19990504 Docket No.: C.A. No. 155151

NOVA SCOTIA COURT OF APPEAL

Cite as Ryan v. Ryan, 1999 NSCA 11

BETWEEN:

THEODORE AUGUSTINE RYAN Applicant/ Appellant - and - JOANNE HELEN RYAN Respondent	)	Mr. Ryan appeared in person Tanya G. Nicholson for the respondent Application Heard: April 27, 1999 Decision Delivered: May 4, 1999

BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN,
IN CHAMBERS

BATEMAN, J.A.: (in Chambers)

[1] The appellant, Theodore Augustine Ryan, has appealed from a decision of Justice Walter R. E. Goodfellow of the Supreme Court determining interim custody and access in relation to the child of the parties to a divorce proceeding.

[2] The Petition for Divorce states that the parties were married on July 30, 1994 and separated August 23, 1996. Alexsandria Patrice Ryan was born on September 10, 1996. Mr. Ryan advises that the parties made unsuccessful attempts to reconcile after the birth of the child.

[3] Pursuant to **Civil Procedure Rule 62.10(2)** Mr. Ryan has applied for a stay of Justice Goodfellow's order pending the hearing of the appeal, which is scheduled for September 22, 1999.

[4] In support of his application Mr. Ryan, who is representing himself, has filed his own affidavits dated April 19 and April 28, 1999. To his first affidavit he has attached copies of certain of the affidavits which were before Justice Goodfellow. He states that he fears irreparable harm to Alexsandria as a result of Justice Goodfellow's decision to award interim custody to the respondent. He expresses his concern that the respondent is imprudent in her relationships with other men, which, in his view, endangers the child. In addition, Mr. Ryan says that the respondent is not careful in her selection of people to care for the child when she is not available to do so.

[5] Although it is unclear from his affidavit, he appears to oppose the financial disclosure ordered by Justice Goodfellow and feels it would be ruinous of his business. Mr. Ryan owns a private security company.

[6] He asks that this Court grant other relief in addition to the stay, including an order for assessment of the child; a direction that there be court ordered mediation; directions on aspects of the financial disclosure; an order that Ms. Ryan respond to interrogatories; that Ms. Ryan provide particulars of her “true address”; a true statement of Ms. Ryan’s finances and a modification of the child maintenance directed by Justice Goodfellow. In the event that the stay is granted he asks to revert to the prior access Orders resulting from appearances before Chief Justice Kennedy and Justice Davison.

[7] Mr. Ryan provided an oral summary of the salient background facts. From his perspective, the respondent has failed from the outset to honuor a Separation Agreement outlining access between the parties. That Agreement, in the section headed “Custody and Access” provided that “the residence of the child shall be with the Wife and she shall have the primary day to day care of the child for guidance and upbringing;” Mr. Ryan was to have “liberal access upon reasonable notice”. In addition, the agreement set out specific access provisions pursuant to which Mr. Ryan was to have Alexsandria with him four days per week during the mother’s working hours and additional access as agreed. The most problematic provision seems to have been:

> “If the Husband or Wife requires a babysitter they shall, whenever possible, advise the other and allow the Husband or Wife as the case may be, the first opportunity to provide such babysitting services”.

[8] As I understand Mr. Ryan's submission, Ms. Ryan was not giving effect to the spirit of that clause. He would learn that she was out for the evening or otherwise, leaving the child with a sitter, and not having notified him. On more than one occasion he felt compelled to contact the police to assist him with access.

[9] Ultimately, the parties appeared before Chief Justice Kennedy for a defined access Order. While the details of the Order are not before me it apparently designated an access schedule and incorporated the Separation Agreement. The access problems continued and the parties appeared before Justice Davison who granted another access Order with terms "consented to" by the parties.

[10] Apparently this further Order did not suffice and they returned to the Supreme Court asking that access be defined. This was the hearing before Justice Goodfellow from which Mr. Ryan has appealed. From Mr. Ryan's perspective he was looking only for an increase in access. He did not expect the Judge to make a designation of interim custody in addition to defining the access. Mr. Ryan says that had he known that custody would be decided at that hearing he would have presented a much more detailed case. In his view, he is clearly the more appropriate choice as custodial parent and could have demonstrated so, given an opportunity.

[11] In addition to determining that Ms. Ryan have interim custody, Justice Goodfellow directed overnight access by Mr. Ryan on Tuesdays and access alternate weekends, one weekend comprising two overnights and the other one overnight.

Justice Goodfellow directed that the parties attempt to structure additional access. He ordered that each party may designate a three week block summer access period with the child, and that during that period the other parent will not exercise access. Mr. Ryan is particularly concerned that harm could come to the child during this block access as Ms. Ryan would be free to travel with the child and pursue relationships with men that she has met on the Internet or otherwise. He fears the child's exposure to such people.

[12] The test usually applied in determining whether or not to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> . . . stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> (1) satisfy the court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. . . . and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> (2) failing to meet the primary test, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[13] As was recognized by Flinn, J.A. in **Ellis v. Ellis** (1997) 163 N.S.R. (2d) 397 (N.S.S.C. Chambers), this Court has shown a willingness to modify the test where the matter involves the custody of children. At p.398:

> In *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341, which is the source of the test generally used for stay applications in the appeal of civil matters, Hallett, J.A. recognized that a different test may apply in cases involving children's welfare. He said at p. 344:
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> > . . . 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 (C.A.); *Routledge v Routledge* (1986), 74 N.S.R. (2d) 290; 180 A.P.R. 290 (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.

[14] Mr. Ryan's Notice of Appeal states:

> . . . the Learned Supreme Court Justice erred in law by not allowing testimony to be heard that was most vital in making a decision. The Honorable Justice was misled in the testimony of Ms. Ryan, the respondent. These grounds are to be explained from a reading of the transcript and perusal of the file.
>
> And that the appellant will ask that the judgment appealed from be reverted to joint custody, until such time as a full trial is heard on the matters of custody, maintenance, access, etc.

[15] The respondent takes the position that the application must fail. In her submission, the Notice of Appeal does not raise an arguable issue. An arguable issue is a ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. (**Brown v. Brown** [1999] N.S.J. 20 (N.S.C.A., Chambers) per Cromwell, J.A.). As Freeman, J.A. said in **Coughlan et al. v. Westminer Canada,** (1993), 125 N.S.R. (2d) 171 at 175:

> . . . if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the Court to allow the appeal, ... the Chambers judge ... should not ... look further into the merits.

[16] I am not satisfied that the appellant has met the burden for a stay applying either the **Fulton** or **Routledge** tests. The one thing, perhaps the only thing, that these parties agree upon is that neither the Separation Agreement, nor the two prior Supreme Court Orders, provided an adequate structure so as to end the access turmoil. To grant

the stay requested by Mr. Ryan would return the child to the admittedly unworkable situation which existed before Justice Goodfellow's Order. While Mr. Ryan may not have anticipated a custody decision, in effect, it does no more than to define the child's living arrangements as already agreed by the parties - residence with the mother who has the primary day to day care of Alexsandria. I am not satisfied that harm will come to the child if this custody disposition is not stayed. It is, in any event, subject to variation by the Supreme Court. In the language of **Routledge**, Mr. Ryan has failed to demonstrate "special circumstances" warranting a stay. Nor am I satisfied that the financial disclosure ordered would occasion irreparable harm.

[17] Accordingly, the application for a stay is refused. My jurisdiction to order any of additional relief requested is predicated upon a stay being granted. Mr. Ryan shall contribute to Ms. Ryan's costs of the application the sum of $800.

Bateman, J.A.