NOVA SCOTIA COURT OF APPEAL

Citation: D.D. v. Nova Scotia (Community Services), 2003 NSCA 146

Date: 20031219
Docket: CA 212492
Registry: Halifax

Between:

D.D.

Appellant

v.

Minister of Community Services, Mi'kmaw Family and Children's Services of Nova Scotia, S.D., M.W.P., M.H. and K.P.

Respondents

And Between:

D.D.

Appellant

- and -

K.P., W.P., M.H. and S.D.

Respondents

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 94(1) **Children and Family Services Act**

Judges: Bateman, J.A. (in Chambers)

Application Heard: December 18, 2003, in Halifax, Nova Scotia

Held: Application dismissed

Counsel: Katherine Briand, for the for the appellant
Raymond Morse, Q.C., for the respondent Mi'kmaw Family & Children's Services
Sheila McDougall, for the respondent, W.P.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for Decision:

[1] This is an application by D.D. for a partial stay of a custody order.

Background:

[2] The application arises from a combined child protection and custody proceeding in the Family Court involving four siblings, now ages 11, 10, 8 and 6. This stay application relates only to H.D. born November (*editorial note - date removed to protect identity*), 1995. It is not disputed that the children's mother, S.D., due at least in part to chronic substance abuse problems, is unable to parent the children.

[3] The matter came to trial before Judge James Wilson of the Family Court of Nova Scotia on November 24 and 25, 2003. The judge delivered an oral decision on November 25. It was a consolidated proceeding involving a protection application pursuant to the **Children and Family Services Act**, S.N.S. 1990, c. 5 and an application for custody under the **Maintenance and Custody Act**, R.S.N.S. 1990, c. 160.

[4] The disposition which is now the subject of the appeal and in relation to which the stay is sought, results from the two Orders - one which terminates the child welfare proceeding effective December 9, 2003 and a companion order which places H.D. in the custody of her father, W.P., effective that same date. Ms. D.D., who is H.D.'s maternal grandmother, seeks to stay that part of the Order which provides for H.D.'s transfer to her father's custody in British Columbia on December 26, 2003. Ms. D.D. proposes that H.D. remain in her care pending the hearing of the appeal.

[5] Some background is helpful. The Mi'kmaw Family and Children's Services (the "Agency") have been involved with the children for some time. There have been two full courses of child protection proceedings. With assistance from the Agency, the children originally remained in the supervised care of their mother, however, on May 23, 2003 it became necessary to remove them. At that time they

were placed in day to day care of their grandmother, D.D., but continued in the temporary care of the Agency.

[6] M.H. is the father of the two oldest children. W.P. is H.D.'s father. The youngest, K., has yet a different biological father. Plans for the future care of the children were presented at the final hearing by Mr. M.H. (for the two oldest children); Mr. W.P. (for H.D.); Ms. D.D. (for H.D. and K.) and by certain others. In view of the options available for the children, the Agency was not seeking permanent care but, rather, supported various of the plans - specifically, those offered by Mr. M.H., Mr. W.P. and Ms. D.D., but the latter as regarded K. only.

[7] The judge ordered that the two oldest children be in the custody of their father, Mr. M.H. K.'s biological father did not seek custody or otherwise put forward a plan for his care. Judge Wilson ordered that he be in the custody of his grandmother Ms. D.D. Mr. P was granted custody of H.D..

The Law:

[8] On an application for a stay pending appeal this Court most commonly applies the three-part test approved by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) (at pp. 346-347). That test requires, generally, that the applicant demonstrate that there is an arguable issue on the appeal; that if the stay is not granted the applicant will suffer irreparable harm that cannot be compensated by damages; and that the balance of convenience favours the granting of the stay. An applicant who cannot meet this "primary" test must, in the alternative, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted.

[9] This test has been modified for stays sought in proceedings affecting the welfare of children. In **R.B.N. v. M.J.N.** (2002), 210 N.S.R. (2d) 179; N.S.J. No. 534 (N.S.C.A.), Oland, J.A., adopting Flinn, J.A. in **J.E.A. v. C.L.M.** (2002), 206 N.S.R. (2d) 312; N.S.J. No. 314 (Q.L.)(N.S.C.A.), said at ¶15: "The test to be applied in this application is whether there are circumstances of a special and persuasive nature to grant a stay." The factors in the three- part **Fulton** test remain, generally, relevant, but where the welfare of children is involved, that

compartmentalized test is not slavishly applied. An apparent error in the trial process such that the appeal is likely to succeed may constitute circumstances of a special and persuasive nature warranting a stay (**Children's Aid Society of Halifax v. B.M.J. and T.S.M.** (2000), 189 N.S.R. (2d) 192; N.S.J. No. 405 (Q.L.)(C.A.)) at ¶ 44.)

