NOVA SCOTIA COURT OF APPEAL
Citation: *Mosher v. Gosby*, 2016 NSCA 10

Date: 20160219
Docket: CA 443454
Registry: Halifax

Between:

Sifton Mosher and Kirsten MacKay

Appellants

v.

Hayley Gosby and Kyle Thompson

Respondents

-and-

Charmaine Howe

Intervenor

Judges:	Fichaud, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	February 3, 2016, in Halifax, Nova Scotia
Held:	Leave granted. Appeal dismissed with costs, per reasons of Van den Eynden, J.A.; Fichaud and Scanlan, JJ.A. concurring
Counsel:	Christine Doucet and Angela Walker, for the appellants Adam North, for the respondent Hayley Gosby Vanessa Jass, for the respondent Kyle Thompson Eugene Tan, for the intervenor Charmaine Howe

Reasons for judgment:

[1] The appellants sought leave to appeal and if granted, to overturn an interim decision of Justice LouAnn Chaisson of the Supreme Court of Nova Scotia (Family Division) dated August 21, 2015. The decision addressed interim care and access arrangements for the respondents' child and where she would attend school. On February 3, 2016, having reviewed the record and considered the submissions on behalf of the parties, this Court was of the unanimous view that leave should be granted and the appeal be dismissed with reasons to follow. These are the reasons.

Background

[2] The motions judge was called upon to make certain interim care decisions respecting the child. She was five years old at the time of the impugned decision. The motions judge actually made two interim decisions respecting the custody, care, and access of the child.

[3] The first interim decision, which is not under attack, is tied to the relief the appellants seek on this appeal. The appellants assert that the motions judge made factual findings in the first interim decision which could support their claim for relief. Had reversible error been found, the appellants did not seek a new interim hearing. They properly acknowledged that would not be an appropriate remedy in these circumstances. Rather, they asked this Court based on the record, which is far from complete, to place the child in their interim primary care pending the trial. That trial is scheduled to commence in approximately nine weeks. Six days of trial are scheduled. For the reasons set out herein, the relief requested is insurmountably problematic.

[4] The first interim hearing and its origin, can be summarized as follows:

(a) The appellants, who are not related to the subject child but had a close relationship with her, applied for standing in December 2014, under the *Maintenance and Custody Act* (*MCA*). If granted, they sought custodial and access rights, both interim and final. At the time of their application, the child's biological mother (Ms. Gosby) had sole custody. The biological father (Mr. Thompson) exercised regular access.

(b) The interim hearing was adjourned twice. On December 22, 2014, the matter was adjourned to March 23, 2015 because there were difficulties in arranging service on Ms. Gosby. On March 23, 2015, the matter was further adjourned until April 15, 2015 to permit Ms. Gosby an opportunity to retain legal counsel. In the intervening period, it was agreed the appellants would exercise specified access on a without prejudice basis.

(c) On March 31, the appellants made an emergency *ex parte* motion which was heard on April 1, 2015. The appellants were concerned the respondent mother would remove the child from the jurisdiction prior to the April 15 hearing. They sought interim primary care and a non-removal order. The motions judge, on a without prejudice basis, granted a non-removal order pending further order of the court.

(d) The interim hearing was held on April 15, 22, and May 25. The motions judge reserved decision. It was delivered orally on June 30, 2015. The order that followed was finally issued on September 9, 2015. Her interim ruling included the following relevant determinations:

i) The appellants were granted leave to pursue their claim for custody and access.

ii) It was in the best interest of the child that she remain in the primary care of her mother. In part, this determination was premised on the motion judge's understanding that Ms. Gosby would either be residing in the Halifax Regional Municipality or with her partner (and their son) as a family unit in Moncton, New Brunswick.

iii) The appellants were granted specified interim access.

iv) The appellants were afforded the right to bring an emergency motion in the event Ms. Gosby failed to adhere to the interim access schedule or the above-noted living arrangements.

v) The matter would be set over for full trial, which the motions judge retained jurisdiction to complete.

[5] Although the transcript of the motions judge's oral decision was provided, the record for the first interim hearing is seriously lacking. The transcript of the evidence and the affidavits filed by, or on behalf of, the respective parties were not provided. For reasons which I will explain, this, in part, renders the relief the appellants seek impossible.

