NOVA SCOTIA COURT OF APPEAL
Citation: *MacDonald v. MacDonald*, 2024 NSCA 58

Date: 20240530
Docket: CA 529567
Registry: Halifax

Between:

Angela MacDonald

Appellant

v.

Steven Daryl MacDonald

Respondent

Judge:	Farrar J.A.
Motion Heard:	May 29, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed with costs to the respondent in the amount of $1,000.00, inclusive of disbursements, payable forthwith and in any event of the cause
Counsel:	Peter Crowther and Lauren Murray, for the appellant Kate Seaman, Haileigh Fletcher and MacKenzie Anderson (articled clerk), for the respondent

Decision:

Introduction

[1] Angela MacDonald appeals the December 19, 2023 order of Justice Jean M. Dewolfe of the Nova Scotia Supreme Court (Family Division) permitting the respondent Steven MacDonald to relocate with the couple's child, C., from Kentville, Nova Scotia to Stratford, Ontario.

[2] On April 15, 2024, the parties entered into a Consent Order whereby Mr. MacDonald agreed he would not relocate with C. before August 31, 2024.

[3] On May 13, 2024, Ms. MacDonald filed a Notice of Motion for a stay. In support of her application, she filed her affidavit sworn on May 2, 2024.

[4] Mr. MacDonald opposes the motion and, in turn, has filed his affidavit dated May 22, 2024.

[5] For the reasons that follow, I would dismiss the motion for a stay with costs to the Mr. MacDonald in the amount of $1,000, inclusive of disbursements, payable forthwith and in any event of the cause.

Background

[6] The parties were married on August 23, 2004, separated on June 1, 2020, and divorced on November 15, 2022. The parties have one child, C., who is presently 11 years old.

[7] On June 23, 2022, Ms. MacDonald was found guilty of twenty counts of tax fraud. She was sentenced to three years in prison and fined $961,186.00. Mr. MacDonald has had primary care of C. since June 2022.

[8] The parties have a Corollary Relief Order from November 15, 2022. According to this Order, Mr. MacDonald has decision-making responsibility of C. and is the primary caregiver.

[9] On June 5, 2023, Mr. MacDonald filed a Notice of Motion seeking permission to relocate with C. On September 25, 2023, Mr. MacDonald's motion was heard. The parties were given an opportunity to provide closing submissions to the Court, detailing each party's plans for parenting. Ms. MacDonald's

submissions were sent on October 6, 2024 and Mr. MacDonald's submissions were filed on October 4, 2023.

[10] On November 29, 2023, Justice Dewolfe released a judgment pursuant to s. 16 of the *Divorce Act*, permitting Mr. MacDonald to relocate with C. to Ontario. A Variation Order was issued on December 19, 2023 permitting the relocation and detailing Ms. MacDonald's parenting time.

[11] On December 28, 2023, Ms. MacDonald filed a Notice of Appeal. An Amended Notice of Appeal was filed on January 15, 2024.

[12] It was Mr. MacDonald's intention to relocate with C. after school finished for the year. Ms. MacDonald requested that C. remain in Nova Scotia for the summer. Mr. MacDonald agreed to remain in Nova Scotia for the summer.

Issue

Should the Variation Order permitting relocation be stayed pending appeal?

Analysis

[13] *Rule* 90.41(2) of the *Civil Procedure Rules* provides:

> A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[14] The authorities on motions to stay in the context of the best interest of the child were summarized in *Chiasson v. Sautiere*, 2012 NSCA 91:

> [14] The law is well settled. In *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A.) Hallett, J.A. set out the principles that govern the exercise of discretion by a judge staying the enforcement of a judgment under appeal "on such terms as may be just". (Rule 90.41(2)). They are: a stay may issue if the applicant shows either (1)(a) an arguable issue for appeal; (b) the denial of the stay would cause the appellant irreparable harm; and (c) that the balance of convenience favours a stay; or (2) there are exceptional circumstances.
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> [15] In *Reeves v. Reeves*, 2010 NSCA 6, Fichaud, J.A. succinctly summarized the principles from the authorities as follows:

> [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.

