

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

2007 DEC 10 PM 4:26

APPELLATE COURT CLERK
NASHVILLE

IN THE MATTER OF)
PATRICIA DIANE WINKLER,)
MARY ALICE WINKLER,)
AND BRIANNA ELOISE WINKLER,)
CHILDREN UNDER 18 YEARS OF AGE)
)
CHARLES DANIEL WINKLER)
AND DIANE B. WINKLER,)
PETITIONERS)
)
v.)
)
MARY CAROL WINKLER,)
RESPONDENT)

No. W2007-02212-COA-R10-CV

MOTION TO STAY ISSUANCE OF THE MANDATE

Pursuant to Rule 10 and Rule 42 of the Tennessee Rules of Appellate Procedure, Petitioners/Applicants Charles Daniel and Diane B. Winkler ("Mr. and Ms. Winkler"), by and through their attorneys Gregory D. Smith and Rebecca K. McKelvey, hereby submit the following Motion requesting this Court to stay issuance of the Court of Appeals mandate related to the Order Denying Rule 10 Application for Extraordinary Appeal (the "Order") filed by the Court of Appeals of Tennessee at Jackson (the "Court of Appeals") on November 27, 2007, and accompany this Motion with a Memorandum of Law filed simultaneously. Rule 10(b) of the Tennessee Rules of Appellate Procedure provides that an appeal from the denial of an application for extraordinary appeal by the Court of Appeals may be made to the Tennessee Supreme Court within thirty (30) days of the filing date of the order denying the application. Mr. and Ms. Winkler have made a timely filing of Petitioners' Rule 10 Application for Permission for Extraordinary Appeal. Pursuant to Rule 42 of the Tennessee Rules of Appellate Procedure,

the Court of Appeals shall stay issuance of the mandate until final disposition of the Rule 10 application to this Court.

The Court of Appeals entered the Order denying Mr. and Ms. Winkler's Rule 10 application on November 27, 2007. Mr. and Ms. Winkler have thirty (30) days from entry of this Order in which to file an application in the Tennessee Supreme Court. Mr. and Ms. Winkler have submitted Petitioners' Rule 10 Application for Permission for Extraordinary Appeal contemporaneously with this Motion. Mr. and Ms. Winkler respectfully request this Court to stay issuance of the mandate related to the Court of Appeals' November 27, 2007 Order until it has an opportunity to consider and dispense with the Rule 10 application to this Court. Mr. and Ms. Winkler also request any other relief the court deems just and necessary.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I hereby certify this 10th day of December, 2007, a true and correct copy of the foregoing Motion to Stay Issuance of the Mandate has been served upon the following persons via United States mail, postage prepaid:

Robert Hawley, Esq.
Guadian ad Litem
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Rebecca K. McKelvey

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No. W2007-02212-COA-R10-CV

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STAY ISSUANCE OF THE MANDATE

COMES NOW the Petitioners / Applicants, Charles Daniel and Diane B. Winkler ("Mr. and Ms. Winkler"), by and through their attorneys, Gregory D. Smith and Rebecca K. McKelvey, and pursuant to Rule 10 and Rule 42 of the Tennessee Rules of Appellate Procedure, hereby submit the following Memorandum of Law in Support of their Motion to Stay Issuance of the Mandate of the Court of Appeals.

I. PROCEDURAL HISTORY

Mr. and Ms. Winkler through former counsel filed Petitioners' Application for Extraordinary Appeal By Permission on Original Application in the Appellate Court Pursuant to T.R.A.P. 10 and Motion for Stay of All Lower Court Proceedings and Orders Concerning Visitation (the "Application") in the Court of Appeals of Tennessee at Jackson (the "Court of Appeals") on September 28, 2007. In response to the Application, the Court of Appeals issued an Order Granting Stay and Directing Respondent to File Answer on September 28, 2007.

Thereafter, the Court of Appeals denied the Application, entering an Order Denying Rule 10 Application for Extraordinary Appeal on November 27, 2007. This Order vacated the Court of Appeals' Order of September 28, 2007 staying the trial court proceedings. Three days later, on November 30, 2007, counsel for Mr. and Ms. Winkler was notified that the Court of Appeals issued a mandate to the trial court in this matter. Mr. and Ms. Winkler are filing a timely Rule 10 application to the Tennessee Supreme Court contemporaneously with this Motion to Stay Issuance of the Mandate.

II. ARGUMENT

The mandate for the November 27, 2007 Order denying the Rule 10 Application should not issue until after this Court has had an opportunity to consider and rule upon Mr. and Ms. Winkler's Rule 10 Application for Extraordinary Appeal. Pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, Mr. and Ms. Winkler have thirty (30) days in which to consider appealing the Court of Appeals' denial of their application for extraordinary appeal in a Rule 10 application to the Tennessee Supreme Court. Moreover, "the timely filing of an application for permission to appeal in the Supreme Court *shall* stay the issuance of the mandate of the Court of Appeals . . . which stay is effective until final disposition by the Supreme Court." Tenn. R. App. Proc. 42(b) (emphasis added). Mr. and Ms. Winkler have filed a timely application to the Tennessee Supreme Court. Consequently, this Court should stay issuance of the mandate until it has an opportunity to consider and rule upon the application.

This Court has held that it is inappropriate for an appellate court to direct issuance of a mandate before the time for appealing the issue has expired. *See Brooks v. Carter*, 993 S.W.3d 603, 611 (Tenn. 1999). In *Brooks*, the father filed a timely application for permission to appeal an order issued by the Court of Appeals in response to a Rule 10 application. *Id.* at 609. The

Tennessee Supreme Court held that the Court of Appeals erred in directing the Clerk of the Appellate Courts to issue mandate because the father's application for appeal was timely. *Id.* at 609. In these proceedings, Mr. and Ms. Winkler have timely filed an appeal from the Court of Appeals' denial of their Rule 10 application to the Supreme Court. Mr. and Ms. Winkler respectfully request this Court to stay issuance of the mandate until this Court reviews their application and a ruling has been made thereon.

Immediate and untimely issuance of the mandate in this case, which vacates the stay of the trial court's order, would result in harm to the welfare of the minor children. In *Brooks*, this Court noted its concern that a contrary ruling could detrimentally affect the welfare of the children at the center of the custody dispute between the mother and father:

For instance, if a trial court awards custody of a minor child to her mother, and later that the Court of Appeals reverses the trial court's decision and awards custody to the father and orders the immediate issuance of mandate, and the Supreme Court grants a Tenn. R. App. P. 11 application filed by the mother and reverses the Court of Appeals' decision, custody of the child will have changed from the mother, to the father, and ultimately back to the mother. Such a chain of events would likely be harmful to the welfare of the child.

Id. at 610. The risk of harm to the welfare of a minor child is even greater in the instant dispute if conflicting orders are issued. It is in the best interests of the children for the stay to remain in place until this Rule 10 application for extraordinary appeal has been considered by the Tennessee Supreme Court.

III. CONCLUSION

This Court should stay issuance of the mandate for the Court of Appeals' Order Denying Rule 10 Application for Extraordinary Appeal. Mr. and Ms. Winkler have made a timely appeal of the Court of Appeals' Order in a Rule 10 application to the Tennessee Supreme Court.

Furthermore, staying the issuance of the mandate will minimize harm to the children that may result from inconsistent rulings.

Respectfully submitted,



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