NOVA SCOTIA COURT OF APPEAL
Citation: *Zinck v. Fraser*, 2005 NSCA 106

Date: 20050712
Docket: CA 249933
Registry: Halifax

Between:

Crystal Zinck

Appellant

v.

Steven Fraser

Respondent

Judge(s):	MacDonald, C.J.N.S.
Application Heard:	July 7, 2005, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed.
Counsel:	Fergus Ford, for the appellant Amy Sakalauskas, for the respondent

Decision:

[1] On June 9th of this year, Justice Legere-Sers of the Family Division issued a decision transferring primary care of the parties' child from the appellant mother, Ms. Crystal Zinck, to the respondent father, Mr. Steven Fraser. Ms. Zinck has appealed that decision and subsequent order issued on June 22, 2005. In the meantime she has applied to stay this order pending the appeal which is set for November 15, 2005. At the conclusion of the hearing, I dismissed the application with reasons to follow. Here are my reasons.

The Decision Under Appeal

[2] Austin Gladue-Fraser is now four years of age. From the time the parties separated in May of 2002 until the judge's decision, Austin had lived with his mother. Throughout most of this time period, Mr. Fraser has enjoyed liberal access.

[3] In January of 2004, the parties agreed to a joint custody arrangement. Just one month later, Ms. Zinck applied to vary the terms of the order so as to accommodate her proposed re-location with Austin to Calgary. In response, Mr. Fraser in November of 2004 applied to have Austin remain in his care. Shortly before the scheduled hearing, Ms. Zinck abandoned the relocation plan. However, Mr. Fraser's request for primary care remained a live issue for the judge.

[4] After the two-day hearing, Justice Legere-Sers ruled in Mr. Fraser's favour. Custody would remain joint but Mr. Fraser would become the primary care-giver. She was motivated to direct this change because of the ongoing conflict between the parties and the history of troubled access arrangements. These problems she attributed directly to Ms. Zinck:

> ¶ 162 Further, I am satisfied that of the two parents Mr. Fraser will make the greatest effort to ensure that Austin remains significantly connected to his mother. The historical evidence and conduct of Ms. Zinck supports the fact that she will sabotage the child's access to the father and his extended family. In this case, the extended families have been a sustaining influence in this child's life as these young parents learn to parent and be self sufficient. There is evidence that Mr. Fraser has returned Austin early in order to attend a party with a friend and to attempt to accommodate Ms. Zinck's schedule. This goodwill has not been reciprocated.

> ¶ 163 The evidence further satisfies me that Mr. Fraser's telephone access has been sabotaged and made difficult, more recently around the court hearing. The explanation provided by Ms. Zinck is not satisfactory.
>
> ¶ 164 The travelling time has been an imposition that has been unnecessary and has placed the child at risk. It was not only unnecessary to drive to Jeddore to pick up the child when Ms. Zinck lived in Dartmouth, it was unreasonable. It made no sense.

[5] Furthermore, the judge found Mr. Fraser to be the more stable parent and the parent more likely to ensure that Austin would enjoy a healthy relationship with both parties:

> ¶ 166 He has shown an ability to sustain a commitment, to accept help and to learn. On March 15, 2004 he began to attend a program for Dad's with Family SOS in Halifax. He also has had the positive influence of his parents in assisting him as he attempts to regain his financial security. He intends to continue this program for Dad's and it is an appropriate indication that he is prepared to cover his deficits by drawing on community resources.
>
> ¶ 167 I have no doubt from the early relationship that both of these parents made mistakes in parenting, based on lack of insight and information. Mr. Fraser has displayed an intent to take on the role of parent and father, he has exhibited financial responsibility, a desire to achieve self sufficiency and financial security and he has the insight and exhibited an intent, despite the many obstacles, to make sure his child has a significant connection with himself and with his mother.
>
> ¶ 168 In contrast, the evidence before me causes me to conclude that, were it up to Ms. Zinck, she would impair access between the child and his father. This access is not only beneficial for his development, it is necessary. This involvement ensures him a viable living arrangement, stability of family connection, and a financial base that is more stable than that which is offered by his mother. . . .
>
> ¶ 183 Of the two parents, Mr. Fraser is more likely to maintain appropriate and healthy contact between the child and his mother. His plan best addresses the child's needs.
>
> [Emphasis by the trial judge.]

The Test for a Stay

[6] This court 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.) considered the heavy onus on an applicant seeking to stay a custody order. Flinn, J.A. stated:

> ¶ 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).

