O'KEEFE & COMPANY

LIFTING THE BIA STAY OF PROCEEDINGS IN FAMILY LAW PROCEEDINGS

June 1st, 2022

Fiorito v. Wiggins, 2017 ONCA 765

Background

Following eight years of protracted and acrimonious child custody litigation, the father of the children in question was awarded $200,000 in costs against their mother, who subsequently declared bankruptcy without having paid any of the costs award. The father then brought a motion for an order annulling the mother's bankruptcy or, alternatively, lifting the stay of proceedings which is automatically granted under s. 69 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") for him to enforce the award.

Section 69.4 of the BIA allows the court to make a declaration that the automatic stay on bankruptcy does not operate in respect of the applying creditor where the creditor is likely to be materially prejudiced by the stay (s.69.4(a)), or where it is equitable on other grounds (s.69.4(b)).

Motion Judge's Decision

The motion judge found that the father was entitled to have the stay lifted so that he could enforce his costs award against the mother's bankruptcy exempt assets. The motion judge also ordered that the mother's discharge from bankruptcy be stayed for a reasonable period to allow the father to take the appropriate enforcement steps.

The motion judge relied on three main findings of fact: (i) the father's need to pursue lengthy custody litigation in order to have any relationship with his children; (ii) the mother's failure to pay anything toward the costs awarded in relation to that litigation; and (iii) the fact that the mother defeated the enforcement of the costs award by reneging on assurances she made to the court about her intent to pay the costs and not use bankruptcy to thwart that payment.

The motion judge found that these factual circumstances differentiated the father's position from that of other creditors and established that he would be materially prejudiced by the continued operation of the stay by likely receiving nothing towards his costs award.

The motion judge noted that allowing the father to enforce that award against the mother's bankruptcy-exempt assets, including RRSPs, would not affect other creditors. She was also satisfied that it was equitable to grant the declaration in the circumstances.

Appeal Decision

On appeal, the mother argued that "material prejudice" under s. 69.4(a) of the BIA requires an applicant to show prejudice different from that experienced by other unsecured creditors. As a result, the decision below was in error because the father's prejudice (receiving nothing on his costs award) was no different from that suffered by any other unsecured creditor in a bankruptcy. The Court of Appeal disagreed with this argument, holding that, while differential treatment may justify a finding of material prejudice, it is not a necessary factor. Material prejudice can arise in any situation when the bankruptcy would treat a creditor unfairly, differently or in some way worse than other creditors.

The mother also argued that the motion judge erred in finding that it was "equitable" to lift the stay of proceedings for the father under s. 69.4(b), by considering the cause of the debt as part of her analysis of the equities. The Court held that the motion judge was "clearly entitled to take into account the circumstances regarding the background to the debt" in finding that it was equitable to lift the stay in favour of the father, including the circumstances surrounding the acrimonious litigation which gave rise to the debt and the fact that the mother led for bankruptcy after representing that she would not. The Court noted that lifting the stay was also equitable in the circumstances because the father would be enforcing the costs award against exempt assets in the bankruptcy and other creditors would therefore not be affected. The mother also took the position that the trial judge misapprehended the evidence regarding the likelihood that the father would receive 'nothing' toward his costs award if the stay was not lifted. Based on the potential for further growth of equity in her home and the value of her exempt assets, the mother argued that the father could have opposed her discharge from bankruptcy and that a bankruptcy court would likely then order that she make payment toward the costs award as a condition of her discharge. The mother argued that, as a result of the motion judge's failure to recognize this, her decision had 'misapprehended and denigrated the bankruptcy regime and the rights of creditors under that regime'.

The Court of Appeal again disagreed with the mother's view and held that the motion judge's finding about the father's likelihood of recovering on the costs award was reasonable based on the mother's statement of a airs. Any potential increase in the value of the home was purely speculative. Although it would be open for any creditor to oppose the discharge of a bankrupt, there was no guarantee that an order would be made or that funds would be available. The use of 69.4 in the circumstances did not, as the mother suggested, denigrate the BIA regime.

The Court also noted that, even if the father received a small dividend towards the $200,000 costs debt as opposed to nothing, given the findings of material prejudice and equitable circumstances, the order for a lift-stay in the father's favour was amply justified.

Takeaways

1.Material prejudice for the purposes of s.69.4(a) can arise in any situation when the bankruptcy would treat a creditor unfairly, differently or in some way worse than other creditors.

2.The 'background' to a debt can be taken into account in determining whether a creditor should be granted a declaration lifting a stay under s.69.4(b).

tle bit of body text

Darren O'Keefe
Principal, Lawyer
(709) 800 6536
darren@okeefeandcompany.com