[6] The second interim hearing and resulting decision (which is the subject matter of this appeal) can be summarized as follows:

(a) The appellants learned that the child's mother, Ms. Gosby, did not carry through with the parenting plan she relied upon and presented to the motions judge at the first interim hearing. This allowed them to bring another emergency motion which they filed July 24, 2015. The appellants sought a change in the interim custodial arrangements. They wanted either shared parenting or primary care.

(b) The interim application was time sensitive. The child was to begin school in September. She was not registered. Where she was to attend school and who she was to reside with pending the final hearing needed to be decided.

(c) This second interim hearing was held on August 21. The appellants and respondents were represented by counsel. The intervenor in this appeal, Ms. Howe, is the child's paternal grandmother. She filed an affidavit and was subject to cross examination. At the time of the hearing, Ms. Howe, had been heavily involved with the child's day-to-day care for approximately five months. She, with the support of both biological parents, acted as the child's *de facto* primary care giver since early April 2015. Although Ms. Howe had always been involved with her granddaughter, she took over her primary care in April following the *ex parte* order which prohibited Ms. Gosby from removing the child from the province of Nova Scotia. From April 2015 until the interim hearing on August 21, Ms. Gosby was primarily working and residing outside of Nova Scotia.

(d) Although Ms. Howe intended to retain counsel and make a formal application for standing, she had not done so at the time of this second interim hearing. I note that given her *de facto* care status (a "*guardian*" under section 2(e) of the *MCA*), it was open to the motions judge (on her own motion) to add Ms. Howe as a party. It appears the

motions judge did not consider this. Rather, she was of the view she could exercise *parens patriae* jurisdiction to place the child in the interim care of Ms. Howe. Both parents supported Ms. Howe in this ongoing interim primary care role.

(e) After hearing the evidence and submissions from counsel, the motions judge delivered an oral decision on August 21, 2015. The formal order was issued on September 30th, 2015. The motions judge ordered that Ms. Howe "shall continue to have primary care and control of the child". Ms. Howe was permitted to register the child in the school in her area. The motions judge maintained the ongoing access for the appellants and addressed the parenting time for the biological parents as well.

[7] The appellants filed their Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) on September 17, 2015.

Issues

[8] On appeal, the appellants allege the motions judge made the following errors:

1. Granting interim primary care to a non-party was an error of law. This error impacted the appellants' procedural fairness;
2. It was an error to rely upon *parens patriae* jurisdiction as there was no gap in the legislation (*MCA*) to fill;
3. Undue weight was placed on the status quo care arrangements of the child with Ms. Howe and there was no analysis of other factors relevant to the best interest of the child;
4. Appropriate weight was not afforded to Ms. Gosby's views of where the child should attend school; and
5. Declining to increase the appellants' interim access was an error, founded on a failure to give appropriate weight to certain evidence or previous findings of the motions judge at the first interim hearing.

Leave

[9] This is an appeal from an interlocutory order. Leave is required. The test for leave is whether there is an arguable issue, being an issue which could result in the appeal being allowed (see *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5). We were satisfied the threshold standard had been met.

Requested relief

[10] Although the appellants assert the motions judge erred in not increasing interim access, they do not seek increased access as a remedy on appeal. The appellants ask this Court to award them primary care pending the trial, which as noted, is some nine weeks away. At paragraph 93 of their factum the appellants' state:

> …the only appropriate remedy in this case is for this Court to change the order on appeal. This is not a matter that should be sent back to the lower court for a further interim hearing. The information that this Court requires to make its decision is contained in the record. No new evidence is needed. …

[11] Surprisingly, and in my view, without supporting authority, counsel for the appellants argue this Court need not conduct any independent analysis of whether the relief sought is in the best interests of the child. All we need to do is accept certain findings the motions judge made at the first interim hearing on April 15, 2015 to underpin and satisfy this Court that the relief sought on appeal is warranted.

Reasons appeal dismissed

[12] Although satisfied the appellants have raised arguable issues, they need not be determined on this appeal. Why? Well, the relief sought by the appellants (being a change in the primary care arrangements) cannot be entertained by this Court for the following reasons:

1. Even if we were to find a reversible error, the decision to change primary care arrangements cannot be made in a vacuum, which is what this Court is faced with.
2. This Court must consider the child's best interests. Both the *MCA* (s. 18(5)) and case authority make it clear the paramount consideration is the best interests of the child.

