Date: 19971201 Docket: C.A. 143297

NOVA SCOTIA COURT OF APPEAL

Cite as Ellis v. Ellis, 1997 NSCA 10

BETWEEN:

TODD GRAHAM ELLIS	)	Margot E. MacDonald
	)	for the Appellant/Applicant
Appellant/ Applicant	)	
	)	
- and -	)	
	)	Paul J.D. Morrison
	)	for the Respondent
JILL DOREEN ELLIS	)	
	)	
Respondent	)	Application Heard:
	)	November 28, 1997
	)	
	)	
	)	Decision Delivered:
	)	December 1, 1997
	)	
	)	
	)	

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.: (in Chambers)

This is an application by the appellant (husband) to stay an order of Associate Chief Justice Kennedy of the Supreme Court of Nova Scotia. The Order is an Interim Order, arising out of a Chambers application, and dealing with custody and access to children.

Following the hearing of this application, on Friday, November 28th, 1997, I advised counsel that I would not grant the stay because I was not satisfied that there were circumstances of a special or persuasive nature which justified a stay. I, therefore, dismissed the application, and indicated that I would give written reasons for my decision.

The husband and the respondent (wife) were married in August, 1990. They separated in January, 1996. There are two children of the marriage, a daughter six years of age, and a son four years of age. Divorce proceedings were commenced in February, 1996. Since then, the parties seem to have spent an inordinate amount of time, in protracted interlocutory proceedings, dealing with custody, access and child support. The husband and wife had joint custody of the two children, pursuant to an

order of Justice Nathanson dated May 29th, 1996. Because joint custody arrangements were not working, a consent order was issued on July 17th, 1997, by Justice Tidman, giving sole custody to the wife with specified access to the husband.

In June, 1997, the wife made application for an order permitting her to move to Winnipeg, Manitoba, with the children. She had developed a common-law relationship with a man who had moved to Winnipeg to accept a job. She wanted to follow him as soon as possible. They plan to marry when the divorce proceeding is finalized. The husband opposed the application. It took six separate appearances before the Chambers judge, in the months of September and October, before the hearing of the application was completed. The last appearance was October 27th, 1997. On November 14th, 1997, the Chambers judge handed down his decision allowing the wife's application. The order, which the Chambers judge issued, is an interim order which is only effective from November 14th, 1997, to December 22-23, 1997. The December dates are the dates set for the trial of the divorce proceedings between the husband and the wife.

The husband has filed a notice of appeal from the decision and order of the Chambers judge; and seeks a stay of the Chambers judge's order pending the hearing of the appeal.

The appeal cannot be heard before the divorce hearing which is to take place in less than a month (on December 22-23, 1997). At the divorce hearing, among other things, the issues of custody and access (which apparently are still in dispute) will be resolved one way or the other. Therefore, if I grant the stay, I will effectively nullify all of the proceedings before the Chambers judge. If I do not grant the stay, the appeal will, probably, be moot, because by the time it is heard, the issues of custody and access will be dealt with at the divorce hearing.

Because of these unusual circumstances, and because the decision and order of the Chambers judge involves custody and access to children, the test which I should apply, in considering this stay application, is as set out by Clarke, C.J.N.S. in **Routledge v. Routledge** (1986), 74 N.S.R. (2d) 290 at p. 291. The appellant must demonstrate:

> . . . circumstances of a special and persuasive nature . . ..

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:

> 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.'

Having reviewed the material filed in support of this application, and having heard the representations of the husband's counsel, it has not been demonstrated to me that there are circumstances of a special and persuasive nature which would warrant staying the Interim Order of the Chambers judge; and, thereby, effectively nullifying the proceedings before him.

Counsel for the husband advanced two arguments that there were special circumstances, here, which warrant a stay. Firstly, it is argued that

the Chambers judge was wrong to have granted the Interim Order when the divorce hearing itself (at which these matters would be dealt with), was so near at hand. Secondly, without a stay, the husband would be effectively denied access to his children at Christmas, unless he incurred substantial cost of travel to Winnipeg.

It is apparent that the Chambers judge considered these matters in his decision, and they are reflected in his Order.

The Chambers judge said in his decision:

> I am mindful that this is an interim application which now governs a period of a little more than one month before the divorce hearing is scheduled, however, to have heard this much evidence, and then leave "mobility" to be decided at the divorce hearing, would not be fair to the parties. The divorce hearing Judge will, of course, not be bound by my determination.
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> . . . . .
>
> There will be a detriment both to the husband and to the children in his access being altered and limited. As a result, however, he is likely to be given liberal access by the divorce order (the wife has agreed to this) and I do not consider the disruption caused to the children by the move to be nearly so detrimental as a change in primary custody.
>
> . . . . .
>
> I will be speaking only to the time from between the date of the decision and the divorce decision, - I order that the father be given two weeks block access before the children are taken to

Winnipeg.

The divorce hearing Judge will ultimately determine those issues.

The husband has, in fact, had a two-week period of access to his children from November 15th, 1997, to November 29th, 1997.

The provisions of the Order, issued by the Chambers judge, with respect to access provides as follows:

> For the period from November 14th, 1997, until the trial of this matter on December 22nd and 23rd, 1997, access by the Respondent Todd Graham Ellis to the children of the marriage shall be as follows:
>
> (a) The Respondent Todd Graham Ellis shall be entitled to two weeks of block access to the children of the marriage, Kayla Nicholle Ellis, born August 10, 1991 and Jordan Tyler Ellis, born September 26, 1993, commencing Saturday, November 15th, 1997 and concluding Saturday, November 29th, 1997, at 6:00 p.m.
>
> (b) Any additional access by the Respondent Todd Graham Ellis to the children of the marriage Kayla Nicholle Ellis, born August 10, 1991 and Jordon Tyler Ellis, born September 26, 1993, other than that set out in this Order shall be determined at the trial of this matter on December 22nd and 23rd, 1997, or as otherwise ordered by this Court.

Counsel for the parties advised me, during the course of the hearing, that Justice Tidman has been assigned to hear the divorce trial commencing on December 22, 1997. Further, that counsel will be meeting

with Justice Tidman on Monday, December 1st for a pre-hearing conference.

Quite apart from the fact that I am not satisfied that special circumstances exist here which would warrant a stay, it seems to me that, to the extent that the Interim Order of the Chambers judge gives rise to any particular hardship, the trial judge can deal with that matter.

I will, therefore, dismiss the stay application.

Counsel for the respondent requests that I order the appellant to pay the respondent solicitor and client costs of this application. He argues that the appeal is unnecessary, and an abuse of process of this Court.

In my view, this is not an appropriate case for solicitor and client costs. I will order that the appellant pay to the respondent, forthwith, her costs of this application on a party and party basis, which I will fix at $750.00, inclusive of disbursements.

C.A. No. 143297

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Appellant

- and -

JILL DOREEN ELLIS

Respondent

BEFORE THE HONOURABLE JUSTICE FLINN (in Chambers)