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Family

'Serious issues' in dissent in family case could 'inspire' SCC to grant leave to appeal, court finds

By **Amanda Jerome**

(October 14, 2021, 9:37 AM EDT) -- The Ontario Court of Appeal has granted a stay of proceedings in a family law case as the appellant mother seeks leave to appeal to the Supreme Court of Canada to keep her children in the province.

Justice David Paciocco, for the Court of Appeal, wrote that he took "comfort in knowing that leave decisions tend to be made promptly."

"If the appeal to the Supreme Court of Canada does not have the merit that I suggest it might have, leave will be denied. I also take comfort in knowing that although I cannot order that a Supreme Court of Canada appeal should be expedited, there are mechanisms before the Supreme Court of Canada for doing so if leave is granted," he added.

In *N. v. F*. 2021 ONCA 688, the court heard that the appellant is "the primary caregiver of her children, Z., a female child born in November 2016, and E., a male child born in November 2019."

In June 2020, the court noted, the appellant "travelled with the children to Ontario from Dubai in the United Arab Emirates ('UAE'), their habitual place of residence." The children's father "remained in the UAE expecting their prompt return."

However, the following month the appellant told the children's father that "she and the children would not be returning to the UAE but would remain in Ontario."

According to court documents, the father "promptly brought an application in Ontario in which he sought the return of the children." But since the UAE is "not a signatory, he could not bring that application under the *Convention on the Civil Aspects of International Child Abduction* …"

Instead, the court noted, the father applied "pursuant to s. 40 of the CLRA [*Children's Law Reform Act*] seeking a declaration that the mother wrongfully retained the children in Ontario, and an order that the children be returned forthwith to the UAE."

The mother argued that "a parenting order should be made in Ontario pursuant to s. 22 or s. 23 of the CLRA, thereby requiring the father's s. 40 application to be dismissed."

The application judge, Justice Clayton Conlan of the Ontario Superior Court, determined he "could not exercise jurisdiction under s. 22 of the CLRA" as the mother had not established that she "satisfied the requisite preconditions in s. 22."

The court noted that "[I]n finding that the mother had not met her burden of establishing that the children would, on the balance of probabilities, suffer serious harm if returned to the UAE"; Justice Conlan also determined that there was "no evidence that the children would be at risk of physical harm in the UAE."

Justice Conlan ruled that the mother had "wrongfully retained the children in Ontario," and ordered the "children be returned forthwith to the UAE."

In response, the mother appealed to the Ontario Court of Appeal.

"In the meantime," the court noted, "the father applied in the UAE for divorce and a guardianship and

custody (decision-making responsibility and primary parenting time) order."

According to court documents, the mother was "served with notice of the UAE action but declined to participate."

Before the Ontario Court of Appeal released its decision, a UAE court "granted the divorce, and gave the father both guardianship and custody, finding that the mother had relinquished her custody by wrongfully depriving the father of the enjoyment of his rights."

The Ontario Court of Appeal released its decision on Sept. 14 with Justices C. William Hourigan and David Brown, in concurring reasons, dismissing the appeal.

The court noted that the judges "reasoned that the mother had demonstrated no errors of law or principle and had simply attempted to challenge the application judge's findings of fact and mixed fact and law by rearguing the case."

"In dismissing the appeal," the court explained, "the majority concluded that deference is owed to the application judge's findings."

The judges also "denied appeals from a battery of constitutional challenges the mother brought against s. 40 of the CLRA."

However, Justice Peter Lauwers dissented, finding that Justice Conlan "erred in making an order pursuant to s. 40 of the CLRA when he should have found that Ontario has jurisdiction to make parenting orders pursuant to s. 23 of the CLRA."

"Specifically," Justice Lauwers "held that the application judge erred in his assessment of serious risk of harm by failing to assess the harm that could be caused by the forced involuntary separation of the mother from the children."

The court noted that Justice Lauwers also concluded that "the application judge's finding that the best interests of the children is the paramount consideration in making parenting orders is inconsistent with the undisputed expert evidence that all fathers are assured guardianship (decision-making responsibility) in the UAE, even where giving this responsibility to a particular mother would be in the children's best interests."

