NOVA SCOTIA COURT OF APPEAL
Citation: *R.B.N. v. M.J.N.*, 2002 NSCA 165

Date: 20021224
Docket: CA 188819
Registry: Halifax

Between:

R. B. N.

Appellant/Applicant

v.

M. J. N.

Respondent

Judge:	The Honourable Justice Linda Lee Oland, In Chambers
Application Heard:	December 5, 2002, in Halifax, Nova Scotia
Held:	Application denied.
Counsel:	Myrna L. Gillis for the appellant/applicant B. Lynn Reierson for the respondent

Oland, J.A.:

[1] This is an application for a stay of the removal of professional supervision during access by a parent, pursuant to a decision of the Honourable Justice Douglas Campbell of the Supreme Court of Nova Scotia (Family Division).

[2] At the end of the hearing on October 4, 2002, the judge gave an oral decision authorizing unsupervised block access. It was agreed that the parties would provide written submissions as to the details of that access. The decision was appealed in a notice of appeal filed on November 1, 2002 and this stay application was heard on December 5, 2002. The application was followed on December 18, 2002 by the judge's release of his written decision allowing unsupervised access. On the same day, he released an addendum to his decision, which deals with the particulars of the block access. His interim variation order, which is the subject of this stay application issued yesterday, December 23, 2002.

[3] The parties to this application are the parents of two children. Their son, now age 11, has a rare syndrome involving progressive neuropsychological impairment that is reflected in language regression. His verbal communication skills are limited. Their daughter is now age 8.

[4] The parties separated in 1999. The issue of access was complicated by the mother's growing concerns following their separation that the children may have been sexually and physically abused by their father. In September 2000 the parties consented to an order granting the mother sole custody and the father supervised access, and providing for interim joint decision-making on medical issues. Social workers, paediatricians, surgeons, psychologists, play therapists, child therapy therapists, speech and language pathologists, and educators are among those who, since 1999, have conducted interviews and assessments or provided reports in regard to the matter of access.

[5] A trial was scheduled for April 8th to 16th, 2002 before Justice Campbell to deal with the divorce and related matters, but primarily to deal with access. The narrow issue was whether access should continue to be professionally supervised or should be supervised by D. R., the father's common-law spouse.

[6] While a substantial body of evidence was to be presented to the judge, two lengthy reports capture the opposing positions. Martin P. Whitzman, a social worker and clinical member of the American (Canadian) Association For Marriage and Family Therapists determined in his July 8, 2001 custody/access assessment that there was insufficient evidence from

documents and interviews to "realistically recommend" that access remain professionally supervised. He recommended that D. R. supervise the father's access for the next six months to a year and that access be gradually extended. Dr. Charles Hayes, a clinical psychologist, stated in his April 6, 2002 risk assessment that there was not "a weight of evidence" that would conclusively prove or disprove whether the father was abusing his children. Following his assessment of the material and interviews, and having in mind the children's vulnerability, particularly that of the son who lacks communication skills, he was of the view that professional supervision should continue for the children to be certain of protection.

[7] The parties were divorced at the hearing on April 9th, 2002. The trial concerning related matters did not proceed as, following discussion in court with the judge, the parties reached agreement. The corollary relief judgment provided that access would be supervised as recommended by a team of three professionals. It reads in part:

> The parties shall co-operate with Dr. Charles Hayes, Dr. Diane Hetherington, and Martin Whitzman, who will operate as a team, to work out a procedure by which they will make recommendations from time to time in terms of the supervision aspects of the access. The professional team's estimated costs will be subject to the approval of the parties and will be shared equally by the parties.
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> The children's well being and safety is the paramount consideration of the team. . . . Until there is a consensus recommendation from the team to change the current access arrangements for the children's best interests, or the parties otherwise agree, access will be exercised by the father with both children of the marriage with an agreed to professional supervisor for three times a week, for a three-hour duration each time, or for nine hours per week to be scheduled by agreement. The costs of this access supervision shall be shared equally between the parties, provided both children go with their father for access.

