

SECURING A STAY IN THE COURT OF APPEALS

By: Kenneth E. Prather, Sr.
KENNETH E. PRATHER, SR., P.C.,
19846 Mack Avenue
Grosse Pointe Woods, MI 48236
Phone: 313-884-5622/313-884-6073 (Fax)
Email: kprather@quixnet.net

Thursday, May 6, 2004
Advanced Level Family Law Seminar
Michigan Chapter of American Academy of Matrimonial Lawyers
The Townsend Hotel
Birmingham, Michigan

Securing a stay in the Court of Appeals can be an essential procedural safeguard for preserving and protecting a client's custodial and financial interests.

The failure to secure a stay in the trial court's adverse decision in a child custody or property division in a divorce case can result in a distinct disadvantage if the decision on appeal is reversed and the case remanded to the trial court.

In a contested child custody case, the burden of proof can be changed from "preponderance of evidence" to "clear and convincing evidence" due to the time that has elapsed to secure a reversal in the Court of Appeals.

In *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982), the Mother was awarded temporary custody of a child for almost two years until the date of the trial for divorce. The trial court concluded that the child had no established custodial environment and consequently declined to apply a clear and convincing standard and awarded the father custody of the child. The Court of Appeals reversed, remanded and held if the trial court determined that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, or in violation of a court order or by a court order which was subsequently reversed. Nevertheless, the Legislature has decided that the bests interest of the child prevail over procedural fairness to the parents and that the best interests of the child generally require continuance of an established custodial environment.

In *Brooks v Brooks*, a case tried in the Wayne County Circuit Court, the trial Judge William Lucas, entered a Judgment of Divorce which provided that the parties' jointly owned home where the Mother and minor son resided would be sold immediately and the proceeds divided equally. After the trial and Judgment, Judge Lucas entered an

Order which denied the Mother's Motion for Stay.

(Exhibit 1)

The Mother filed Plaintiff-Appellant's Motion for Approval of Stay Bond on Appeal and Stay of Proceedings in the Court of Appeals.

(Exhibit 2)

The Court of Appeals approved the Stay Bond and stayed enforcement of the property division pending the appeal.

(Exhibit 3)

During the appeal and on remand to the trial court, the Mother's possession and interest in the home was preserved and protected.

PRACTICAL TIP

If you intend to appeal and need a stay in the Court of Appeals, you must:

First - file a Motion to secure a ruling in the trial court on your Motion for Stay and Approval of Proposed Bond on Appeal. The Motion should state the reasons for the requested stay and attach the proposed Bond on Appeal to the Motion; make a complete record before the trial judge and ask for specific reasons if the Motion for Stay and proposed Bond on Appeal are rejected.

If you do not receive a ruling in the trial court on the Motion for Stay and proposed Bond on Appeal, the Court of Appeals will not hear and rule on the Motion for Stay. MCR 7.209(A)(2).

Second - when you file a Motion for Stay and approval of Bond on Appeal in the Court of Appeals, you should attach to the Motion a transcript of the hearing in the lower Court.

LEGAL AUTHORITIES
COURT RULES

MCR 2.614(A)(1)(2) Stay of Proceedings To Enforce Judgment provides:

(A) Automatic Stay; Exceptions: Injunctions, Receiverships, and Family Litigation.

(1) Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for new trial, a motion to alter or amend the judgment, a motion for judgment notwithstanding the verdict, or a motion to amend or for additional findings of the court is filed and served within 21 days after entry of the judgment, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order on the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

(2) The following orders may be enforced immediately after entry unless the court orders otherwise on motion for good cause:

(a) A temporary restraining order.

(b) A preliminary injunction.

(c) Injunctive relief included in a final judgment.

(d) An interlocutory order in a receivership action.

(e) In a domestic relations action, an order before judgment concerning the custody, control, and management of property; for temporary alimony; or for support or custody of minor children and expenses.

MCR. 7.101 (H)(1) Stay of Proceedings provides:

(1) Civil Actions.

(a) Unless otherwise provided by rule or ordered by the trial court, an execution may not issue and proceedings may not be taken to enforce an order or judgment until the expiration of the time for taking an appeal under subrule (B).

(b) An appeal does not stay execution unless

(I)the appellant files a stay bond to the opposing party as provided by this rule or by law; or

(ii)the appellant is exempted by law from filing a bond or is excused from filing a bond under MCL 600.2605 or MCR 3.604(L) and the trial court grants a stay on motion.

