NOVA SCOTIA COURT OF APPEAL
Citation: ***Young v. Stephens***, 2015 NSCA 86

Date: 20150929
Docket: CA 441193
Registry: Halifax

Between:

Shelley Anne Young

Appellant

v.

Michael Stephens

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	September 17, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Daphne Williamson, for the appellant Kim Johnson, for the respondent

Decision:

[1] Honour Young Stephens just turned 5 years old earlier this month, and she just started school. She is a very lucky little girl in many respects, most notably that she has two parents that have been actively involved in her care, and clearly love her very much.

[2] For a significant portion of her life, Honour has been in the equal care of her parents, alternating between their homes on a weekly basis. She has been raised with the goal of fully knowing, understanding and living her Mi'kmaq heritage and culture.

[3] Because of Honour starting school, and the fact that her parents do not live close enough together to permit a week-on/week-off schedule to continue, a judge had to decide where Honour should live. Each of her parents wanted to have primary care of Honour, with generous access to the other parent.

[4] On June 8, 2015, Justice Douglas Campbell decided that it was in Honour's best interests to be in the primary care of her father, Mr. Stephens, with significant parenting time with her mother, Ms. Young. Ms. Young has appealed that decision, and has brought a motion requesting that the decision be stayed until her appeal can be heard.

[5] The stay motion was heard on September 17, 2015. I had the benefit of reviewing affidavits filed by both parties and the written submissions of their counsel. I also had the benefit of hearing the very capable submissions of counsel on behalf of their respective clients at the hearing. At the conclusion of argument, I reserved my decision to give full consideration to the parties' evidence and submissions.

The Legal Framework

[6] Both parties are in agreement with respect to the principles which apply to a motion for stay in the context of a child custody order. These were recently summarized by Farrar, J.A. in **Chiasson v. Sautiere**, 2012 NSCA 91, as follows:

> [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.

[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. ...

[17] Mr. Chiasson 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. The risk being that if the stay is withheld, the rights and interests of the child would be so impaired by the time of final judgment that it would be impossible to afford complete relief. On the other side of the scale, this risk must be balanced with the risk of harm to the child if the stay is granted (**Minister of Community Services v. B.F.**, 2003 NSCA 125, ¶19).

Analysis

[7] In her Notice of Appeal, Ms. Young puts forth eight grounds of appeal. For the purpose of this decision, I have assumed that there is at least one arguable issue raised. In my view, the determinative issue on this motion is whether Ms. Young

has demonstrated circumstances of a special and persuasive nature to satisfy me that issuing a stay would better serve, or cause less harm to Honour.

[8] In her written and oral submissions, Ms. Young raises three issues as to why a stay is warranted:

- She is fearful that Honour will be physically harmed in her father's care;
- She is fearful that Honour will lose the benefit of having been raised since birth speaking Mi'kmaq with her mother, and being immersed in her cultural heritage should she remain in her father's primary care; and
- She is extremely concerned that Honour's mental health and psychological well-being may be irreparably harmed should a stay not be granted.

[9] I will address each of the above concerns separately.

Fear of Physical Harm

[10] Ms. Young recounts in her affidavit sworn in support of this motion, that Honour has expressed being fearful of her father. After recounting examples of aggressive and assaultive behaviour Mr. Stephens has perpetrated, including against herself prior to their separation in 2011, she says:

> 7. Mr. Stephens was however, convicted of savagely beating another man at a Truro bar in 2009 and is known to have assaulted his brother in a rage several years ago. He has a bad temper and I have reason to believe that he has physically disciplined Honour and that she fears him, . . .

[11] Ms. Young recounts comments made by Honour which Ms. Young views as being very concerning and raises the question of how Mr. Stephens is treating the child while she is in his care.

