NOVA SCOTIA COURT OF APPEAL
Citation: *Doncaster v. Field*, 2013 NSCA 122

Date: 20131029
Docket: CA 413485 and 415700
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judge:	Beveridge, J.A.
Appeal Heard:	October 24, 2013, in Halifax, Nova Scotia
Written Release	October 29, 2013
Held:	Appeal is dismissed with costs to the respondent, per reasons for judgment of Beveridge, J.A.
Counsel:	Ralph Ivan Doncaster, in person for the appellant Janet Stevenson, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Mr. Doncaster filed motions to consolidate two of his outstanding appeals and for a stay of an order for interim custody and access issued by The Honourable Justice Bourgeois.

[2] I heard Mr. Doncaster's motions on October 24, 2013. During the hearing, Mr. Doncaster withdrew his motion to consolidate the appeals since granting that motion would likely jeopardize the scheduled hearing date of November 13, 2013 in relation to C.A. 413485. In addition, the remedy he was seeking in C.A. 4147500 was a re-instatement of the access provisions that he was arguing in C.A. 413485 were wrong. Accordingly, I say nothing about the merits of the consolidation motion.

[3] At the conclusion of the hearing, I reserved my decision. After carefully reviewing the available record, and the well-known criteria for granting a stay, I am not satisfied that I should grant the requested order.

[4] To understand the basis for Mr. Doncaster's request, and my reasons, additional background information is required.

BACKGROUND

[5] Mr. Doncaster and Ms. Field have four children. The parents separated in January of 2011. At first, the children lived with each parent on alternating weeks. In early January, 2012, there were Family Court proceedings. On an interim basis, custody was joint, with Mr. Doncaster having unsupervised access at set times, but not overnight.

[6] Family Court proceedings were overtaken when Mr. Doncaster filed a Divorce petition in the Supreme Court. He also filed a motion for interim custody and access. The appellant had counsel.

[7] The motion was heard by the Honourable Justice J.E. (Ted) Scanlan, as he then was, on March 5, 2012. In an oral decision (not reported), Justice Scanlan

ordered Ms. Field to have sole custody of the children on an interim basis. With respect to access, he ordered that Mr. Doncaster have no access, or any contact, direct or indirect, with the children, and prohibited him from driving on that portion of Highway No. 2 where contact could occur with Ms. Field or the children.

[8] Justice Scanlan also directed Mr. Doncaster to undergo a complete psychological assessment, and parental capacity assessment at the IWK Health Centre. The oral decision was formalized in an order dated March 13, 2012.

[9] Mr. Doncaster filed an application for leave to appeal on March 14, 2012 setting out numerous complaints of error (C.A. No.388212). On the same day, he also filed a Motion for a stay of Justice Scanlan's order of March 13, 2012. The parties duly appeared. Filing dates were set. The appeal was set down for hearing on September 14, 2012. The motion for a stay was scheduled for April 5, 2012.

[10] Justice Hamilton heard the motion for a stay on April 5, 2012. She released her written decision on May 2, 2012 dismissing the motion for a stay (2012 NSCA 44). I will refer to her reasons later.

[11] On June 1, 2012, Mr. Doncaster, through counsel, abandoned his appeal from Justice Scanlan's decision and order by filing a Notice of Discontinuance. Mr. Doncaster then discharged counsel. In subsequent correspondence with the court, on the question of costs, Mr. Doncaster confirmed that the discontinuance of the appeal was his decision. He wanted to seek a remedy in the Supreme Court.

[12] Mr. Doncaster did just that; he instituted proceedings in Supreme Court seeking a re-visiting of the interim custody and access arrangements. That proceeding was heard by Justice Bourgeois on November 19-21, and December 18-19, 2012.

[13] Justice Bourgeois heard oral testimony from four psychologists who dealt with either the parties or the children, Mr. Doncaster's former and current physician, a family member, Mr. Doncaster's current partner, and the parties. At the conclusion of the proceedings on December 19, 2012, Justice Bourgeois announced that her decision was reserved. Nonetheless, she made a number of comments to the parties to let them know some of her key findings and to begin

implementing her directions. There is no need to review them all, but some are key to understanding what happened later.