(c) The stay bond must be set by the trial court in an amount adequate to protect the opposing party. If the appeal is by a person against whom a money judgment has been entered, it must be not less than 1 1/4 times the amount of the judgment.

MCR 7.209 Bond; Stay of Proceedings provides:

(A) Effect of Appeal; Prerequisites.

(1) An appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders.

(2) A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.

(3) A motion for bond or a stay pending appeal filed in the Court of Appeals must include a copy of the trial court's opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions. Unless determined by law, the dollar amount of a stay or appeal bond in a civil action must be set by the trial court in an amount adequate to protect the opposite party.

(E) Stay of Proceedings by Trial Court.

(1) Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.

(F) Conditions of Appeal Bond.

(1) Civil Actions. In a bond filed for stay pending appeal in a civil action, the appellant shall promise in writing:

(a) to prosecute the appeal to decision;

(b) to perform or satisfy a judgment or order of the Court of Appeals or the Supreme Court;

(c) to perform or satisfy the judgment or order appealed from, if the appeal is dismissed;

(d) in an action involving the possession of land or judgment for foreclosure of a mortgage or land contract, to pay the appellee the damages which may result from the stay of proceedings; and

(e) to do any other act which is expressly required in the statute authorizing appeal.

(G) Sureties and Filing of Bond. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court which entered the order or judgment to be stayed.

(1) Civil Actions. A bond in a civil action need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.

(H) Stay of Execution.

(1) If a bond is filed before execution issues, and notice is given to the officer having authority to issue execution, execution is stayed. If the bond is filed after the issuance but before execution, and notice is given to the officer holding it, execution is suspended.

(2) The Court of Appeals may stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms.

(3) When the amount of the judgment is more than \$1000 over the insurance policy coverage or surety obligation, then the policy or obligation does not qualify to stay execution under MCL 500.3036 on the portion of the judgment in excess of the policy or bond limits. Stay pending appeal may be achieved by complying with that statute and by filing a bond in an additional amount adequate to protect the opposite party or by obtaining a trial court or Court of Appeals order waiving the additional bond.

MCR 3.604 Bonds

(A) Scope of Rule. This rule applies to bonds given under the Michigan Court Rules and the Revised Judicature Act, unless a rule or statute clearly indicates that different procedure is to be followed.

(D) Affidavit of Surety; Notice of Bond.

(1) A surety on a bond, except for a surety company authorized to do business in Michigan, must execute an affidavit that he or she has pecuniary responsibility and attach the affidavit to the bond.

(2) In alleging pecuniary responsibility, a surety must affirm that he or she owns assets not exempt from execution having a fair market value exceeding his or her liabilities by at least twice the amount of the bond.

(3) A copy of a bond and the accompanying affidavit must be promptly served on the party for whose benefit it is given in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the court in which the bond has been filed.

(E) **Objections to Surety.** A party for whose benefit a bond is given may, within 7 days after receipt of a copy of the bond, serve on the officer taking the bond and the party giving the bond a notice that the party objects to the sufficiency of the surety. Failure to do so waives all objections to the surety.

(F) **Hearing on Objections to Surety.** Notice of objection to a surety must be filed as a motion for hearing on objections to the bond.

(1) On demand of the objecting party, the surety must appear at the hearing of the motion and be subject to examination as to the surety's pecuniary responsibility or the validity of the execution of the bond.

(2) After the hearing, the court may approve or reject the bond as filed or require an amended, substitute, or additional bond, as the circumstances warrant.

(3) In an appeal to the circuit court from a lower court or tribunal, an objection to the surety is heard in the circuit court.

(G) **Surety Company Bond.** A surety company certified by the Commissioner of Insurance as authorized to do business in Michigan may act as surety on a bond.

CASE LAW

Denton v Winiemko, 434 Mich 904, 453 NW2d 680 (1990) held:

The filing of an appeal bond is required to secure a stay of proceedings to enforce the judgment during the appeal. It is not a condition of the right to appeal. *Wright v Fields*, 412 Mich 227 (1981).

BOND FORM

The Bond On Appeal Approved Form approved by SCAO should be used in the trial court and Court of Appeals.

(Exhibit 4)