[8] Four months later, in August 2002, the mother moved to A., G. with both children and without advising the father. Just before her departure, she filed an application to specify the terms of access. The application documents were served on the father only after she had left this province. The father brought an application to be heard on an emergency basis seeking return of the children and a change in custody.

[9] On October 4, 2002, Justice Campbell heard from the father and, by way of teleconferencing, from the mother. Both parties were represented by counsel and both were cross-examined.

[10] In his decision, the judge referred specifically to reports by seven professionals. He had before him additional reports to which he did not refer, including Dr. Hayes' April 6, 2002 risk assessment which had been provided to him for the trial that month that did not proceed to a hearing. The judge stated that while he had not had an opportunity to hear from the authors of the various medical reports, and was cognizant of the fact that his was an interim decision, he had been asked to read those reports and had done so.

[11] It was the judge's view that the mother's deep belief that sexual abuse had occurred and that the father is the perpetrator had become the problem in the parties' dealings with respect to their children. He indicated that, while he could not say with any certainty that abuse did not happen, he could say "with a great deal of comfort" that it was much more likely that it had not happened than that it had. The judge also commented that although counsel for the mother spoke of a mountain of evidence, he found no such mountain. He was satisfied that the risk was sufficiently small that supervision on a professional basis could stop.

[12] The judge's decision reads in part:

> . . . it seems to me to be an impractical thing for me to order Ms. N. to come back to Nova Scotia. But on the other hand, I am going to arrange for block access that will be unsupervised.

The judge added that if the mother moved back to Nova Scotia with the children, there would be no supervision of access other than a condition involving Ms. R.. His interim variation order sets out his disposition of the father's application and the particulars of the condition he imposed on the father's access:

> The Application for the return [of] the children to Nova Scotia is denied.
>
> The access of M. N. to the children of the marriage, I. (N.) N., born October *, 1994 and V. N., born March *, 1991 (collectively referred to as "the children") (* *editorial note- dates removed to protect identity*), will be unsupervised and for a period of six months from the commencement of the first access occasion, the access shall be conditional upon M. N. continuing in his common-law relationship with D. R. and her general presence in the home.

[13] The judge directed three periods of access: in late December, in the spring, and during the summer. For Christmas 2002, he ordered that the father may exercise access by notifying the mother of a seven day period during the children's Christmas break when he may travel to G. and exercise access there. In other years, that access would be from December 21st to December 30th. The judge ordered a two week period each spring and a 30 day period each summer, and provided particulars as to how those dates were to be determined. His order also addressed other access, transportation issues, and costs associated with access.

[14] The mother has appealed this decision permitting unsupervised access and applies for a stay pending the hearing of that appeal, pursuant to *Civil Procedure Rule* 62.10.

[15] The test to be applied in this application is whether there are circumstances of a special and persuasive nature to grant a stay. Flinn, J.A. in *J.E.A. v. C.L.M.*, [2002] N.S.J. No. 314 reviewed the test for stays of execution as set out in *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341, and stated at ¶ 19:

> The test is different for granting an application to stay the execution of a judgment in a case involving the custody of children. That was pointed out by Justice Hallett in *Fulton*, and he referred to the cases of *Millett v. Millett* (1974), 9 N.S.R. (2d) 26 (N.S.C.A.) and *Routledge v. Routledge* (1986), 74 N.S.R. (2d) 290 (N.S.C.A.). In each of those cases the court used the test that "there need to be circumstances of a special and persuasive nature to grant a stay."
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> This test, in custody cases, was also referred to by Justice Bateman in *Ryan v. Ryan* (1999), 175 N.S.R. (2d) 370 and by myself in *Ellis v. Ellis* (1998), 163 N.S.R. (2d) 397 and *Children's Aid Society of Halifax v. B.M.J.*, (2000), 189 N.S.R. (2d) 192. (Emphasis added)

[16] In support of the stay application, in addition to the evidence and record of the October 4, 2002 and April 2002 proceedings, the mother has filed an affidavit dated November 27, 2002 sworn by Dr. Charles Hayes. The affidavit is not lengthy and consists of six short paragraphs, most of which serve to introduce its exhibits. These were Dr. Hayes' curriculum vitae, his report dated April 6, 2002, and his letter to counsel for the mother dated November 27, 2002, regarding that earlier risk assessment. Dr. Hayes'

affidavit confirms his previous position that supervised access should continue.