[12] In his affidavit, Mr. Stephens denies being abusive in any way towards Ms. Young and that he has never used physical discipline with Honour. He states:

> 29. I have never been abusive toward the appellant. Not physically, not verbally, not emotionally, and not psychologically. I am not a violent man. I was convicted of assault in 2009 following a bar fight. I deeply regretted the incident, served my house arrest (living with Ms. Young at the time), and have never had any other issues with the law in my life. All of that was

> before our daughter was born. On occasions when Shelley has been angry with me, she has threatened to make these accusations against me to get custody of our daughter. This evidence was before Justice Campbell.
>
> 30. I do not hit or spank Honour and never have.
>
> 31. Honour is not and has never shown any sign that she is "afraid of me".

[13] From the material before me, I am satisfied that Ms. Young's concerns about Mr. Stephens' potential violence and Honour's fear of her father, have been longstanding – existing well before the June 8, 2015 custody decision. I am further satisfied that Ms. Young made these concerns known during the custody hearing. Her grounds of appeal support this conclusion, as she alleges the trial judge failed to give adequate weight to the evidence in that regard.

[14] Clearly the trial judge concluded Honour was not at risk of physical harm in her father's care after hearing the evidence of both parties. Although Ms. Young asserts Honour is at risk should a stay not be granted, in my view, this position is inconsistent with the parenting plan she proposed to the trial judge where Mr. Stephens would have generous access with Honour including a continuation of the longstanding week-on/week-off schedule for this past, and future summers. The same willingness to provide Mr. Stephens with "generous" access was repeated through counsel at the hearing before me.

[15] I am not satisfied, with respect to this concern, that Ms. Young has demonstrated special or persuasive circumstances justifying a stay.

Fear of Language Loss / Loss of Cultural Identity

[16] This issue was squarely before the trial judge. In his decision, he writes:

> [11] It is to be noted that both of the parents and the child are of First Nations. They belong to the Mi'kmaq community. Therefore a number of cultural factors must be at the forefront of the Court's mind in deciding what to do about this parenting dispute. Of particular concern to the mother is the fact that the father does not speak his native Mi'kmaq language (although he is attempting to learn it) while she, by stark contrast, not only speaks the language but teaches it and is therefore, to a degree, an expert with respect to it.
>
> [12] The mother's affidavit devoted many paragraphs to a description of her ability to promote and respond to the cultural needs of the child along with many other types of needs. I would not dispute any of those assertions.

> [13] The father resides in a First Nations community. He stresses his ability to expose the child directly to cultural amenities by virtue of that fact and also by reference to the fact that his parents and other relatives live there as well and are active in the child's life.
>
> [14] If there is any good news in this case, it is the fact that the child will have the benefit of being exposed to many cultural events and teachings while in the care of each of the parents respectively.
>
> [15] I am satisfied that the many cultural issues that are urged upon me to be determinative of the legal issue are not at all determinative because of the fact that both parents have a great deal to offer the child in that regard and because the opposite parent will play a significant role no matter what the parenting plan may be, given my conclusion that both parents should be involved in a major way.

[17] In the evidence presented before this Court, Ms. Young asserts that Honour will lose her language and cultural identity should she primarily live in Millbrook with her father. She states in her affidavit:

> 15. Mr. Stephens has enrolled Honour in public school in Truro, near the reserve. Neither Mi'kmaq language nor culture are taught there, nor are he or other members of the community fluent speakers and opportunities to engage with the language or cultural activities in the Millbrook community are very limited. Therefore, I have great concern that Honour will lose some of her language and cultural pride in that environment.
>
> 16. I presented evidence on these concerns during the trial but I believe that it was not fully appreciated by Justice Campbell and he did not make any inquiries which would have enabled him to better appreciate the culturally sensitive or significant nature of his decision, nor do I feel that he gave proper consideration to Mr. Stephens' history of aggression toward myself or others or my efforts to facilitate access since the separation, among other errors that I feel were made.

[18] Ms. Stevens, Operations Supervisor at the Millbrook Cultural & Heritage Centre swore an affidavit in which she says that "very few people" speak Mi'kmaq in the Millbrook community. She further states she knows Mr. Stephens' family and they do not speak the language.