The appellant brought a motion pursuant to s. 65.1(1) of the *Supreme Court Act* for "a stay of proceedings relating to this court's decision from September 14, 2021 in *N. v. F.* 2021 ONCA 614, pending her leave to appeal application to the Supreme Court of Canada."

On the motion, the mother argued that "there are serious issues to be tried that do raise issues of public importance, including: (1) 'the removal of children to non-Hague countries', a broad issue that has never been considered by the Supreme Court of Canada; (2) the need to establish clear principles to be applied in determining serious risk of harm under ss. 23 and/or 40(3) of the CLRA, including whether the standard to be used when assessing the risk of serious harm under s. 23 is less stringent than the standard to be used in *Hague Convention* cases, and whether the rights of the children contained in the *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3 (entered into force 2 September 1990) apply, and (3) the constitutional challenges to the return provision in s. 40(3) of the CLRA."

"In response," the court noted, the father countered that "this case raises only factual disputes particular to this litigation, and that the mother identifies no errors in the majority's constitutional law analysis."

Justice Paciocco wrote that "[T]here is much merit in the positions taken by the father."

"The mother has alleged no errors of law or principle in the majority's constitutional analysis and Lauwers J.A. did not dissent on the constitutional points. It may be that serious constitutional issues to be tried can be identified but none have been identified for me and none are readily apparent," he added.

Justice Paciocco also stressed that "the fact that the Supreme Court of Canada has yet to consider the removal of children to non-*Hague Convention* countries is of no moment if this case does not raise issues of law or legal principle that have broader application."

He agreed with the father that "most of the issues in the appeal before us were questions of fact or mixed fact and law."

However, Justice Paciocco was "nonetheless persuaded that there are serious issues that arise from Lauwers J.A.'s dissent that could inspire the Supreme Court of Canada to grant leave to appeal."

"First, it is not uncommon in other contexts to determine the seriousness of a risk based on a calibration of the likelihood that a risk will arise, and the degree of harm that will occur if that risk does arise," he explained, noting that Justice Lauwers' "concerns about the separation of the children and the mother, and the enforceability of the 'with prejudice' agreement may not simply rest on a factual dispute with the majority, but on the proper outcome in non-*Hague Convention* cases when the risk of separation or unenforceability may not be more probable than not, but where those outcomes, if they occur, could pose significant risks to the welfare of the children."

Justice Paciocco noted that a "second and related consideration is how the onus of proving serious risk operates when there is a risk of separation and yet an inability on the evidence to predict its impact."

"How significant must that risk be?" he asked.

"Finally," he wrote, "there is a serious issue to be tried relating to whether gender inequalities in the law of the UAE, as a matter of law, undermine the integrity of best interest determinations."

Justice Paciocco determined he was satisfied that, "in the circumstances, there is a risk of irreparable harm to the children if a stay is denied."

"I am persuaded that the balance of convenience favours granting the stay pending leave to appeal. I have already identified the risk of irreparable harm to the children. I am mindful, in coming to this conclusion, that it is invariably in the interests of children to have disputes about parental rights resolved promptly, and that any delay, including the delay pending judicial determinations, creates harm of its own. I recognize, for example, that unless the order below is enforced, the children will remain largely separated from their father, which is not in their best interests," he explained, noting that he found "solace" in evidence before him that the father "has been able to maintain a meaningful emotional bond with the children."

"More importantly, even assuming that the children would be returned to Ontario if the appeal succeeds, the risk that the status quo relating to the children's primary care could be disrupted pending a final judicial determination is of greater concern than the harm caused by delay," he added.

Justice Paciocco accepted that there are "offsetting risks to the father, including the risk of the perpetuation or the wrongful retention of his children, and the appreciable challenges he has encountered in maintaining contact with them."

"I do not mean to disregard the profound compromise of his parental rights that has occurred, but my best evaluation of all the circumstances is that the balance of convenience favours granting the stay," he added, noting that "[D]elay cannot be entirely avoided but it can be minimized."

"I can minimize front-end delay by ordering as a condition of the stay of proceedings that the mother must file her application for leave to appeal within 45 days from the release of the September 14, 2021 decision. The mother's counsel shared their expectation that this deadline could be achieved," he stressed before granting the motion to stay.

Counsel for the appellant and respondent declined to comment on the decision.

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