[16] Saunders, J.A. more recently rearticulated the test in *Slawter v. Bellefontaine*, 2011 NSCA 90:

> [21] ... In cases involving the welfare of a child where issues of custody or access arise, ***the test this Court applies when deciding whether to grant a stay pending appeal is whether there are "circumstances of a special and persuasive nature" justifying the stay***. This test originated in *Routledge v. Routledge* (1986), 74 N.S.R. (2d) 290 (NSCA) and the principle has been consistently applied ever since. ...
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> [Emphasis added.]

[15] Ms. MacDonald must show a risk of harm by the continuing in force of the relocation order and the delay until the result of the appeal is known. The risk being that if the stay is withheld, the interests of the child would be so impaired by the time of the final judgment it would be impossible to afford complete relief. On the other side of the equation, this risk must be balanced against the risk of harm to the child if the stay is granted (*Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 125, at ¶19).

Application of the Test

Arguable Grounds of Appeal

[16] The grounds for appeal are as follows:

> (1) The Learned Trial Judge erred in law by misdirecting herself and incorrectly applying the law on relocation, specifically but not limited to;
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> a) by placing undue significance on the interests and opportunities of the move for the Respondent thereby failing to prioritize the best interests of the child;

b) by failing to give appropriate significance and weight to the impact of the relocation on the child and the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons.

(2) The Learned Trial Judge erred in law and fact in her analysis and application of the best interests of the child test, specifically;

a) by failing to give due consideration to the plan of the Appellant for the child thereby failing to properly balance the plans put forward by each parent;

b) by unduly focusing on the impact that relocation would have on the child's parenting time with the relocating parent rather than assessing the impact of the child's parenting time and relationship with both parents;

c) by failing to give due weight and consideration to the impact on the child of the separation from the Appellant and extended family in Nova Scotia

d) by failing to give due weight and consideration to the history of care of the child and surrounding circumstances;

e) by failing to give appropriate weight and significance to the status quo thereby failing to assess the full impact of the deleterious effects of the move on the child or the alternatives for minimizing harm and maximizing the benefits of the child.

(3) The Learned Trial Judge erred by misapprehending the evidence and drawing unsupported conclusions which materially affected her decision.

(4) The Learned Trial Judge erred in law and fact in her analysis by incorrectly applying the law on variation application, specifically, but not limited to:

a) by failing to give due weight and consideration to the best [interests] analysis relating to the Appellant's Variation Application separate from the Respondent's motion to relocate.

(5) The Learned Trial Judge demonstrated a reasonable apprehension of bias that prohibited the Appellant from having a fair and just trial.

[17] In most stay motions, the Court does not have the advantage of the record from the court below. I do. The Appeal Book has been filed and I have had an opportunity to review the evidence and submissions which were before Justice Dewolfe. In my view, Ms. MacDonald, on this stay motion and in her Amended Notice of Appeal is attempting to relitigate the issue of relocation. Even if Ms. MacDonald's grounds of appeal raise an arguable issue, that is not sufficient on a

stay motion where the best interests of the child are paramount. The evidence on the stay motion and the grounds of appeal are not sufficiently meritorious on their own that I would interfere with the motion judge's decision. The analysis therefore becomes whether Ms. MacDonald has demonstrated circumstances as special and persuasive in nature to satisfy me that issuing a stay would better serve or cause less harm to C.

Disruption to C.

[18] At the September 25, 2023 hearing, Mr. MacDonald provided a comprehensive plan for relocation which included schooling, extracurriculars, medical professionals, family, parenting time with Ms. MacDonald and more. Although relocation would inherently require some degree of disruption to C.'s day-to-day life, the benefits of relocation were found to outweigh the drawbacks.