[19] As to Honour's exposure to the Mi'kmaq language and culture, Mr. Stephens states in his affidavit:

> 5. With respect to the cultural issues raised in Shelley's affidavit, she made the same statements in her affidavit at the time of the trial. The following are my responses to her opinions, taken from my affidavit sworn June 5, 2015:

12. My home address in Millbrook has remained the same since March 2011. Honour has lived approximately half her life in Millbrook since her birth. Honour has always maintained her place in the community and is well known by all. She is a registered Millbrook Band member and has many family members, including her mother's relations that also live in the community. Honour's network of friends and family in the community is vast and has always been consistent. Honour has attended multiple community functions, ceremonies and events, including powwows, sweat ceremonies, sacred fires, pipe ceremonies, fishing derbys, feasts, St. Anne's celebrations, various sporting events and trips, annual harvests of moose, deer, rabbit, salmon, bass, gaspereau, trout, smelt, clam, lobster and various medicines. My family also has a garden that we harvest annually.

. . .

16. . . . I do not speak Mi'kmaq fluently yet, however I have taken full advantage of the language programs available in my community and ceremonies that take place. I have learned to read in Mi'kmaq and can participate in basic conversations. There are also multimedia tools available where a person can access lessons in the Mi'kmaq Language to include, Mi'kmaq online talking dictionary, the Mi'kmaq Lexicon, YouTube Mi'kmaq speaking channels, and the L'nui'suti Language App for the iPhone. I have also developed Flashcards in Mi'kmaw and have them labeling various objects in my home so that I can continue to learn and practice the language as often as possible with our daughter. I believe that by working together on this project, Honour can see how important our language and culture are, and of course no matter what the outcome of this proceeding, Honour's mother will always hold an important place in her life and be able to work with her on her language skills.

. . .

44. . . . I am a pipe carrier, drum keeper, and a story keeper, and actively engaged in various traditional ceremonies. I live in a First Nation community, where not only is "cultural programming" provided, but we are submersed in our culture in daily life. As a pipe-carrier, I include Honour in ceremonies, sweat lodge, medicine picking and prayer.

6. There are those in our community who speak Mi'kmaq and those in our community who do not. There are those in our community who actively participate in cultural activities and those who do not. I make an effort to seek out and expose Honour and myself to those who do, because my culture is an

> important part of who I am, and Shelley and I have both made every effort to expose our daughter to her heritage.

[20] Honour is indeed fortunate to have parents who want her to know and live her First Nations culture. Her life will undoubtedly be enriched because of this. The trial judge accepted that Mr. Stephens was supportive of Honour speaking Mi'kmaq and engaging in cultural events. His evidence before this Court supports that conclusion.

[21] Honour has been spoken to in English and Mi'kmaq since her birth. She converses in both languages. Based on the materials before me, I am not satisfied that Honour is at risk of losing her Mi'kmaq language nor will she be deprived of full participation in her First Nations community. As such, this concern is not a special or persuasive circumstance justifying a stay.

Risk to Mental Health and Psychological Wellbeing

[22] In her affidavit, Ms. Young explains her concern as follows:

> 19. Honour has continued to be in my care on a bi-weekly basis and 50% of the time since the final custody hearing. As such, I have had ample opportunity to assess her state of mind and emotional state after learning that she is to go live with her father and only see me a couple of weekends per month. Simply put, she is completely distraught and I have great concern for her emotional and mental well-being, and perhaps her physical well-being, if the decision of Justice Campbell is not stayed and Honour is not permitted to be in my care pending the outcome of my appeal.
>
> 20. Honour has always been an amazing, funny and happy go-lucky child. However, for the past year or so she has been experiencing night terrors after returning from access visits with her father, gets visibly upset during access exchanges to his care, has made some disturbing comments. This is why I was seeking counseling for her in early 2015 before being denied consent by Mr. Stephens and was told during an initial consultation, and do verily believe, that these reactions and behaviors are brought on by stress since children do not have the coping skills or maturity to verbalize their feelings.
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> 21. These problems have gotten much worse since Justice Campbell's decision as Honour is aware that she must go live with her father (if the decision is allowed to stand pending appeal).
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> 22. Since the decision, I have witnessed her regular night terrors and held her in my arms until she's cried herself back to sleep. I have seen the distress she is in when she has to go back to her father's residence, even just for an access visit.