[14] Justice Bourgeois found that both Mr. Doncaster and Ms. Field obviously love their children. She found as a fact that the reluctance of the children to see Mr. Doncaster was not the result of any parental alienation by Ms. Field. Justice Bourgeois directed: that the children continue their therapy with Ms. Bird; that Mr. Doncaster continue treatment with Dr. Taylor and Dr. Aty, follow their recommendations with respect to medications, and make the necessary arrangements to start cognitive behaviour therapy.

[15] Justice Bourgeois recognized that it is a rare case indeed where a judge would order no contact with children, but she was not prepared to implement contact. She would permit Mr. Doncaster to start contact via written letter once he commenced cognitive behavioural therapy. Each letter would be reviewed by his therapist for appropriateness and sent to Ms. Bird, to be vetted by her in terms of potential impact on the children's emotional and psychological well-being. Copies of the letters would be retained and, if necessary, also subject to review by the Court.

[16] In early January 2013, Mr. Doncaster met with Tanya Broome, who he describes as his clinical social worker. He says she helped him with a series of letters that he wrote to each of his children. Apparently these letters were sent to Ms. Bird. Mr. Doncaster learned on February 27, 2013 that Ms. Bird did not forward them to the children because there was, as yet, no written decision on interim access.

[17] Justice Bourgeois released her written decision on March 7, 2013. It is reported (2013 NSSC 85). It is not necessary to review in detail her decision. It confirmed her views expressed orally to the parties on December 19, 2012. She made a number of key findings. One of these is that the hearing before her was not a re-hearing of the proceedings held before Justice Scanlan on March 5, 2012. She said she was bound by the facts that he found. However, even if she was to consider the issue of interim custody and access on a *de novo* basis, she agreed entirely with the factual findings reached by Justice Scanlan and adopted them. She wrote:

> [13] The above being said, it is not this Court's function to conduct a re-hearing of the matter before Scanlan, J., or to determine whether his findings were correct. That is the function of the Court of Appeal, not this Court on a subsequent interim hearing. In my view, the findings reached on March 5, 2012 are facts to which I am bound. Even if I am wrong in this regard, I have during the course of the present hearing, been provided with the evidence presented at the March 5, 2012 hearing and of course, additional evidence from both parties. If I am obligated to consider matters on a de novo basis, I agree entirely with the factual findings reached by Scanlan, J., and adopt them.

[18] On March 18, 2013, Mr. Doncaster filed his Notice of Application for leave to appeal and Notice of Appeal from the decision of Justice Bourgeois. This is appeal file C.A. 413485. Filing dates were set and the appeal set down to be heard by a panel of this Court on November 13, 2013. Mr. Doncaster has filed, without objection by the respondent, amendments to the Notice of Appeal, the latest being May 23, 2013. Mr. Doncaster filed the transcript of the proceedings before Justice Bourgeois, but not the documents, including copies of the paper exhibits, required to be included in Part I of an Appeal Book. He was to file a factum by September 2, 2013. He has not done so.

[19] In the meantime, Mr. Doncaster filed a motion on March 25, 2013 in the Nova Scotia Supreme Court for an order directing Ms. Bird to comply with the decision of Justice Bourgeois to present his letters to his children. Both Ms. Bird and Ms. Field responded. There was, at that time, no order that encapsulated Justice Bourgeois' directions of December 19, 2012, nor her written reasons of March 7, 2013.

