Case Name:
K. v. K.

Between
G.K., and
A.K.

[2005] O.J. No. 2229

139 A.C.W.S. (3d) 796

Court File No. 154/05

Ontario Superior Court of Justice

P.T. Matlow J.

June 3, 2005.

(19 paras.)

Civil procedure -- Appeals -- Interlocutory or final orders -- Judgments and orders -- Final or interlocutory.

Motion by the father pursuant to rule 62.02 for an order granting leave to appeal to the Divisional Court from an order. The order prevented the father from proceeding with a separate appeal until he had paid child support arrears. He was to pay child support arrears in the amount of $54,903 forthwith.

HELD: Motion dismissed. Rule 62.02 applied only to interlocutory orders and the order the father sought to appeal was final. It was final because it stayed the appeal permanently. Therefore, there was an absolute right of appeal to the Court of Appeal. This court did not have jurisdiction to grant leave to appeal. However, since the appeal was not brought within the applicable time limit, the father required an order extending the time within which to appeal. If the order had been interlocutory, the judge would not have granted leave to appeal because the father did not meet the test in rule 62.02(4).

Statutes, Regulations and Rules Cited:

Family Law Act, s. 48

Ontario Rules of Civil Procedure, Rule 62.02, Rule 62.02(4)

Counsel:

Milton J. Bernstein, for the Moving Party

Steven D. Benmor, for the Respondent

ENDORSEMENT

1 **P.T. MATLOW J.** (endorsement):-- This motion is quashed. Counsel may make written submissions regarding costs within one month.

2 This motion was brought pursuant to rule 62.02 for an order granting leave to the moving party, A.K., to appeal to the Divisional Court from the order of Justice Harvison Young dated February 24, 2005. That rule applies solely to interlocutory orders of a judge of this court.

3 The operative part of Justice Harvison Young's order reads as follows;

> THE COURT ORDERS THAT:
>
> 1. The Respondent A.K. shall not be permitted to proceed with his appeal of the Order of the Honourable Mr. Justice Zuker dated May 14, 2004 until he pays the child support arrears.
> 2. The Respondent A.K. shall deliver payment of the child support arrears in the amount of $54,903.33 payable forthwith before he is permitted to proceed with his appeal of the Order of the Honourable Mr. Justice Zuker dated May 14, 2005.
> 3. The Respondent A.K. shall pay to the Applicant G.K. cost of this motion on a full indemnity basis.
> 4. The Applicant G.K. shall file written costs submissions no later than March 7, 2005; the Respondent A.K. shall file written costs submissions no later than March 14, 2005.

4 Both counsel agreed that the order was interlocutory and that rule 62.02 applied.

5 However, with respect, I have come to a different conclusion. In my view, the order is a final order from which there was an absolute right of appeal to the Court of Appeal. It is for this reason that I now conclude that I do not have jurisdiction to grant leave to appeal.

6 I observe, however, that because no appeal to the Court of Appeal has been brought within the applicable time limit, there is now required an order of that Court extending the time within which to appeal.

7 It is of no consequence to my conclusion that, at the right top corner of the formal order, it is marked that the order is "Temporary" rather than "Final".

8 Justice Zuker's order, which was the subject of Justice Harvison Young's order, required the moving party to pay monthly child support to the respondent in accordance with the detailed provisions of the order. The moving party then appealed Justice Zuker's order, which was made in the Ontario Court of Justice, to this court pursuant to section 48 of the Family Law Act.

9 Because, according to the respondent, the moving party remained in default of Justice Zuker's order even after the commencement of his appeal, she moved before Justice Harvison Young to quash his appeal. Justice Harvison Young refused to quash the appeal and, instead made the order described in paragraph 2.

10 The effect of her order, according to its terms, was to cause an immediate and permanent stay of the appeal. There was no way to predict, or reason to expect, that the moving party would ever pay the arrears. The appeal was the only proceeding pending in this court and the order therefore finally disposed of the appeal.

