Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SYMONE JAMES,
Appellant/Respondent,

v.

SAMUEL FAUST,
Appellee/Petitioner.

S. Ct. Civ. No. 2015-0070
Re: Super. Ct. MS. No. 9/2012 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Debra S. Watlington

Considered and Filed: August 7, 2015

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Lee J. Rohn, Esq.
Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorney for Appellant,

Samuel Faust
Fort Pierce, FL
Pro se.

OPINION OF THE COURT

PER CURIAM.

This matter comes before the Court pursuant to an emergency motion filed by the mother of a minor child requesting that this Court stay the Superior Court's July 22, 2015 order, which directed her to make arrangements for her minor son to relocate to Florida to live with his father no later than August 10, 2015. For the reasons that follow, we grant the motion and stay enforcement of the Superior Court's order pending this appeal.

I. BACKGROUND

The facts underlying this child custody matter were largely set forth in this Court's disposition of a prior appeal in this case, in which this Court vacated the Superior Court's decision to award the father sole physical custody of the parties' son. *James v. Faust*, S. Ct. Civ. No. 2014-0038, __ V.I. __, 2015 V.I. Supreme LEXIS 5 (V.I. Feb. 24, 2015). Specifically, this Court held that the Superior Court had erred by (1) failing to follow the two-step procedure mandated by *Tutein v. Arteaga*, 60 V.I. 709 (V.I. 2014); (2) making ambiguous or contradictory findings; and (3) relying on an *ex parte* report submitted by the guardian *ad litem* without providing the parties with an opportunity for cross-examination.

From the limited information that may be gleaned from the Superior Court's July 22, 2015 order, it appears that after this Court's remand, the Superior Court held a custody hearing on May 13, 2015, and provided the parties with an opportunity to cross-examine the guardian *ad litem* and otherwise supplement the record. In its July 22, 2015 order, the Superior Court concluded that although the parties were similarly situated, sole physical custody should be awarded to the father because, among other reasons, "he has never had the opportunity to have primary custody" and "[t]he minor child should not be deprived of being raised by his father just because his father has been unsuccessful in receiving a prior decision by the Court." *Faust v. James*, Super. Ct. MS. No. 009/2012, slip op. at 10 (V.I. Super. Ct. July 22, 2015). The Superior Court awarded sole physical custody to the father for the next 11 years, and further directed the mother to prepare the minor child to relocate to Florida no later than August 10, 2015.

The mother filed a motion for the Superior Court to stay its own decision pending appeal on July 31, 2015, and filed a notice of appeal with this Court on August 4, 2015. At 1:17 p.m. on August 6, 2015, the mother filed an emergency motion for stay pending appeal with this Court,

noting that the August 10, 2015 deadline was imminent and that the Superior Court had not issued a ruling. *See* V.I.S.CT.R. 8(b). Later that day, the Superior Court issued an opinion denying the mother's motion, concluding that she failed to establish a likelihood of success on the merits or irreparable harm. Shortly after receiving the Superior Court's opinion, this Court issued an order directing the father to file a response to the motion the mother filed with this Court, on or before 12:00 p.m. on August 7, 2015. The father timely filed his opposition, and thus this matter is ripe for an expedited ruling.

II. DISCUSSION

Ordinarily, "[t]o determine whether a litigant is entitled to a stay [or injunction] pending appeal, this Court considers: (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." *Engeman v. Engeman*, S. Ct. Civ. No. 2015-0023, 2015 V.I. Supreme LEXIS 20, at *3-4 (V.I. July 2, 2015) (unpublished) (quoting *Tip Top Constr. Corp. v. Gov't of the V.I.*, S. Ct. Civ. No. 2014-0006, 2014 V.I. Supreme LEXIS 15, at *2 (V.I. Feb. 14, 2014) (unpublished)). "The first of these factors is ordinarily the most important. However, a movant may also have his motion granted upon a showing of a substantial case on the merits when the balance of equities, as determined by the other three factors, clearly favors a stay." *Rojas v. Two/Morrow Ideas Enters.*, S. Ct. Civ. No. 2008-0071, 2009 V.I. Supreme LEXIS 6, at *5 (V.I. Jan. 22, 2009) (unpublished) (internal quotation marks and citations omitted).[1]

[1] This Court established this standard for a stay pending appeal pursuant to its authority to shape Virgin Islands common law, due to the absence of any legislation or binding precedent governing such motions. *Accord, 3RC & Co. v. Boynes Trucking Sys.*, S. Ct. Civ. No. 2015-0016, __ V.I. __, 2015 V.I. Supreme LEXIS 22, at *7-8 (V.I. July 23, 2015) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011)). However, as we have previously emphasized, the Legislature—while not setting forth specific factors—has unambiguously expressed an intent for the

