NOVA SCOTIA COURT OF APPEAL

Citation: Wedsworth v. Wedsworth, 2005 NSCA 10

Date: 20050121
Docket: CA 238283
Registry: Halifax

Between:

Deborah Louise Wedsworth

Appellant

v.

John James MacLeod Wedsworth

Respondent

Judge:	Cromwell, J.A.
Application Heard:	January 20, 2005, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed.
Counsel:	Colleen J. Scheuer, for the appellant respondent in person

Decision:

[1] The appellant has appealed the decision and order of Coady, J. in the Family Division of the Supreme Court. After nine days of hearing, the judge ordered that the corollary relief judgment between the parties dated December 31, 1998, be varied:

(1) to grant sole custody of the three children of the marriage to the respondent, Mr. Wedsworth;
(2) to suspend Ms. Wedsworth's access to the children for four weeks; and
(3) to provide for two supervised contacts with the children by Ms. Wedsworth each month beginning in February.

[2] The judge also ordered that the matter would return to Court in mid April 2005 for review of access by Ms. Wedsworth.

[3] The appeal has been set down to be heard on May 11th, 2005. Ms. Wedsworth applies for a stay of Coady, J.'s order.

[4] At the conclusion of the hearing in Chambers, I dismissed the application with reasons to follow. These are my reasons.

[5] Until the order under appeal, the children, John (born April 16, 1992) and twins, Michael and Joseph (born January 13, 1996) had been in the sole custody of Ms. Wedsworth since separation in April of 1997.

[6] Coady, J. recognized that his order was drastic. As he put it, "this is one of of those rare and exceptional cases where drastic action is required to meet the best interests of the children." The judge found:

> [61] This is a family that has not recovered from the impact of family breakdown. More importantly, the consequences of the *status quo* is adversely affecting these young children. The evidence leads me to believe that there is no possibility this situation can be fixed. Communication will not improve. Co-parenting will never happen. I agree with the assessor that the *status quo* cannot continue and that the children must be "rescued" from their present circumstances.
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> [62] This is one of those rare and exceptional cases where drastic action is required to meet the best interests of the children. It is a case where the wishes of the children must be given little weight. It is one of those few cases where the parental rights of one parent must be severely curtailed in the interests of creating a healthy family environment for these children. It is unfortunate for the parents that things have gotten so bad that the court is left with such limited options.

...

> [65] I have made this decision as a result of several factors that are apparent on the evidence. I have placed considerable weight on the evidence of Ms. van Feggelen. I have concluded that if I do not vary custody, the boys will be irreparably harmed. Further, Ms. Wedsworth has no insight into the boys' plight and, in fact, has created the *status quo*. On the other hand, Mr. Wedsworth is restrained and has shown himself more intuitive when it comes to the children's best interests. He is more committed to non-custodial access than Ms. Wedsworth. He enjoys a stable life, a functional family and an active extended family.
>
> [66] I have also based my decision on the fact that in the foreseeable future it is unlikely that Ms. Wedsworth will change her attitude towards Mr. Wedsworth. It is unlikely that she will change her approach to parenting given that she will not accept her shortcomings.

[7] The judge also expressed concerns about what Ms. Wedsworth might do in the face of an adverse ruling. The judge referred to the evidence given by Ms. van Feggelen, a registered psychologist, who prepared a custody and access assessment. The assessor raised concerns about what Ms. Wedsworth might do in the face of an adverse ruling and indicated that she had the potential to do something irrational. The judge shared these concerns. He said, at para. 72:

> Ms. Wedsworth is unpredictable. She has not shown restraint in the past. She has ignored past court orders and can legitimize any action that is consistent with her view of the world.

[8] The appellant recognizes that the test to be met in an application for a stay of a judgment concerning the custody of children is set out in **Children's Aid Society of Halifax v. J.B.M.** (2000), 189 N.S.R. (2d) 192; N.S.J. No. 405 (Q.L.) (C.A.) at paras. 29 - 31. There must be circumstances of a special and persuasive nature in order to grant a stay.

[9] I see no such circumstances present in this case. The appellant submits that there is significant trauma to the children associated with the order changing custody. However, the change in custody has already occurred. The children have been enrolled in new schools as of January 10th and, according to the affidavit evidence filed by Mr. Wedsworth, which was not challenged, the children have adjusted well to their new setting.

[10] If I were to grant the stay, the children would once again be uprooted and returned to Ms. Wedsworth with the possibility that, if her appeal does not

succeed, they will once again be shuffled back to reside with their father. This would compound the trauma for these children rather than relieve it. Nor on the material before me am I persauded that the learned trial judge's reasons disclose a clear and determinative legal error so as to constitute special and persuasive circumstances. Of course, I have formed no view of the ultimate merits of the appeal.

[11] The trial judge had the advantage of hearing several days of evidence before reaching the decision he did. He gave extensive and carefully crafted reasons for the decision he took which he recognized to be drastic and exceptional. It is not the role of a judge in Court of Appeal Chambers to second guess his conclusions, absent clear and determinative legal error or circumstances of an exceptional and compelling nature. I see none here. The application for a stay of execution of Coady, J.'s order is dismissed.

Cromwell, J.A.