[10] In **Minister of Community Services v. B.F.**, [2003] N.S.J. No. 421(Q.L.) (N.S.C.A., in Chambers), a child protection case, Cromwell, J.A. discussed the legal principles applicable to an application for a stay of proceedings pending an application for leave to appeal to the Supreme Court of Canada (**Supreme Court Act**, R.S.C. c. S-19, s. 65.1). His comments are helpful here, although, as he discusses at ¶10 through ¶12, the test for a stay pursuant to the **Supreme Court Act** differs in certain material respects from the usual test applied in this Court. The following remarks are particularly helpful:

> ¶ 13 . . . this case involves the care and custody of children. It follows that the decision to grant or deny a stay must weigh and give effect to their best interests. In my view, this requirement leads to some modification of the irreparable harm aspect of the test. The primary focus in a case like this should be on the risk of irreparable harm to the children while, of course, taking due account of the rights of the parties. In addition, given the need for stability and finality in child custody matters, there will generally need to be circumstances of a "special and persuasive nature", usually connected to the risk of harm to the children, in order to persuade the Court to grant a stay: see, for example, **Children's Aid Society of Halifax v. B.M.J.** (2000), 189 N.S.R. (2d) 192; [2000] N.S.J. No 405 (Q.L.)(C.A. Chambers) at paras. 29 - 30 and the cases cited there.
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> . . .
>
> ¶ 19 The fundamental issue in an application of this sort is to balance the risks of harm -- particularly harm to the children -- in light of the possible, but as yet unknown, outcome of the application for leave to appeal. To paraphrase R. J. Sharpe's description of the central problem posed by interlocutory injunctions (of which the stay pending appeal may be viewed as an example), the issue may be best understood in terms of balancing the relative risks of granting or withholding the remedy. The applicants must show a risk of harm produced by the combination of the continuing in force of the order under appeal and the delay

> until the result of the proposed appeal is known. This risk is that if the stay is withheld, their rights and the interests of the children will be so impaired by the time of final judgment that it will be too late to afford complete relief. On the other hand, this risk must be balanced with the risk of harm to the children if the stay is granted. The risk to be considered is that of harm to the children that could result from staying an order that may be affirmed on further review to be both lawful and in their best interests: R. J. Sharpe, *Injunctions and Specific Performance* (Canada Law Book Inc.: Aurora, updated to November, 2003) at para. 2.90 - 2.100.
>
> (Emphasis added)

[11] This is not to suggest, however, that the determination of a stay application reduces to a simple balancing of interests. The decision of the trial judge is deserving of considerable deference. He has the opportunity of observing the parties and hearing the evidence. This is a distinct advantage, unavailable to the appellate court. This Court has commented that nowhere is the advantage of the trial judge greater than in family proceedings. As Flinn J.A. stated in **Children's Aid Society of Halifax v. B.M.J. and T.S.M.**, supra:

> [31] There is, at least, one very good reason why the test for granting an application to stay the execution of a judgment in a custody case is different. 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. The court of appeal will only interfere with such a decision where the trial judge has gone wrong in principle, or has overlooked material evidence (see **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 112 N.S.R. (2d) 258; 307 A.P.R. 258 (C.A.)).

Analysis:

[12] The parties have filed a number of affidavits primarily addressed to H.D.'s situation as it has developed since Judge Wilson's decision on November 25, 2003. All parties agree that I receive that evidence, with limited exceptions. Ms. D.D. takes issue with that portion of H.D.'s teacher's affidavit (Jane Pitts) which deposes to circumstances as they were prior to the trial. Such evidence, she says, was or could have been presented at the hearing and is not properly submitted on this application. The Agency and Mr. W.P. submit that I should not consider Dr. John Krawczyk's letter which is attached to one of Ms. D.D.'s affidavits. I ruled that I would not rely upon the evidence contained in Ms. Pitt's affidavit which pre-dates the trial, and that, while I would receive Ms. D.D.'s affidavit with the doctor's letter attached, I would afford the letter limited weight in the circumstances.

[13] Essentially, it is Ms. D.D.'s position that the judge was wrong to order that Mr. W.P. have custody of H.D. Her opposition focuses on a number of issues: the father's disreputable history; he has had limited contact with H.D. since her birth; a transfer of custody will require H.D. to move to British Columbia and therefore separate her from siblings and extended family. There are, Ms. D.D. submits, too many unknowns about Mr. W.P.' circumstances and his ability to parent. H.D. has no extended family in British Columbia save for Mr. W.P.' mother, with whom H.D. is not yet well acquainted. These were all factors in evidence before the trial judge. The only new matter which has arisen since the decision is H.D.'s reaction to the move to British Columbia.