[7] At the same time Flinn, J.A. did recognize that in the face of an apparent error in the trial process, the disruption inherent in a custodial change could represent a special circumstance warranting a stay:

> ¶ 44 There could be a case where, even with the limited information that a Chambers judge has at his disposal, it might be apparent to the Chambers judge that there, likely, was an error in the trial process, and, for that reason, the appeal is likely to succeed. In such a case, the matter of the disruption of the children would, in all probability, be a circumstance of a special and persuasive nature warranting a stay.

[8] In **J.W. v. D.W.** (2005), 229 N.S.R. (2d) 350, this court recently considered an application to stay an order that transferred custody from one parent to another. Cromwell, J.A. succinctly summed up this test:

> ¶ 8 There must be circumstances of a special and persuasive nature in order to grant a stay. . . .
>
> ¶ 11 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.

Conclusion

[9] There are no special and persuasive circumstances in this case that would justify a stay of Justice Legere-Sers' order. She had the opportunity over two days to see and hear the witnesses when considering the best interests of this young boy. The evidence included an independent assessor's recommendation for sole custody to Mr. Fraser. In her lengthy decision she carefully considered all the evidence in detail.

[10] Furthermore, I see no "clear and determinative legal error." I acknowledge the appellant's main submission in this regard. She asserts that the judge clearly erred in concluding that the appellant's relocation plans represented a change in circumstances material enough to justify a variation. The appellant urges that because she had abandoned those plans before the hearing, this was no longer an issue for the judge to consider.

[11] I cannot accept this submission for the following reasons. First of all the judge recognized the need to meet the threshold test for material change and in fact identified this as a serious and compelling issue:

> ¶ 188 The most serious compelling legal argument raised by Mr. Ford on behalf of the mother relates to the question whether there has been a sufficient change in circumstances to meet the threshold test outlined in *Gordon v. Goertz* [1996], 2 S.C.R. 27 SCC to move the Court to the second stage; a broad consideration of the best interests of the child. . . .
>
> ¶ 192 The material change required by *Gordon* relates to a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child which materially affects the child. The change must have been unforseen or not reasonably contemplated by the judge who made the initial order.

[12] Furthermore, while the appellant abandoned her intention to re-locate, it is clear that the judge was nonetheless troubled by that fact that she created this plan in the first place. She was also troubled by the fact that the appellant waited until a week before the hearing before abandoning this plan. The judge felt that this plan was presented to obstruct the existing consent order. Thus for the judge, it was not enough that the appellant abandoned the plan. The fact that she raised it in the first place was disconcerting enough. In other words, it appears as though the judge felt

that the appellant demonstrated bad faith in circumstances that commanded good faith. For her, this represented the requisite change in circumstances. She noted:

> ¶ 155 The evidence further satisfies me that the Consent Order was, at least with respect to Ms. Zinck, entered into to address Mr. Fraser's fear that she would remove the child from Nova Scotia. In hindsight it appears it was not entered into in good faith. The mother never intended to put this issue to rest.
>
> ¶ 156 The testimony establishes that her planning for the Calgary trip lacks certainty and does not provide a solid base for Austin. Further, it would take her from her own family and his family, without allowing for extensive supports, which she has required in the past and requires in the future if she moved.
>
> ¶ 157 It was not well thought out and it appears to be an attempt to move Austin away from his father and family and to sabotage Mr. Fraser's contact with his child.
>
> ¶ 158 The proposals that she made for access were not only inappropriate for the child but were not founded in good faith.
>
> ¶ 159 It is clear that Ms. Zinck is not reasonable or flexible with respect to access arrangements in Nova Scotia. That historic conduct shows no signs of changing even with the mother's assertion that she would be flexible in Calgary.
>
> ¶ 160 While the mobility issue has been withdrawn at the last minute it was a last minute decision recognizing the frailty of the request to move.

[13] In reaching my conclusion, I acknowledge that the appellant will make these same submissions at the appeal proper and there will have the benefit of the complete record. However on the limited record before me, and given my narrow scope of review, I see no error sufficiently "clear" and "apparent" to justify a stay.

[14] Furthermore and in any event, the judge's ruling should not represent a drastic disruption for Austin. Mr. Fraser has always been a part of his son's life. In fact he was the primary care-giver for several months in 2002. As well, despite the assessor's report recommending sole custody to Mr. Fraser, the judge maintained the existing joint custody regime "in order to retain the mother's involvement in a significant way." To this end, Austin will enjoy ongoing access with his mother.

[15] There is nothing sufficiently compelling to warrant a stay in this matter. The application is dismissed.

MacDonald, C.J.N.S.