11 What complicates the characterization of Justice Harvison Young's order as either final or interlocutory is the condition imposed for the possible removal of the stay, namely, the payment of all arrears. Although the order required payment of the arrears "forthwith", there was no assurance that there would be compliance either "forthwith" or later and, "until" the arrears were paid, the stay would continue in effect.

12 The classic test for distinguishing between final and interlocutory orders is that set out in Hendrickson v. Kallio, [1932] O.R. 675 (C.A.):

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.
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> ...
>
> It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order. (emphasis added)

13 In F.J. Castle Co. v. Kouri (1909), 18 O.L.R. 462 (Div. Ct.), an order had been made upon the plaintiff's motion for summary judgment under then Rule 603. The order allowed the defendants to defend upon condition of their paying money into court and directed that, in default of payment into court, the plaintiff was to be at liberty to sign final judgment. At issue was whether or not an order could be final because a further step had to be taken pursuant to it before judgment could be entered for the plaintiff.

14 The Court held that the order was a final one. A final judgment was ordered unless the payment is made. No further action of the judge is needed, which made the order final

in its nature. Although English cases had held that an order of this kind was interlocutory, the Court rejected this approach at p. 465, referring to the decision in Bank of Minnesota v. Page (1887), 14 O.A.R. 347, and stating:

> Mr. Justice Osler, speaking for the Court, refers to the course of the Court as to entertaining such appeals (citing the cases), and says the "order is in its nature, if not in form, final ... even though it has to be carried into effect by entering judgment in pursuance of it." (emphasis added)

15 More recently, the Court of Appeal in Laurentian Plaza Corp. v. Martin (1992), 7 O.R. (3d) 111 (C.A.), dealt with whether an order that included conditions was final or interlocutory in nature. An order was made setting aside a default judgment and the noting in default upon several terms and conditions. The Court acknowledged that while an order setting aside a default judgment is interlocutory and an order dismissing a motion to set aside default judgment is final, an order setting aside a default judgment on conditions falls some place in between.

16 The Court concluded that the approach of Strachan v. Riggs, [1935] O.J. No. 50, [1935] O.W.N. 307 (C.A.), was the proper one to take in order to determine whether the order was final or interlocutory. In Strachan, Middleton J.A. applied the Hendrickson test, stating:

> The order ... [was] an interlocutory order. It deals with matters of practice and procedure in the action, and, while it may be final in its terms, it does not itself deal with and determine the merits of the real contention between the parties. It relates to the machinery for the adjustment of the rights of the parties.

17 The Court in Laurentian Plaza held that the order was interlocutory. However, it acknowledged the difficulty of resolving the conflict created where the effect of the order will be final if the conditions are not met:

> One aspect of the difficulty is that orders made on condition vary greatly. ... As a matter of policy it may seem that some of these orders, which, analytically, are interlocutory, might be appropriately treated as final -- but, if this were to be done, where would the line be drawn and how could the definition of what is final be expressed so that it could be applied with some degree of predictability or confidence?
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> Neither can the nature of the order reasonably turn on the particular circumstances of the defendant. The question of categorization which determines access to appellate review must be decided on the basis of the legal nature of the order and not on a case by case basis depending on the application of the order to the facts of a particular case. As I have indicated, jurisdictional rules should be as clear as possible and their application should not be beset with factual disputes which themselves may be protracted and difficult to resolve. (emphasis added)

> Further, the consideration that the order may have the effect of terminating the proceeding does not mean that it is a final one. See Chesapeake & Ohio Railway Co. v. Ball, [1953] O.R. 877 (C.A.) and Ontario Medical Association v. Miller (1976), 14 O.R. (2d) 468, 2 C.P.C. 125 (C.A.).

18 In Laurentian Plaza, the order did not, unlike in the case at bar, finally dispose of the proceeding. The proceeding was permitted to continue subject to the fulfillment of the conditions imposed. If those conditions were not fulfilled as required, it would have required further judicial intervention to finally dispose of the proceeding.

19 If I am wrong in my characterization of the order of Justice Harvison Young as a final order and it is interlocutory, I would refuse to grant leave to appeal. The moving party does not satisfy the test set out in rule 62.02(4).

P.T. MATLOW J.