[20] Justice Bourgeois heard the enforcement motion on May 1, 2013. She dismissed the motion in written reasons dated May 7, 2013, which are now reported (2013 NSSC 149). Bourgeois J. referenced her concern over Mr. Doncaster's lack of access to his children, but emphasized that despite that concern, her primary consideration was, and continued to be, the best interests of the four children (¶23). She explained why, on December 19, 2012, she had given Mr. Doncaster the opportunity to start to take the steps she felt were necessary before contact by correspondence would be permitted:

> [24] The Court was able to readily conclude after the close of the hearing that Mr. Doncaster lacked insight into how his behaviours impacted negatively, both directly and indirectly, on his children. It was clear, as recommended by the

> assessor, that he would require not only pharmacological intervention in relation to his ADHD symptomology, but also cognitive behavioural therapy. From the evidence presented at trial, it was apparent that finding various professionals willing and able to engage in providing services to members of this family had been at times challenging. As opposed to waiting for the issuance of a full written decision, the Court felt it prudent to give Mr. Doncaster the opportunity in advance of the release of a decision, to firstly find an appropriate therapist, and then initiate therapeutic intervention.
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> [25] Although it was hoped the comments on December 19, 2012 would allow Mr. Doncaster to get started on the process contemplated by the Court, the comments were not intended to be enforceable against either party or Ms. Bird. Further, until a written order is issued, the Court is of the view that the written decision released March 7, 2013 also remains unenforceable.

[21] Justice Bourgeois also concluded that even if what she had said and written about access by vetted correspondence were enforceable decisions, she would decline to do so because she was not satisfied that Mr. Doncaster had commenced cognitive behavioural therapy. Further, it would not be appropriate for Ms. Bird to be distracted from the paramount importance of her role as therapist for the children, and there was a potential conflict of interest for her if she acted as a gatekeeper for correspondence from Mr. Doncaster.

[22] Lastly, in light of the motion for enforcement, the evidence heard and the factual findings, Justice Bourgeois concluded that it was appropriate to change her written decision of March 7, 2013. She recognized that it is highly unusual for a parent to be prohibited from exercising access with their children. To do so required cogent and compelling evidence that access would not be in the best interests of the children. The Court found that this was such a case, but had been hopeful that the directed steps to Mr. Doncaster would be able to rectify the situation. (¶35). She doubted that he had meaningfully undertaken steps to gain control over his behavioural unpredictability and gain insight about the impact of his actions on the children.

[23] Justice Bourgeois was not satisfied that it was appropriate for Mr. Doncaster to send letters directly to the children. She concluded that her written decision of March 7, 2013 would be modified as it related to access: Mr. Doncaster would not be permitted to have contact directly or indirectly with the children.

This could be reviewed no earlier than three months hence. Her reasons are concisely set out as follows:

> [39] So where does that leave the Court in terms of considering access between Mr. Doncaster and his children? Although both are extremely important considerations, the best interests of the children must take precedence over Mr. Doncaster's right of access. The Court previously concluded that direct access was not in the best interest of the children. Implementing access via correspondence is simply not workable at the present time. There is no other form of access that the Court views as being in the best interest of the children at this time.

[24] On May 21, 2013 Mr. Doncaster filed a Notice of Application for Leave to Appeal and Notice of Appeal from the decision by Justice Bourgeois of May 7, 2013. This is appeal file C.A. 415700.

[25] On July 5, 2013, Justice Bourgeois issued her formal order encapsulating her written decisions of March 7 and May 7, 2013. Sole custody was awarded to Ms. Field on an interim basis. Mr. Doncaster was denied any access or contact with the children. He was ordered to continue treatment with his family physician and psychiatrist and to follow all recommendations made by them regarding treatment. The order also specified that to assist Mr. Doncaster in gaining insight into how his behaviours are perceived by others, including his children, and to acquire the necessary tools to more positively conduct himself, he shall arrange and commence cognitive behavioural therapy with a qualified therapist, which shall include an anger management component.

ISSUE

[26] The sole issue for me to decide is: should I grant a stay of the order of Justice Bourgeois of July 5, 2013?

[27] The filing of a notice of appeal has no impact on the operation or effectiveness of an order. In recognition that there may be circumstances where an appellant should be able to obtain relief from the consequences of a trial judgment, pending his or her appeal, an appellant can apply under *Civil Procedure Rule* 90.41 for a stay. The power to do so is broadly worded. The *Rule* provides:

> 90.41(1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.

> (2) 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.

