NOVA SCOTIA COURT OF APPEAL
Citation: *N.S. v. R.S.*, 2016 NSCA 55

Date: 20160627
Docket: CA 452333
Registry: Halifax

Between:

N.S.

Appellant

v.

R.S. and L.S.

Respondents

Judge:	MacDonald, C.J.N.S.
Motion Heard:	June 23, 2016, in Halifax, Nova Scotia in Chambers
Held:	Motion is dismissed
Counsel:	Matthew Conrad, for the appellant Nicole MacIsaac, for the respondents

Decision:

BACKGROUND

[1] This matter involves the very sad circumstances facing 2 ½ year old B.A.S. Tragically his father, T.S., died of cancer last year, leaving only his mother, N.S., to raise him. T.'s parents, R. and L.S., want to maintain a relationship with their grandson. But even that has gone badly for B. He is caught in the middle of a court action over how much contact he will enjoy with his grandparents. This is perplexing since no one is suggesting that N. is a bad mother or that R. and L. are bad grandparents. No doubt they are all hurting from T.'s death and perhaps this is a product of their grief.

[2] In any event, Associate Chief Justice Lawrence O'Neil was asked to resolve this dispute. Following a full day hearing, he directed a plan that would gradually have B. spend day-long visits with his grandparents every second weekend. Here are the terms of his May 31st, 2016 order:

> Access
>
> 1. R. and L. S. shall enjoy access with the child, B.S., according to the following schedule and according to the following terms:
>
> a. Beginning immediately and continuing until the end of July 2016, R. and L.S. shall have access with B. every ten (10) days for two (2) hours each visit.
>
> i. Until the end of June 2016, these visits shall take place at a neutral site agreed by the parties, and N.S. may be present during these visits.
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> ii. Beginning July 1, 2016, access may be at a location determined by R. and L.S., and N.S. may no longer attend access visits.
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> b. Beginning August 1, 2016, and continuing until the end of November 2016, R. and L.S. shall enjoy access with B. every ten (10) days for four (4) hours each visit.
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> c. Beginning December 1, 2016, and continuing until otherwise agreed by the parties or by further order of the court, R. and L.S. shall enjoy access with B. every second weekend, for one (1) day to be agreed by the parties, from 10:00 a.m. to 4:00 p.m.
>
> d. Over the Christmas holiday, R. and L.S. may enjoy access with B. for two (2) hours at a time agreed by the parties.
>
> e. Any additional access shall be as agreed by the parties.

> f. Should B. be unable to attend an access visit due to illness or any other reason, access will be made up as agreed by the parties.
>
> g. B.'s sisters, J.S. and T.S. may attend any access visits.

[3] B.'s mother takes issue and has asked this Court to set this order aside. Her appeal will be heard on November 8th of this year. In the meantime, she asks me to stay the order.

ANALYSIS

The Test

[4] For decades, we have been applying the *Fulton* test when appellants seek to stay the execution of trial orders pending appeal. Essentially, to secure a stay the appellant must establish: (a) that the appeal raises at least an arguable issue to consider; (b) that the appellant will endure irreparable harm without a stay (should the appeal ultimately be successful); and (c) the balance of convenience favours granting a stay. Then, even if this test is not met, exceptional circumstances may command a stay in the interest of justice [*Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A. in chambers)]

[5] However, when it comes to family law, a child's best interests must always be an overriding consideration with significant deference to the trial judge. Cromwell, J.A. (as he then was) in *Gillespie v. Patterson*, 2006 NSCA 133 explained it this way:

> [3] The test usually applied in deciding whether to grant a stay of execution is, of course, that set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A., in Chambers). The party seeking the stay must convince the court that there is an arguable issue raised on the appeal, that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm, and that the balance of convenience favours granting the stay. Alternatively, even if the three-part primary test is not satisfied, a stay may nonetheless be granted if the party seeking the stay persuades the court that there are "exceptional circumstances that would make it fit and just that the stay be granted ...": **Fulton, supra**, at paras. 29 and 30.
>
> [4] As Hallett, J.A. pointed out in Fulton at para. 13, the court has taken a different approach to applications for stays of custody orders. In those cases, the court has required the applicant to show that there are circumstances of a "special and persuasive nature": see, for example, Ryan v. Ryan (1999), 175 N.S.R. (2d)

> 370; Children's Aid Society of Halifax v. B.M.J. (2000), 189 N.S.R. (2d) 192. The rationale for the different approach in custody cases (including related orders made under the Children and Family Services Act, S.N.S. 1990, c. 5) is that the question of custody of a child is a matter which peculiarly lies within the discretion of the judge who hears the case and that the best interests of the child, which is the paramount consideration, is fact driven: see B.M.J. at para. 31.

