NOVA SCOTIA COURT OF APPEAL
Citation: *Tattrie v. Grace,* 2015 NSCA 91

Date: 20151007
Docket: CA 443622
Registry: Halifax

Between:

Kelly Tattrie

Appellant

v.

Tami Grace

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	October 1, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion for stay granted
Counsel:	Jim O'Neil, for the Appellant Tami Grace, Respondent in Person

Decision:

[1] On October 1, 2015, I heard a motion to stay a recent decision in which a trial judge directed that the parties' children change their elementary school.

[2] Having read the materials filed and having heard the submissions of the parties, I advised that I would be granting a stay, and promised written reasons to follow. These are my reasons.

Background

[3] Mr. Tattrie and Ms. Grace have three children, one girl and two boys, ages 11, 9 and 7 respectively. Following their separation, the parties were able to reach agreement on a parenting arrangement. An Interim Consent Order was issued on January 8, 2015 following a judicial settlement conference. At that time, both parties were represented by counsel, and agreed to continue their shared parenting arrangement, whereby each parent has the children in their care 50% of the time.

[4] At the time of consenting to that order, Mr. Tattrie was residing in Malagash, and Ms. Grace was residing in Old Barns, just outside of Truro. Although the order addressed such issues as homework, it was silent as to where the children would attend school. There is no dispute that for the last 2.5 years, the children have been attending Wallace Consolidated Elementary School.

[5] In July, 2015, the parties returned to court to deal with property issues and to finalize their divorce. Ms. Grace was self-represented. Although, without the benefit of a transcript, it is not clear how such arose, it is clear that during the hearing on July 22, 2015, Ms. Grace raised the issue of the children's school. She sought to have the three children transfer to attend school in Old Barns for the upcoming school year. At this point it is worthy of note that the schools are within the Chignecto-Central Regional School Board district.

[6] The matter was adjourned to September 2, 2015 at which time the parties provided evidence with respect to where the children should attend school. Mr. Tattrie took the approach, "if it's not broke, don't fix it", submitting that there was no reason to change, as the children were doing well at the Wallace Consolidated Elementary School. From her affidavit evidence, it is clear that Ms. Grace felt that the school in Wallace did not provide the same educational programming as

available in Old Barns, and that better opportunities existed in the elementary school mere footsteps from her home.

[7] During the course of that hearing, the trial judge directed that the parties provide further information from the respective schools as to staffing levels and programs, by way of written filings. No further hearing to present evidence on those issues was scheduled.

[8] In response to the court's request, both parties filed their own affidavits which either contained statements attributed to school personnel, or attached various forms of written hearsay about the respective attributes of the schools. Mr. Tattrie in particular alleged in his affidavit that the information Ms. Grace presented about the Wallace school was not correct based upon his recent conversations with the Principal.

[9] Neither party filed affidavits from staff at either school, nor School Board personnel who would have firsthand knowledge of the resources available. Mr. Tattrie's counsel wrote to the court and requested a hearing date be set, so that appropriate persons could be subpoenaed to give direct evidence in relation to the schools, and be subject to cross-examination.

[10] A hearing did not take place. What followed was a letter dated September 21, 2015 to the Prothonotary from the trial judge. It read in its entirety:

> Further to the above, and receipt and consideration of Ms. Grace's correspondence of September 3, 2015, and September 16, 2015 and Mr. O'Neil's brief of September 15, 2015, I am satisfied that in the circumstances the children's schooling, as proposed by Ms. Grace, is in the best interests of these children.
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> There will be disruption, but having regard to the information provided in respect to the Wallace Consolidated Elementary School, the long term interests of these children is to now effect the change to the Truro area schools.
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> The necessity for them to travel will occur which ever school they attend, and as noted by Ms. Grace, with the change to the Truro schools, "Mr. Tattrie would follow the same travelling schedule as I have".
>
> My decision is not made easily. Changing the children's schools is not something to be taken lightly. Nevertheless, considering all the relevant factors, it is my view that it is in their best interests.
>
> I would ask Mr. O'Neil if he might prepare an Order to reflect all the changes made to the previous Order and circulate a copy to Ms. Grace as well as provide

> one to the court. If the form of the Order is satisfactory, Ms. Grace should contact the Prothonotary in Truro and provide her written consent.
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> If the Order, in her opinion, is not consistent with my decision, she should contact the Prothonotary, Ms. Johnson and advise. I will then arrange either a telephone conference or a hearing date to fix the terms of the Order.

[11] During the motion before me, both parties confirmed that no further written decision is expected from the trial judge in relation to the issue of the children's school. Both also confirmed that no order has been issued by the court as of yet. Both confirmed that in a telephone conference with the trial judge on September 28th to discuss the form of the order, he advised that it was his intent that only the two boys would transfer to Old Barns, and the girl would continue to attend the Wallace Consolidated Elementary School. Both parties confirmed that the children have started, and remain at the Wallace school, in Grades 6, 3 and 2 respectively.

Law

[12] The principles which apply to a motion for stay in the context of a child custody order are well-established. These were 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.
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> [15] In **Reeves v. Reeves**, 2010 NSCA 6, Fichaud, J.A. succinctly summarized the principles from the authorities as follows:
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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.
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> [16] Saunders, J.A. more recently rearticulated the test in **Slawter v. Bellefontaine**, 2011 NSCA 90:
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> > [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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> [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).

[13] Although the decision here does not alter the custody of the children, I am satisfied the same principles should apply.

Analysis

[14] In his Notice of Appeal, Mr. Tattrie puts forward several grounds of appeal, relating to the sufficiency of the reasons, procedural concerns, and the adequacy of the evidence relied upon by the court below. I am satisfied that there is at least one arguable issue raised.

[15] I am further satisfied that Mr. Tattrie has demonstrated circumstances of a special and persuasive nature which justify the issuing of a stay. As noted earlier, the children have been attending Wallace Consolidated Elementary School for the last 2.5 years. Prior to that time, the two older children were home schooled. There is nothing in the materials before me to suggest that the children have been faring poorly in their present school. Their report cards and recent psychological assessments suggest they are doing well.

[16] In my view, having the boys start attending an entirely new school now, only potentially to be returned to Wallace, poses a greater risk of disruption to their educational progress, than changing schools should the trial judge's decision be upheld.

[17] Further, I am troubled by the differential treatment of the eldest child, who will remain in Wallace, while her brothers attend a different elementary school. I have been provided the affidavits filed by the parties in the court below, and there is nothing therein to suggest that such an arrangement was sought, or contemplated by either parent. Their submissions before me confirmed that was the case.

[18] The outcome of having the children attend different schools will be that the parent who has the children will be tasked with getting one child ready and off to school in Wallace, while facilitating the other two getting to school in Old Barns. Such an outcome was clearly unexpected by both parents, and although Ms. Grace advised that she has made arrangements to made this scenario "doable", Mr. Tattrie raised feasibility concerns.

[19] I am satisfied that having the children attend different schools does not better serve their needs, than maintaining them at the present time, in the same school.

Conclusion

[20] The motion for a stay of the decision permitting the children to attend school in Old Barns pending the outcome of the appeal, is granted. In the circumstances, each party shall bear their own costs.

Bourgeois, J.A.