[14] Ms. D.D. has deposed to what she perceives to be H.D.'s dramatic opposition to leaving her to live in British Columbia with her father and to the deterioration of H.D.'s behaviour since she learned of the Order. H.D.'s negative reaction to the change in her care arrangement is the centerpiece of this stay application.

[15] The judge's decision, as regards H.D.'s custody, provides helpful context:

> The situation with respect to [H.D.] is obviously a much more difficult one. [H.D.] is described as having the greatest needs in terms of structure and support. [D.D] recognizes that too. I think the change in school, although Ms. Francis may have had something to do with it, was an attempt by [D.D] to get [H.D.] into a more structured and organized school. Some of the comments, and I don't know

if they were just editorial comments or not, but I got the impression that perhaps the school where she was attending was a little wild, kids got into trouble, things happen, people get blamed for it. Ms. Burns testified about having to go to school, I think maybe to meet with [H.D.] or settle her down or spend some one on one time with her. She presents with some very special needs. I think she is a youngster who is going to take a lot of time. Pretty well full-time I would think in terms of addressing those needs.

Mr. W.P. and his plan, clearly has some risks associated with that. They've been identified. Certainly his past history, his own drug problems and he takes the responsibility of not being around or available during some critical years in her life. On the positive side, and I talked about this in the beginning. People can change, people do change and they can change when they are committed to change. The evidence I have is that he has changed. I was favorably impressed by his evidence and also his mother, Ms. [M].'s evidence. They are starting, trying to bring forward their plan from a difficult position in terms of the amount of contact they've had with [H.D.], but it appears that what little time they've had, has been well used. They are not total strangers. This would be so easy if we were talking Truro. We are talking Kamloops and we are talking a little girl. So again the risks are clearly evident. If I approve of Mr. [W.P.]' plan [H.D.] has a lot of things to adjust to and she's not going to have weekend access with her grandmother or her siblings. If I leave her with [D.] she will continue to have very demanding needs over the next while. I have no reason to believe that the services that have been in place would continue because we would be at the end of a protection order. There would be no Ms. Farrell. There would be no family support worker. It will be left to [D.] to arrange those things on her own. She would continue to have a fair bit of exposure, directly or indirectly with her Mom and again the ability to supervise in a small community I recognize is very limited. It is one of the things I am running into over and over again in some of these cases. We want to maintain the children in there community where they are known and their family is, but the down side is that you don't always do a sufficient change of environment to give services a chance to work. That's part of the challenge here.

I have come to the conclusion that [H.D.]'s best interests in this case are served by giving her a new opportunity. I am prepared to endorse the position taken by the Agency and Mr. [W.P.]. An Order will be issued with respect to that. Again, access to both [D.] and [S.], certainly all reasonable access to [D.] and continued supervised access with the same terms for [S.]. The current protection order I want to remain in place to December 9th to allow the Agency to be supportive or helpful in any way they can as people work through the implications of this. As of

> that date, the custody orders for Mr. [H.] and Mr. [W.P.] and [D.] will come into effect for the four children. The children will remain on an access basis with [D.] until after Christmas. They should have the opportunity to spend their Christmas together and then appropriate arrangements be made between Christmas and New Years to get them settled and into the next phase of life.
> (Emphasis added)

[16] At trial the judge had the benefit of the evidence of, and a report from, Jolaine States, a clinical psychologist with Imani psychological services. At the request of the Agency, she had prepared an assessment of H.D.'s needs. The assessment was conducted from June to early September, 2003. Ms. States administered a number of psychological and educational tests; conducted interviews with H.D., D.D. and case social worker, Krista Thompson, and reviewed the relevant court documentation. She found H.D. to be of average intellectual ability, but experiencing "significant fear, sadness, anxiety and anger". She wrote:

> ... She feels considerable anger, sadness and worry about her life. At the same time, she feels helpless to change it in the immediate. She copes by rebelling against it, or trying to manipulate others so as to gain some measure of control. She continues to hope and desire that significant others in her environment (especially her mother) will understand and meet her needs. She is wary that this will happen, and so, tries to meet her needs independently. Many of her nurturance needs remain unrealized.
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> Behaviorally, [H.D.] is experiencing considerable behavioral difficulty causing poor adjustment or adaptation to her school and home environment alike. It is likely that her suspected diagnosis of ADD is accurate and exacerbating her problems. Certainly she presents with symptoms and behaviors consistent with this diagnosis. Additionally, interpersonal family dynamics further complicate the picture leading to further maladaptive social behavior. Her coping strategies of noncompliance and aggression do not serve her well in getting her needs met and result in increased anger and emotional distress. She also appears to be depressed.
>
> [H.D.] is a child in need of structure and consistency to allow her to better adapt to her world and to develop the empathy and pro-social behaviours that will allow