[28] The usual test for a stay is the one articulated by Hallett J.A. in *Purdy v. Fulton Insurance Agencies Ltd*. (1990), 100 N.S.R. (2d) 341. He wrote that a stay should only be granted if an appellant satisfies the court that there is an arguable issue raised by the appeal; if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm; and that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; or if the court is satisfied that there are exceptional circumstances that make it fit and just that a stay be granted.

[29] However, Justice Hallett was careful to point out that the three part or stage test is not the only test; where requests are made for stays of custody orders, a stay should only be ordered if special circumstances exist such that it would be harmful to a child's welfare if the order was acted on before the appeal could be heard. He wrote of this as follows:

> [13] That is not the only test: this Court has considered stays of custody Orders on the ground that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (*Millett v. Millett* (1974), 9 N.S.R. (2d) 26 (N.S.C.A.); *Routledge v. Routledge* (1986), 74 N.S.R. (2d) 290 (N.S.C.A.)). These cases involved children's welfare, not monetary judgments. In *Millett* the stay was granted; in *Routledge* refused. In the latter case, Clarke, C.J.N.S., stated:
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> > "In my opinion, there need to be circumstances of a special and persuasive nature to grant a stay."

[30] The shift in focus for an appellate court judge when considering a motion for a stay where a child's custody, access or welfare is at issue was emphasized twenty years later by Fichaud J.A. in *Reeves v. Reeves*, 2010 NSCA 6. He set out concisely the applicable legal principles that govern:

> [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 para. 7. *D.D. v. Nova Scotia (Minister of Community Services)*, 2003 NSCA 146, at para. 9-11. *Minister of Community Services v. B.F.*, [2003] N.S.J. No. 421 (Q.L.) (C.A.), at para. 13, 19. *Family and Children's Services of Annapolis County v. J.D.*, 2004 NSCA 15, at para. 10-14. *Minister of Community Services v. D.M.F.*, 2004 NSCA 113, at para. 12-15, 20. *Family and Children's Services of Cumberland County v. D.Mc.*, 2006 NSCA 28, at para. 12-13. *The Children's Aid Society of Cape Breton-Victoria v. L.D.*, 2006 NSCA 32 at para. 18-19. *Gillespie v. Paterson*, 2006 NSCA 133 at para. 3-4. *Crewe v. Crewe*, 2008 NSCA 68, at para. 7.
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> [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.

[31] Mr. Doncaster was well aware of these legal principles. They are the ones that Justice Hamilton referred to, and applied when she considered, and then dismissed, his motion for a stay of Justice Scanlan's order of March 13, 2012 (2012 NSCA 44 ¶20-22)

[32] I will assume that Mr. Doncaster has raised an arguable issue. In my opinion, there are two hurdles to Mr. Doncaster's request for relief that he has not overcome. First, it is the relief he has requested. His written brief requests "an order staying Justice Bourgeois' decision, ordering Ms. Field to provide copies of my letters (exhibits A-F) to my children, and an order allowing access between myself and my children shortly after the resumption of communication". Mr. Doncaster's oral submissions echoes the relief he seeks, although the request for access was qualified in that it be supervised.

[33] The problem is: Mr. Doncaster is not really seeking a stay of Justice Bourgeois's order or its enforcement; he is asking that I grant him the very relief he may be able to obtain should he ultimately be successful on his appeal. That is,

access to his children via correspondence and in person. If that type of arrangement for access had been in place prior to Justice Bourgeois' order, and I was satisfied that a stay of Justice Bourgeois' order would better serve, or cause less harm to, the children's interest pending the outcome of the appeal, I would do so.

[34] No such arrangement was in place. What was in place? Justice Scanlan's order of March 13, 2012 that directed that Mr. Doncaster have no contact directly or indirectly with the children of the marriage. Whether or not such an order was still in the best interests of the children was at the core of the five day hearing before Justice Bourgeois in November and December 2012. Justice Bourgeois, after hearing from many experts, and the parties, decided it was not in the children's best interests at that time to substantively alter the interim custody and access arrangements.

[35] Justice Bourgeois' decision as to the appropriate access arrangements, keeping the best interests of the children paramount, is the second hurdle that stands in the way of granting the relief requested.