[6] Then in *Reeves v. Reeves*, 2010 NSCA 6, my colleague Justice Fichaud added:

> [20] *Fulton's* test is modified in stay applications involving the welfare of children, including issues of custody or access. That is because, in children's cases, the court's prime directive is to consider the child's bests interest. The child's interests prevail over those of the parents, usually the named litigants, on matters of irreparable harm and balance of convenience. *Fulton*, page 344. *Ellis v. Ellis* (1997), 163 N.S.R. (2d) 397, at p. 398. *Nova Scotia (Minister of Community Services) v. J.G.B.*, 2002 NSCA 34, at ¶ 7. *D.D. v. Nova Scotia (Minister of Community Services)*, 2003 NSCA 146, at ¶ 9-11. *Minister of Community Services v. B.F.*, [2003] N.S.J. No. 421 (Q.L.) (C.A.), at ¶ 13, 19. *Family and Children's Services of Annapolis County v. J.D.*, 2004 NSCA 15, at ¶ 10-14. *Minister of Community Services v. D.M.F.*, 2004 NSCA 113, at ¶ 12-15, 20. *Family and Children's Services of Cumberland County v. D.Mc.*, 2006 NSCA 28, at ¶ 12-13. *The Children's Aid Society of Cape Breton-Victoria v. L.D.*, 2006 NSCA 32 at ¶ 18-19. *Gillespie v. Paterson*, 2006 NSCA 133 at ¶ 3-4. *Crewe v. Crewe*, 2008 NSCA 68, at ¶ 7.
>
> [21] I summarize the following principles from these authorities. The stay applicant must have an arguable issue for her appeal. But, when a child's custody, access or welfare is at issue, the consideration of irreparable harm and balance of convenience distils into an analysis of whether the stay's issuance or denial would better serve, or cause less harm to, the child's interest. The determination of the child's interests is a delicate fact driven balance at the core of the rationale for appellate deference. So the judge on a stay application shows considerable deference to the findings of the trial judge. Of course, evidence of relevant events after the trial was not before the trial judge, and may affect the analysis. The child's need for stability generally means that there should be special and persuasive circumstances to justify a stay that would alter the status quo.

[7] In this matter, it is noteworthy that Associate Chief Justice O'Neil retained jurisdiction of this matter, indicating that, if necessary, he would conduct a review in January of 2017. That calls for greater deference to the trial judge's findings. For example, in *Grant v. Grant*, 2008 NSCA 51 Cromwell, J.A. noted:

> [8] I note as well that the circumstances generally must be particularly persuasive to stay an interim custody order pending appeal because it is reviewable by the court that issued it if the circumstances require. That court is much better placed than is this one to make the sort of factual determinations on which these matters generally will turn.

Conclusion

[8] Having carefully reviewed the evidence and counsels' submissions, I am not persuaded to grant the stay. I say this for several reasons.

[9] Firstly, I am prepared to accept that N.S. has established an arguable issue on appeal. After all, as this Court noted in *Royal Bank of Canada v. Saulnier*, 2006 NSCA 108, the threshold is low:

> [10] The threshold necessary to demonstrate a serious or arguable issue is not high nor is it dependent upon a detailed assessment of the likelihood of success on appeal. The Court said in RJR –MacDonald, supra, at pp. 337-338:
>
> > What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...
> >
> > Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[10] Here, Ms. S. lists 13 grounds of appeal. At least a couple of them allege procedural errors which she says challenged her ability to fully present her case. While it is impossible at this early stage to know whether any of these allegations will ultimately cause us to intervene, they are enough to overcome this initial hurdle.

[11] However, I do not accept that a stay would be in B.'s best interests. Ms. S. insists that, if I deny the stay, B. will have been forced upon his grandparents without her being present. This, she highlights, would inevitably represent a traumatic experience for him. Yet, she reasons if I grant the stay and she loses on appeal, it will only represent a five or so month delay in Associate Chief Justice O'Neil's plan. Furthermore, she reminds me that B. has, in the past, gone several

months without much contact with his grandparents and got along just fine. Another five months would, therefore, pose no significant risk.

[12] Respectfully, I do not see it this way. Ms. S.'s written brief acknowledges that B.'s grandparents visited him "usually weekly and sometimes more" while T. was alive. After T. died, they continued to visit but not as often. Then, last August, a dispute over T.'s estate arose. This prompted the hard feelings that now affect this little boy. As a result, there was no contact until March of this year. However, since then there have been five visits.

[13] So B. has had a relationship with his paternal grandparents since birth. It has been cut off once. Granting the stay guarantees that it will be interrupted, if not cut off, again. That, in my view, would not be in his best interests.

[14] In reaching this conclusion, I realize that Ms. S.'s biggest concern involves the upcoming visits where she will not be in attendance. For her, that is a huge risk not worth taking. Yet, by all accounts, last week's visit (when she was present) went poorly, with reciprocating allegations of inappropriate behaviour by the adults present. While I am in no position to determine who was right and who was wrong, at least with only B. and his paternal grandparents present, the opportunity for this conflict would be eliminated.

[15] Considering the deference I owe to the trial judge and all the circumstances of this difficult case, there are no "special and persuasive" circumstances that would justify a stay.

DISPOSITION

[16] The motion for a stay is dismissed with costs in the cause of the main appeal.

Michael MacDonald, C.J.N.S.