We conclude that the mother is entitled to a stay pending appeal under the balancing of the equities standard. Although the mother, in support of her motion for a stay, argued to the Superior Court that "to have a young child uprooted from his mother and sent to live in Florida with his father for 11 years will have a traumatic effect on the child," the Superior Court did not directly address this argument on the merits, and instead rested on the fact that the mother and father had an opportunity to mediate their dispute and that "[c]hild custody determinations are some of the hardest decisions for the Court and this Court encouraged the parties to mediate and to come to their own agreement." *Faust v. James*, Super. Ct. MS. No. 009/2012, slip op. at 7 (V.I. Super. Ct. Aug. 6, 2015). Significantly, numerous courts have held that a stay of a custody order pending appeal will generally be warranted if the effect of the order is to change the child's living situation. *See, e.g.*, *Alpers v. Alpers*, 806 P.2d 1057, 1060 (N.M. Ct. App. 1990) ("Without any indication that the health or safety of the minor children is in jeopardy, a presumption exists that keeping the status quo during the pendency of an appeal is in a child's best interests."); *Clark v. Clark*, 543 N.W.2d 685, 687 (Minn. Ct. App. 1996) ("Because interruption of a child's stable living circumstances is discouraged, the district court should exercise caution regarding a stay when the court's order calls for major changes in a child's custody or circumstances."); *accord*, *Ferreira v.*

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best interests of the child to govern custody determinations in the Virgin Islands. *See, e.g.*, *Jung v. Ruiz*, 59 V.I. 1050, 1057 (V.I. 2013); *Madir v. Daniel*, 53 V.I. 623, 631 (V.I. 2010); 16 V.I.C. § 109(b); 16 V.I.C. § 145(a); 16 V.I.C. § 345(c). The New Mexico Court of Appeals, recognizing that the ordinary test for a stay pending appeal did not appear to take into account the best interests of the child, reformulated it to require courts to consider the following modified factors:

> (1) the likelihood of hardship or harm to the children if the stay is denied; (2) whether the appeal is taken in good faith and the issues raised are not frivolous; (3) the potential harm to the interests of the non-moving party if the stay is granted; and (4) a determination of other existing equitable considerations, if any.

Alpers v. Alpers, 806 P.2d 1057, 1060 (N.M. Ct. App. 1990). However, because we would reach the same result under either test, we express no opinion as to whether a more refined standard for a stay pending appeal should govern in child custody appeals.

Ferreira, 512 P.2d 304, (Cal. 1973) ("stability of environment . . . in itself is an important factor in the welfare of the child."). Notably, were this Court to ultimately agree with the mother and reverse the Superior Court's July 22, 2015 order, it may result in two disruptions to the child's life: the move to Florida, and a potential second move back to the Virgin Islands. *Alpers*, 806 P.2d at 1060 ("[T]he entire daily routine and living conditions of children could be needlessly disturbed in the event the appellate court reverses the trial court's ruling. Absent imminent physical or emotional harm to the child, it would appear that generally the least change in a child's living situation is in his or her best interests."). And while we agree that the father may experience a hardship in the event we were to eventually affirm the July 22, 2015 custody order, in that his assumption of sole physical custody would be delayed by the time necessary to resolve this appeal, this hardship is greatly outweighed by the hardship the child would face in the event he is forced to permanently relocate to Florida and then abruptly required to relocate to the Virgin Islands.

We also conclude that the mother has established a substantial case on the merits so as to justify a stay. We do question her ability to succeed on one of her claims—that her former counsel failed to submit purported evidence of abuse—since consideration of this issue would require this Court to consider a matter that has not been fairly presented to the Superior Court. *See* V.I.S.CT.R. 4(h). Nevertheless, her second issue—that the Superior Court may have impermissibly "weigh[ed] the rights and interests of the father rather than the child," (Mot. 3)—clearly possesses merit, given that the Superior Court, based on its own findings, appears to have taken into consideration that the father never had primary custody before, a fact that appears wholly irrelevant to a best interests of the child analysis. *James*, 2015 V.I. Supreme LEXIS 5, at *8 ("[T]he Superior Court must only consider factors that are relevant to the best interests of the *child*, and the consideration in this case of what the father is 'entitled' to with regard to the child fails this basic tenet of *Madir*." (emphasis

in original)); *Alpers*, 806 P.2d at 1062 ("[I]ssues of custody are not resolved on the basis of the parents' interests, but on the basis of the best interests of the children."). Consequently, in the absence of any other circumstances, we conclude that the mother is entitled to a stay of the July 22, 2015 custody order pending appeal.

III. CONCLUSION

For the foregoing reasons, we grant the emergency motion for a stay pending appeal.

Dated this 7th day of August, 2015.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court