[17] In essence, the mother's submissions for a stay are two-fold: first, special circumstances exist that could be harmful to the children if a stay is not granted; and second, the process was flawed in that professional supervision during access was removed without the benefit of a full hearing and representations.

[18] The mother argues that there is sufficient evidence of serious weight that shows the possibility that the children were abused by their father. She adds that the son who is unable to communicate freely cannot alert others to any harm he may be suffering. Moreover, the children have recently moved and to have unsupervised access with overnight stays away from their mother would be extremely stressful for them.

[19] The mother argues that the children may be exposed to a risk of abuse if the stay is not granted and that they will not suffer a significant disadvantage by not seeing their father on an unsupervised basis were the stay granted. She does not object to the children seeing their father, but says this should be allowed only with professional supervision pursuant to the terms of the corollary relief judgment.

[20] Whether the "special circumstances" test for a stay of an order regarding custody has been met has been considered in various decisions of a judge of this court sitting in chambers. These include *Millett v. Millett* (1974), 9 N.S.R. (2d) 26 (N.S.S.C., A.D.), *Routledge v. Routledge*, [1986] N.S.J. No. 195 (C.A.), *Children's Aid Society of Halifax v. B.M.J.*, [2000] N.S.J. No. 405 (C.A.), *Ryan v. Ryan*, [2001] N.S.J. No. 384 (C.A.) and *MacDougall v. Mombourquette*, [2001] N.S.J. 549. It is apparent that whether the test is met is often dependent on the facts of the particular case.

[21] Counsel for each of these parties reviewed in some detail those evaluations and reports favourable to her client, attacked those relied upon by the opposing party, and urged a close scrutiny of the medical and other documentation. Even if it were realistically possible, it is not essential that I conduct a minute examination or comparison to tease out every error, omission, or analytical flaw. The issue before me is simply whether, on the evidence before me, there are circumstances of a special and persuasive nature to grant a stay of the unsupervised access order pending appeal.

[22] As noted in *Children's Aid Society v. B.M.J.*, supra at ¶ 35, evidence to demonstrate such circumstances should be provided in support of a stay application which involves the custody of children. In this regard, the mother has submitted the affidavit of Dr. Hayes. He was available for cross-examination in chambers; none was conducted.

[23] Dr. Hayes wrote the November 27, 2002 letter exhibit to his affidavit after the mother informed him of the judge's decision and asked that he write her lawyer with his concerns. That letter summarizes his April 6, 2002 assessment and reiterates the reasons for his opinion that professional supervision should continue. It does not contain any significant information not already in his earlier report. Although the affidavit indicates that the team of three professionals described in the corollary relief judgment did meet, neither it nor the letter advises of any recommendation regarding access that might have been reached by that team. Nor do either purport to set out the views of that team, although Dr. Hayes mentions the team's concern for the welfare of the children.

[24] It is my view that the mother has not established that there are circumstances of a special and persuasive nature that warrant a stay.

[25] I begin by observing that although the order for interim unsupervised access followed an emergency hearing, the judge who made that decision in October 2002 was not unfamiliar with these parents or with the issue of access involving these children. The seven day trial scheduled for April 2002 did not proceed to hearing. However that same judge had had discussions during the first two of those days with the then self-represented father and with counsel for the mother, which concluded with the consent corollary relief judgment. The judge had been given all the reports pertaining to access. He stated in his decision that he had thought about the matter on almost a daily basis since the parties were in court the previous April and that he had read every piece of material he could in the file. The judge also heard the testimony of the parties under direct and cross-examination.