> her to function appropriately as an adult. I believe that she needs to be in a structures and nurturant environment to assist her in realizing a positive developmental outcome.
> (Emphasis added)

[17] Ms. States made a number of recommendations, including, that H.D. be placed in the custody of her father, should his parental capacity assessment and home study be favourable.

[18] Also before the judge was a comprehensive Home Study Report of Mr. W.P.'s living circumstances which was prepared for the trial by the Secwepemc Child and Family Services Agency in Kamloops, British Columbia, where Mr. W. P. resides. The study contains a frank analysis of Mr. W.P.'s past criminal behaviour and substance abuse. The study also reveals that Mr. W.P. has made significant changes in his life since 1999. He has a positive relationship with his mother and her husband who live nearby on a reserve, is involved in organized religion, has successfully completed a methadone program to deal with his drug addiction, does volunteer work and maintains his own apartment. Mr. W.P. is of aboriginal heritage. The report concludes with a favourable recommendation:

> I visited [W.P]'s home five times spending approximately 10 hours with him. I also visited [W.P]'s parents home twice for an hour and a half per visit. It was my observation that the homes of both were a safe and secure environment to raise a child. I observed [W.P] to be sincere and passionate in his desire to obtain custody of [H.D.] and take on a full time father role. He was able to articulate clearly to me, his ability to raise a child and I was impressed by the many changes he has made in the past three years of his life. [W.P.] was open and eager to completing the homestudy and efficiently performed his part of obtaining a criminal record check and references.

[19] Mr. W.P. and his mother testified at the trial.

[20] Ms. D.D. has raised numerous grounds of appeal. Most allege that the trial judge erred in the weight he assigned to aspects of the evidence or that he failed to consider relevant evidence. The transcription of his oral judgment, which is now available, reveals that certain of the allegations, in particular, that the judge failed to consider evidence, are not borne out by the record. The judgment does not

reflect obvious legal error, nor is such alleged in the notice of appeal. I am satisfied, however, that the grounds raised in the notice of appeal meet the very low threshold required for a stay application.

[21] Ms. D.D. is understandably disappointed by the judge's decision that H.D. be in the custody of her father. She was available at an important point in the children's lives and feels she should be permitted to continue to parent both K. and H.D.. I accept that it is her sincere belief that H.D.'s interests would be better served by remaining in her grandmother's care.

[22] The affidavits from H.D.'s teacher, Jane Pitts and from Kim Collins, child protection worker with the Agency, however, detail actions taken by Ms. D.D., since the custody disposition which can only be viewed as contrary to H.D.'s interests. On November 26, Ms. D.D. advised Ms. Pitts that she would be keeping H.D. home from school to spend time with her until she moved to live with her father. D.D. was encouraged to keep H.D. in school. Her school attendance thereafter was intermittent until December 9 when Ms. D.D. arrived to collect H.D. from school mid-morning. H.D. has not returned to school. The school has since been advised by Ms. D.D. that H.D. would not be returning.

[23] Ms. Collins deposes that since the custody decision, the relationship between Ms. D.D. and the Agency has broken down. Ms. D.D. has advised that she distrusts the Agency and lays blame with the Agency for H.D.'s emotional difficulties. Ms. D.D. refused to take H.D. to a counselling appointment with Jolaine States, who had prepared H.D.'s needs assessment for the trial, which appointment had been arranged by the Agency. Both Ms. Collins and Ms. Pitts depose that in the period immediately after the court's decision H.D. appeared to interact positively with her father and enjoy his company. The evidence of Ms. Pitts and Ms. Collins is uncontradicted.

[24] Mr. W.P. deposes that he had a successful pre-arranged weekend visit with H.D. on November 29 and 30 but his access that weekend was denied by Ms. D.D. until the Agency intervened. He visited H.D. at school on December 2. Ms. D.D. has not permitted him any contact with H.D. since then. He telephoned Ms. D.D. several times a day until leaving for British Columbia on December 6. He was not permitted to speak with H.D. Since his return to British Columbia, despite efforts, he has had no success in reaching H.D. This evidence is uncontradicted.