[36] Justice Bourgeois recognized in her oral comments of December 19, 2012, and in her written decision of March 7, 2013, that it was a very rare case where a judge would order no contact. She also implicitly recognized the understandable angst felt by Mr. Doncaster at being denied contact with his children, whom he loves. She recited his stated desire to see his children, and willingness to follow and abide by any restrictions or conditions the Court might impose.

[37] Nonetheless, the trial judge concluded that it was not in the best interests of the children to re-initiate access. Her key findings are set out in three paragraphs. They are:

> [133] I am acutely aware of the time which has passed since March 5th, 2012. I am mindful of the "maximum contact" principle contained in s. 16 (10) of the *Divorce Act*. I cannot conclude however, that it is in the best interest of these children to re-initiate access with their father at this time.
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> [134] In order to move towards normalizing his relationship with the children, Mr. Doncaster has much work to do. I accept the recommendations of Ms. Komissarova in her psychological assessment in terms of the therapeutic approach to be taken with and by Mr. Doncaster.

> [135] It is also important however, for all parties to recognize that the overall goal should be to re-integrate Mr. Doncaster into the lives of his children, if it is in their best interests to do so. This is premised however, upon him engaging in therapy and gaining insight into his behaviour and obtaining control over his behaviour. The children need to continue with their own therapy, and when appropriate, be prepared for re-initiating in person contact with their father.

[38] As earlier detailed, she decided that if Mr. Doncaster started cognitive behaviour therapy and follow medical advice, she was prepared to permit access via correspondence to be vetted by Mr. Doncaster's therapist and the children's.

[39] Mr. Doncaster's efforts to comply with these requirements were canvassed in the hearing of May 1, 2013 before Justice Bourgeois. It is evident from Justice Bourgeois' written decision of May 7, 2013 (2013 NSSC 149) that she had the first group of letters written by Mr. Doncaster to his children, but that she had no real details about the qualifications of his therapist to provide cognitive behavioural therapy or if that process had commenced. It was therefore premature to consider if the letters should have been conveyed to the children (¶27).

[40] Mr. Doncaster argues that he has produced evidence on this motion for a stay that was not before Justice Bourgeois. He says all four sets of letters that he wrote to his children are exhibits to his affidavit of October 15, 2013, and that his Clinical Social Worker, Tanya Broome, either assisted him or reviewed the letters.

[41] Missing from his affidavit is any indication of the qualifications of Ms. Broome to undertake cognitive behavioural therapy or that he engaged in such therapy with Ms. Broome. In his oral submissions of October 24, 2013, he allowed that they had discussed cognitive behavioural therapy. There is no evidence he commenced or underwent such therapy. His affidavit recites that he last met with Ms. Broome on April 24, 2013, when Ms. Broome advised that she does not feel competent to assist him, particularly as it relates to Asperger's syndrome and she would no longer see him.

[42] Lastly, Mr. Doncaster attached to his affidavit a July 8, 2013 a letter from Andrea Cook, Registered Psychologist. Ms. Cook recounts having met with the appellant and his current partner. Based on her meeting with them and the history they related to her, it was her opinion that Mr. Doncaster meets the original DSM-

IV criteria for an Asperger's diagnosis; or the new DSM-V Autism Spectrum Disorder.

[43] When and how access should be exercised to promote or safeguard the best interests of children is a fact driven determination. It is not my function on a stay motion to re-interpret, re-weigh or otherwise substitute my opinion as to what is in the children's best interests for that of the trial judge. The conditions the trial judge imposed might not be the ones I would have. But I see no basis to do anything but defer, on a motion for a stay, to the determination that she made as to what was required in the best interests of the children.

[44] Furthermore, I see nothing in the affidavit of October 15, 2013 that convinces me that access via correspondence and/or in person must be ordered pending the hearing of the appeal, a scant three weeks hence, such that to do otherwise would create such a risk of harm to their interests that a stay or like remedy is warranted.

[45] The motion is dismissed with costs to the respondent in the amount of $1500, inclusive of disbursements.

Beveridge, J.A.