[26] The circumstances before me are such that it is helpful to recall some of the reasoning underlying the test for a stay in a case such as that before me. In *Children's Aid Society of Halifax v. B.M.J.*, supra Flinn, J.A. stated at ¶ 31 that there was at least one good reason why the test requiring for circumstances of a special and persuasive nature for granting an application

for a stay in a custody case is different from that in *Fulton Insurance Agencies Ltd. v. Purdy*, supra:

> The question of custody of a child is a matter which peculiarly lies within the discretion of the judge who hears the case. The ultimate issue in such a case - the best interests of the child - is fact driven. The trial judge has the opportunity, generally denied to an appellate tribunal, of seeing the parties and investigating the child's circumstances. For these reasons the court of appeal shows considerable deference to the decision of a trial judge in custody matters. (Emphasis added)

Here, the judge had heard the parties and reviewed all the reports submitted on their behalf. He had an advantage denied an appellate court judge, no matter how carefully he or she might review the evidence and the record.

[27] An application which involves allegations of abuse of children and claims that children might be harmed demands careful scrutiny. The well-being and safety of children is always a paramount consideration. It cannot be, however, that the fact that an allegation of abuse had been raised will automatically result in a stay.

[28] In deciding the extent of the supervision attached to access, the judge made an assessment as to the risk of abuse to the children. In my view, the mother in her application for a stay of his decision, is asking the chambers judge to conduct a second assessment of the same material, only now without the benefit of hearing the parties, and, based upon Dr. Hayes' affidavit, to reach a different conclusion.

[29] There is, however, nothing of substance in Dr. Hayes' affidavit and its exhibits that was not contained in his April 6, 2002 report which was provided to the judge who ultimately ordered unsupervised access. Moreover, there is no additional information in that material that I can identify which would support a determination that there are special and persuasive circumstances requiring a stay pending the hearing of the appeal.

[30] Since the hearing of the application in chambers, counsel for the mother, the father who is now self-represented, and the mother herself have sent in correspondence, all unsolicited by the chambers judge, which either pertains

to the submissions made to Justice Campbell regarding the details of the block access, reiterates submissions made in Court of Appeal chambers, purports to provide additional information, or disagrees with aspects of the decision and its addendum. For example, the mother says that, for reasons set out in her correspondence, the access periods ordered could have negative effects on her daughter's schooling and on her own employment, that the son has difficulty flying, and that the Christmas access visits that have been ordered should be rescheduled as the father is a non-Christian *(*editorial note- term removed to protect identity*) who does not celebrate that holiday. The statements in the post-hearing correspondence do not constitute evidence for the purposes of the stay application. They were not contained in sworn affidavits and, consequently, I am unable to consider any of them in determining this application.

[31] The evidence before me on the stay application is essentially that contained in the affidavit of Dr. Hayes. As indicated earlier, it does not set out circumstances which I consider special or persuasive such as to warrant a stay.

[32] An apparent error in the trial process such that the appeal is likely to succeed may constitute circumstance of a special and persuasive nature warranting a stay: see *Children's Aid Society of Halifax v. B.M.J.*, supra at ¶ 44. In this regard, the mother submits that there has not been a full hearing on the issue of supervision of access. She says that she understood that the matters of custody and access would be scheduled for a full hearing following the emergency hearing, that no expert witness was heard or cross-examined and she had not waived her rights in that regard, and that she was denied an opportunity to make representations on this issue, before the judge ordered the removal of professional supervision.

[33] I have reviewed the application documents, the pre-hearing memorandum from counsel for the mother to the judge, and the transcript of the emergency hearing on October 4, 2002, and other relevant material and have considered the submissions of behalf of the mother. While this may be an arguable ground of appeal, an error in the trial process that constitutes circumstances warranting a stay is not readily apparent to me.

[34] Accordingly, the application for a stay of the interim order allowing unsupervised access is dismissed, with costs to the respondent in the amount of $750.00, plus disbursements.

Oland, J.A.