[25] Ms. D.D., through her family doctor, arranged for H.D. to meet with Dr. Krawczyk, child psychiatrist, on December 12, 2003. As mentioned above, his letter is attached to her affidavit. I attach little weight to that letter. Dr. Krawczyk "recommends" that H.D. remain in Nova Scotia with her grandmother for the time being. He bases this recommendation solely on the single visit on December 12, where he indicates that, while H.D. was present for the session, she was very quiet and Ms. D.D. did much of the talking. He does not say that he has consulted any external sources or reports, and in particular, the psychological assessments of H.D. prepared in the child protection proceeding. Ms. D.D. deposes that the doctor did review that report. Dr. Krawczyk did not consult any person other than Ms. D.D. about H.D.'s circumstances. His letter does not provide a diagnosis, but rather "impressions" of H.D.'s mental state. These include major depression, generalized anxiety disorder and ADHD.

[26] None of Dr. Krawczyk's observations are new. In her assessment of H.D.'s needs, Ms. States observed that H.D. presented as a "young girl experiencing significant fear, sadness, anxiety and anger." This is consistent with Dr. Krawczyk's impressions and was evidence before the trial judge. As indicated above, Ms. States recommended at trial that H.D. be placed in her father's care.

[27] The risk, if the stay is not granted, is that H.D. will experience the disruption of moving to British Columbia to live with her father, only to return if the appeal is successful. In **Minister of Community Services v. B.F.**, supra, Cromwell J.A. said:

> ¶ 22 Disruption of children, particularly temporary and avoidable disruption, is to be avoided. However, simple disruption, in the sense of moving children from one stable and appropriate environment to another, has usually not been taken, on its own, as sufficient risk of irreparable harm to justify a stay pending appeal. As Flinn, J.A. pointed out in **Children's Aid Society of Halifax v. B.M.J.**, supra at para. 42, " ... disruption will be present in every case involving the transfer of care of young children. If that was the sole basis on which [a stay were to be granted], it would be tantamount to making a stay automatic in cases involving the custody of young children ...". (See also, **GR. v. C.A.**, [2003] A.J.C. No. 1169 (Q.L.)(C.A. Chambers). Generally speaking, something more than evidence of the inevitable disruption of change of place of residence will be needed to demonstrate a risk of irreparable harm.

[28] Whether H.D. remains in Nova Scotia with Ms. D.D. or travels to British Columbia to live with her father, there will be significant changes in her life, as was noted by the trial judge (¶15, above), which I repeat here for ease of reference:

> . . . If I approve of Mr. [W.P.]'s plan [H.D.] has a lot of things to adjust to and she's not going to have weekend access with her grandmother or her siblings. If I leave her with [D.] she will continue to have very demanding needs over the next while. I have no reason to believe that the services that have been in place would continue because we would be at the end of a protection order. There would be no Ms. Farrell. There would be no family support worker. It will be left to [D.] to arrange those things on her own. She would continue to have a fair bit of exposure, directly or indirectly with her Mom and again the ability to supervise in a small community I recognize is very limited.

[29] In addition H.D.'s two older siblings will move to reside in a different community with their father, M.P..

[30] It is a reasonable inference from the evidence before me that much of the trauma that H.D. is currently experiencing is attributable to Ms. D.D.'s vehement opposition to the custody disposition. It is to be expected that H.D. would be apprehensive about the prospect of moving to live with her father. I am satisfied, however, that this predictable reaction has been exacerbated by the unfortunate actions of Ms. D.D. I so saying, I recognize that she believes she is acting in H.D.'s best interests.

[31] Ms. States, Samantha Landon, the social worker who prepared the British Columbia home study, and the trial judge were all favourably impressed with Mr. W.P. There is no evidence, in my view, that H.D. would be less well served by moving to live with her father while the appeal is pending, than if she stays here. Significant changes will be happening in H.D.'s life irrespective of the move. All of the factors raised by Ms. D.D. as supporting H.D. remaining in Nova Scotia in the interim were before the trial judge. Nothing new has arisen save for H.D.'s behaviour since trial. It bears noting that this is now a private custody dispute. The protection proceeding has ended and the Agency is no longer available to provide services and oversee H.D.'s care. In view of what has transpired, I am satisfied that remaining in Nova Scotia in the care of Ms. D.D., in these unusual

circumstances, actually presents a greater risk of harm to H.D. than would a move to British Columbia. I am not satisfied that there are circumstances of a special and persuasive nature warranting a stay.

Disposition:

[32] The application for a stay of the removal order is dismissed.

Bateman, J.A.