided in California. Justice Bryson partially stayed execution, pending the determination of the appeal, and said:

> [17] It is argued on behalf of Mr. Vogler that there is nothing to suggest that he is financially irresponsible or unable to manage money. That may well be but it is clear that unless he preserved his damage award intact, he could not readily repay it if the appellants were substantially successful on appeal. He does not live in this jurisdiction. He does not have a large income and he does not have any assets. **Where a substantial payment is offered, all the appellants need do at this stage is satisfy the Court that there is a probability of difficulty of repayment if the appeal is successful** (*MacCulloch v. McInnes, Cooper and Robertson*, 2000 NSCA 92, at para. 12 and *Dillon v. Kelly* (1995), 145 N.S.R. (2d) 194). I am satisfied that there is such probability.
>
> (Emphasis added)

[19] I note in the present instance, Ms. Wintrup has not offered a partial payment to Mr. Adams, but rather seeks to stay the entirety of the monetary judgment contained in the Corollary Relief Judgment.

[20] The third factor, balance of convenience, only needs to be addressed if the appellant seeking a stay establishes the existence of arguable grounds and irreparable harm on a balance of probabilities. See *Reid v. Halifax Regional School Board,* 2006 NSCA 35 at para. 29.

[21] With respect to exceptional circumstances, Saunders J.A. described the nature of the secondary test for a stay in *Armoyan v. Armoyan*, 2011 NSCA 92 as follows:

> [34] As to the secondary test, the appellant has failed to identify any circumstances which I would consider exceptional, or produce any evidence to support such an assertion. While the phrase "exceptional circumstances" can never be exhaustively defined, it has been interpreted by this Court to at least mean factors that would make it plainly unjust to refuse the stay. In other words, it is intended to catch the rare case when a court would wish to avoid a clear injustice in circumstances that did not meet the three requirements of the primary test.

[22] I now turn to apply the above principles to the matter before me.

Analysis

Primary test

[23] I am satisfied Ms. Wintrup has met the first element of the primary test for a stay. She has raised arguable grounds of appeal. There is no need for me to comment further on this element.

[24] The element of irreparable harm is more complicated and requires more consideration. Ms. Wintrup raises the following concerns in support of her argument she will suffer irreparable harm should a stay not be granted and she is subsequently successful on appeal:

- Mr. Adams lives in Saudi Arabia, which is not a party to any reciprocal enforcement arrangements with Canada;
- "While Ms. Wintrup could explore reciprocal judgment enforcement in Ontario (where Mr. Adams owns property), or, the United Kingdom under

> the associated legislation it is noted that neither option represents a guarantee in light of the possibility that equity be withdrawn from the associated properties or assets be moved or withdrawn from the associated jurisdictions";
>
> - Even if successful in seeking enforcement, the process will be difficult and expensive; and
>
> - Mr. Adams has not filed income tax returns in Canada and Scotland in a number of years.

[25] In his response submissions, Mr. Adams asserts the element of irreparable harm has not been established on a balance of probabilities. At best, there is a remote risk that Ms. Wintrup may suffer irreparable harm. In her written submissions, Mr. Adams' counsel outlines the events that would need to occur in order for irreparable harm to arise:

- Ms. Wintrup is successful on appeal;
- Mr. Adams is ordered to pay back the full amount of the trial judgment;
- Mr. Adams fails to comply with that order;
- Mr. Adams sells the Ontario property and transfers the proceeds of sale out of Canada to a non-reciprocating jurisdiction;
- Mr. Adams removes all of his Canadian financial investments and transfers them to a non-reciprocating jurisdiction; and
- Mr. Adams sells his Scottish properties (which is a reciprocating jurisdiction) and transfers the proceeds of sale to a non-signatory country.

[26] Mr. Adams notes since the filing of the Petition for Divorce, he could have liquidated his assets and moved them to Saudi Arabia in order to circumvent Ms. Wintrup's claims, but he has not done so.

[27] The case authorities outlined earlier direct Ms. Wintrup must establish on a balance of probabilities that, should a stay not be granted, she will suffer irreparable harm. As noted above, she is concerned Mr. Adams will not repay her the $268,019 if the trial decision is set aside or varied on appeal. She relies heavily on his residency outside of Canada and the possibility of his deliberate actions to evade enforcement.

[28] Although I recognize the residency of a respondent outside of Canada and in a non-reciprocating jurisdiction is an appropriate factor for consideration, I am unable to conclude Ms. Wintrup has established a probability of irreparable harm. I agree with Mr. Adams that at best, there is a possibility of irreparable harm. But the possibility of irreparable harm is insufficient to justify the granting of a stay. In reaching this conclusion, I note:

- Mr. Adams attorned to the jurisdiction of the Supreme Court of Nova Scotia in terms of the divorce and participated fully in the proceedings;
- Mr. Adams complied with the Corollary Relief Judgment and filed releases in relation to the certificates of litigation filed against the properties retained by Ms. Wintrup. This is a strong indicator of his good faith intention to abide by court orders;
- Mr. Adams has been gainfully employed for many years in the Middle East with a healthy income, as demonstrated by materials filed in support of the motion. Unlike many respondents in successful stay motions, there is no indication he is impecunious or lacks the ability to repay funds to Ms. Wintrup should the appeal be successful;
- At the time of trial, Mr. Adams was the registered owner of property located in Consecon, Ontario. Inherited from his father, an appraisal introduced into evidence at trial showed the property as having a value of $780,000. According to a Statement of Property sworn by Mr. Adams for the purposes of the divorce trial, that property was not encumbered;
- The same Statement of Property (and the judge's decision) indicated that Mr. Adams was the owner of two properties in Scotland;
- In her written submissions in support of the motion for stay, Ms. Wintrup acknowledged Mr. Adams still owned the property in Ontario; and
- I am unable to conclude, based on the evidence before me, Mr. Adams not filing tax returns in Canada or Scotland (it appears he has not resided in either jurisdiction for many years) is either indicative of malfeasance on his part, or may give rise to judgments against the properties Ms. Wintrup says she may be forced to execute against.

[29] Given my conclusion relating to irreparable harm, it is not necessary for me to address the balance of convenience factor.

Secondary test

[30] Ms. Wintrup submits should she be unsuccessful on the primary test, a stay should be granted in light of the exceptional circumstances in the present instance. She says her voluntary action of placing the sum of $268,019 into an interest-bearing trust account creates an exceptional circumstance justifying the granting of a stay.

[31] With respect, I do not accept Ms. Wintrup's submission that her decision to place the funds the judge ordered be paid to Mr. Adams in an interest-bearing account creates an exceptional circumstance. In my view, the existence of this account does not make it "plainly unjust to refuse the stay."

Conclusion

[32] For the reasons above, the motion for stay is dismissed. I set the costs of the motion at $750.00, payable in the cause.

Bourgeois J.A.