> Her reaction when being returned yesterday to start school in Truro on September 3, 2015, was absolutely heartbreaking because she was so distraught and there was nothing I could do to comfort or help her without breaching the current Order.

[23] Several individuals filed affidavits supportive of Ms. Young's concerns, including observations of Honour being very upset on access exchanges, and her expressing a desire to stay with her mother. Although general observations are recounted in the affidavit evidence, Ms. Young mentions only the September 3, 2015 exchange specifically as being traumatic for Honour. In the other affidavits, similar observations are made, but only the exchanges on June 14, 2015 and June 18, 2015 are specifically identified by date. These exchanges followed immediately after the release of Justice Campbell's custody decision.

[24] Mr. Stephens addressed the concerns regarding Honour's mental and emotional state in his affidavit, including the following:

> 7. Honour has been exchanged between Shelley and I frequently her entire life, and weekly for the past several years. Over the years, there have been occasional exchanges where Honour was upset at an exchange, typically because she was hungry, or tired, or just waking up from a long car ride, or where she knew that her other parent was on their way to do something fun. For the most part, the exchanges are uneventful, and when she is upset, her reactions are short-lived. She is easily redirected, and she settles in quickly. This has not changed since Justice Campbell's decision was released on June 8, 2015.
>
> 8. I acknowledge that Honour was unusually emotional on the first few access exchanges after the decision was released. On each of the occasions that Honour was upset, her mother was also upset. On the few occasions when Honour was upset at the access exchange, she was soothed within minutes of the exchange ending. The vast majority of these exchanges have been fine.
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> . . .
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> 26. Honour's first day of school was September 3. Honour was excited to start school. She went with no problems and came home with no problems. That night, she was excited to tell me all about her first day.
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> . . .
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> 33. Honour does not have nightmares at my home.
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> . . .

> 35. Honour has started school already at Truro Elementary. She appears to be happy there and enjoys her school, her teachers and her friends. There are six students in her class from her pre-school here.
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> . . .
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> 37. Honour is her usual happy-go-lucky, friendly and outgoing self. She appears to be settling into her routine at school and being with me the majority of the time. I see no indication at all that she needs counselling. With the exception of one exchange where she was unusually quiet for a while, and one exchange where she was extremely upset but got over it very quickly, Honour is the same child she always was – confident, smiling and adaptable.

[25] In his affidavit, Mr. Stephens also lists a number of access exchanges which have occurred since the June 8th decision in which Honour's behaviour has been completely normal.

[26] As there was no cross-examination on the filed affidavits, it is difficult to assess the credibility of any of the affiants. The concerns about access exchanges, nightmares and counselling were before Justice Campbell, as it was Ms. Young's assertions that these concerns arose in the year preceding the decision. Justice Campbell had the opportunity to see the parties testify and weigh their evidence accordingly. I have received evidence as to Honour's behaviour following the decision on June 8th. Ms. Young says Honour is "distraught" with increased night terrors. This is countered by Mr. Stephens who asserts that other than two exchanges closely following the June decision, Honour's behaviour has been completely normal, and that she has never had night terrors in his care.

[27] Neither parent challenged the description of the other of Honour's behaviour when in the care of the other. Particularly, there is no evidence before me to challenge Mr. Stephens' description of Honour as settling quickly after exchanges with her mother, and being happy in his care. There is also nothing before me that challenges his assertion that Honour was happy to start school in Truro, and settling in well.

[28] Although Ms. Young's evidence regarding how Honour behaves in her care is concerning, in my view, there is nothing that satisfies me that this is attributable to being in the primary care of her father. I am further unable to conclude that the behaviour complained of is severe or long-lasting. I am unable to conclude, based on the evidence before me, that Honour is at risk of serious emotional or psychological harm. As such, Ms. Young has failed to establish that this concern gives rise to special and persuasive circumstances justifying a stay.

Conclusion

[29] The motion for stay pending appeal is dismissed. Costs will be in the cause, in the amount of $500.00.

Bourgeois, J.A.