[19] Justice Dewolfe recognized that she must balance the disruptions of the proposed move against the benefits to the child. She correctly cited s. 16.92 of the *Divorce Act* and then set about addressing each of the factors on the evidence before her:

> **s. 16.92(1)(a) the reasons for the relocation**
>
> [50] Mr. M. testified that he wishes to spend more time with C. He currently flies from Toronto at the beginning and end of each flight rotation. This means he is away from C. an extra four to six days per month.
>
> [51] In addition, Mr. M. has been offered a new flight training position which is Monday to Friday daytime work. This would mean Mr. M. would rarely be away from C. overnight.
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> [52] Mr. M. and DM own a home in Stratford. DM's family lives in [Stratford] and it is an advantageous location for DM's career. Therefore Mr. M. proposes that he commute to Pearson airport from Stratford, approximately 1.5 hours each [way] per day.
>
> [53] There is no indication Mr. M. wishes to move in order to reduce Ms. M.'s time with C. Indeed, he has presented a comprehensive plan for significant parenting time.
>
> **s. 16.92(1)(b) the impact of the relocation on the child**
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> [54] C. is well established in Kentville. Mr. M. believes C. will adjust to living in Stratford given the network of family and friends, and the availability of a comparable school, activities and services.
>
> [55] C. is familiar with Stratford and has spent time there on several occasions.

[56] Dr. Tougas confirmed that C. is an intelligent, capable child. She spoke highly of Mr. M. and DM's capacity for, and history of, supporting C.

[57] Mr. M. correctly pointed out that if Ms. M. returns to Cape Breton (as she testified she will probably do if C. moves) he can arrange direct flights to Sydney, so that C. can see her extended family (on both sides) in a roughly similar time frame as driving from Kentville.

[58] Mr. M. is willing to fly with C. and pay for her travel four to five times a year.

s. 16.92(1)(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons

[59] Ms. M. was C.'s primary caregiver until May 2022. Mr. M. became C.'s primary caregiver in May 2022. She spent no time with Ms. M. from June 2022 to December 2022 and no overnights from January 2023 to May 2023. She is currently spending one or two weekends per month with Ms. M.

s. 16.92(1)(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section [16.92], provincial family law legislation, an order, arbitral award, or agreement

[60] Mr. M. has complied with the statutory notice provisions.

s. 16.92(1)(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside

[61] Not applicable

s. 16.92(1)(f) the reasonableness of the proposal of the person who intends relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses

[62] Mr. M. has offered to fly with C. to Nova Scotia at his expense at least four to five times per year.

s. 16.92(l)(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance

[63] When Ms. M. was C.'s primary caregiver she repeatedly failed to comply with the parenting provisions of Court orders.

[64] Conversely, Mr. M. has followed all court orders.

[…]

[65] The Court finds that Ms. M. has not met the burden of proving on a balance of probabilities that the move will not be in C.'s best interests.

> [66] While C. is established in Kentville, this must be balanced against the benefit to C. of relocating to Stratford. The move to Stratford will provide C. with time with her Father and more stability and predictability for her home life with Mr. M. and DM. She is young and adaptable, intelligent and capable. Mr. M. has supported C.'s physical and emotional health and she is excelling in her education, activities and services in his care. Mr. M.'s plan addresses all of C.'s needs, including time with her Mother.
>
> [67] The move to Stratford will mean less flexibility of parenting time with Ms. M. However, the Court is reassured that Mr. M. will follow the direction of the Court to ensure significant parenting time for C. with Ms. M. and extended family.
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> [68] The Court finds that it is in C.'s best interests to relocate with Mr. M., therefore permits the relocation.

[20] The motion judge made strong findings of fact favouring Mr. MacDonald's proposed move to Ontario. While I appreciate the grounds of appeal raised by Ms. MacDonald intend to challenge the motion judge's findings and the weight given to those findings; there is nothing that was filed in support of the stay which would cause me to question her conclusions. They are rooted in the evidence. As noted earlier, on a stay application we owe deference to the findings of fact made by the motion judge.

[21] Ms. MacDonald says that Mr. MacDonald's refusal to extend the agreed upon stay beyond August 31, 2024, despite the appeal being heard only twelve days later is somehow unreasonable. This assertion fails to address the Court may reserve its decision for an indeterminate amount of time. This matter may not be resolved within twelve days.

[22] Ms. MacDonald argues it would be disruptive if the stay were refused and the appeal was successful. This would result in C. moving to Ontario and then back to Nova Scotia. I do not consider this to be a significant risk. As noted earlier, I am of the view the grounds of appeal, although perhaps arguable, have very little merit considering the strength of the findings by Justice Dewolfe supporting the relocation.

Disruption to the Status Quo

[23] Ms. MacDonald's primary argument in support of the motion for a stay is that the status quo would be better maintained providing C. with more stability and causing less anxiety. The evidence before Justice Dewolfe demonstrated that C. is

a resilient, adaptable, and flexible child who has been thriving in school and extracurriculars while in Mr. MacDonald's primary care:

> [66] While C. is established in Kentville, this must be balanced against the benefit to C. of relocating to Stratford. The move to Stratford will provide C. with more time with her Father and more stability and predictability for her home life with Mr. M. and DM. She is young and adaptable, intelligent and capable. Mr. M. has supported C.'s physical and emotional health and she is excelling in her education, activities and services in her care. Mr. M.'s plan addresses all of C.'s needs, including time with her Mother.

[24] The potential impact on her was already considered by the motion judge and it was ultimately determined to be in her best interest to relocate. Further, in *Chiasson*, this Court stated:

> [28] I do not accept Mr. Chiasson's submission that the move to Ottawa, because it separates him from his daughter, constitutes "circumstances of a special and persuasive nature". If that were the case, in every mobility case where a parent had moved with the child from one province to another, it would trigger a stay and compel a return of the child to the former place of residence pending appeal. In each case a judge must look at all of the circumstances before deciding whether granting or denying a stay would best serve the child's interests. As I see it, this is precisely what MacDonald, J. did when she was deciding the application to vary.

[25] A change in the status quo was clearly contemplated by the motion judge in making the determination on relocation. If this factor alone were sufficient to trigger a stay of proceedings, an appeal of a relocation finding would automatically trigger a stay.

[26] The motion judge did not look favourably on the actions of Ms. MacDonald leading up to her incarceration and her plan for C. while she was in jail:

> [40] Ms. M. has not met C.'s emotional and psychological needs. Ms. M. has displayed very little insight into the impact on C. of her actions and words. She did not prepare C. for the possibility of her incarceration. She proposed removing her from school, activities, and friends upon her incarceration. She has upset C. during contact, and has perpetuated C.'s anxiety. Ms. M. appears to have little insight into the trauma she has caused C. through her actions.

[27] The motion judge also made negative findings of fact in her decision regarding Ms. MacDonald's conduct following the parties' separation. These included:

- Ms. MacDonald refusing to facilitate parenting time between C. and Mr. MacDonald despite there being court orders in place governing parenting (¶21);

- Ms. MacDonald failing to send C. to school on the days that Mr. MacDonald was scheduled to pick her up (¶21);

- Ms. MacDonald making reports to Child Protective Services that were found to be unsubstantiated and resulted in C. being interviewed twice while at school (¶23).

[28] On the other hand, the motion judge found Mr. MacDonald was diligent in fostering a relationship between C. and her mother. He historically followed all court orders and has facilitated parenting time with Ms. MacDonald. Mr. MacDonald has consulted with C.'s psychologist, Dr. Michelle Tougas, to gradually increase Ms. MacDonald's parenting time (¶25-27).

[29] Overall, there is little evidence to suggest that relocation to Ontario, prior to the hearing of the appeal, would irreparably damage the relationship between C. and Ms. MacDonald or cause harm to C. It would be detrimental to C. if a stay were granted, the appeal dismissed, and she were to relocate in the middle of the school year.

[30] I find a stay of proceedings is not in C.'s best interest. The motion judge found that Mr. MacDonald was the appropriate primary caregiver for C. and it is in her best interests to relocate with Mr. MacDonald to Ontario. This finding was supported by the evidence she heard.

Conclusion

[31] The motion for a stay is dismissed with costs to the respondent in the amount of $1,000.00, inclusive of disbursements, payable forthwith and in any event of the cause.

Farrar J.A.