3. This Court is not in a position to assess whether the requested relief is in the child's best interests. The record is incomplete. Although a transcript of the judge's oral decision was provided from the first interim hearing, the affidavit evidence and the hearing transcript is not before us. This deficiency alone makes the appellants' request unsustainable.

4. Although the motions judge made certain positive factual findings respecting the appellants at the conclusion of the first interim hearing, she ultimately determined that placing the child in their interim primary care was not in the child's best interests. She weighed a number of factors, including concerns that awarding the appellants primary care might increase conflict within the child's family dynamic. She also placed limits on Ms. MacKay's communications with the child's parents.

5. Simply put, the available record from the first interim hearing, upon which the appellants primarily rely, does not provide a sufficient basis upon which this Court can assess the appropriateness of the requested relief. Furthermore, during submissions to this Court, the appellants acknowledged that the factual findings of the motions judge in the second interim hearing were not sufficient to underpin the relief requested; hence their heavy reliance upon findings in the first interim decision. I note, there was no application for fresh evidence made respecting the current best interests of the child.

6. In short, a child's "best interests" determination is a factual determination. This Court does not have the necessary evidentiary or factual basis upon which to make that assessment.

[13] Given that the only relief sought by the appellants cannot be entertained by this Court, there is no reason to set out the standard of review for the issues raised or to address the specific issues or position of the respondents and intervenor.

[14] Before setting out the cost award, I note that the nature of the hearing and resulting decision under appeal was interim. As is frequently the case in family matters, a judge is called upon to make important interim decisions respecting parenting arrangements for children pending final resolution. Such interim decisions are intended to stabilize a child's situation and provide appropriate day-to-day care arrangements until the matter can be heard in full.

[15] The context for interim hearings, particularly interim emergency hearings, is often on short notice, constrained by available court time, and with limited evidence. Notwithstanding the strenuous objections of counsel on behalf of the appellants that the motions judge could not entertain placing the child in the interim care of her paternal grandmother, the motions judge decided, in these circumstances, she could. I refer to the record where the motions judge stated:

> THE COURT: Certainly I can exercise my *parens patriae* jurisdiction to say that although the documentation has not specifically been filed, that there was an indication of the involvement of Ms. Howe throughout these proceedings that was not contested, that there is certainly documents in the file to indicate that Ms. Howe is prepared to support and to continue to have [the child] in her care and so yes, there has been no Section 18 maintenance and custody application made on behalf of Ms. Howe, but that doesn't prohibit me from making a determination with respect to in this interim period and certainly while Ms. Howe is making arrangements to formalize that documentation to make some ruling in terms of what the Court deems to be in [the child's] best interests.
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> […]
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> And so you are correct. Your clients have every ability to test that information on a fulsome hearing of the matter with cross-examination of Ms. Howe and Mr. Thompson in relation to how this is going to play out in the long run. What I am tasked with today on an emergency basis and with very limited time and very limited information, is what the Court needs to adjudicate on so that this child is registered in school, knows where she is going to be every night, and knows what the schedule is going to be.

[16] As noted earlier, although there may be arguable issues, including procedural irregularities, the appellants have come to this Court seeking very specific relief without a proper foundation. They have therefore put the respondents and intervenor through unnecessary, and no doubt fractious, litigation. Shortly, the appellants' application for custody of the child will be before the Supreme Court of Nova Scotia (Family Division) for final determination. In hindsight, the parties' energies and resources would have been better spent preparing for this upcoming trial rather than responding to an appeal which requested relief the Court was unable to entertain, given the restricted foundation before it.

Costs

[17] I would award costs to Mr. Thompson and Ms. Howe in the amount of $3,000.00 each, inclusive of disbursements. Although Mr. Thompson and Ms. Howe secured counsel under a legal aid certificate, costs remain warranted. The Nova Scotia Legal Aid Commission has limited resources, which they use to help as many litigants as possible. These limited resources should not have to be wasted on an unnecessary appeal. Ms. Gosby did not file an appeal factum. Her counsel essentially maintained a watching brief and made limited submissions. No costs are awarded to Ms. Gosby.

Van den Eynden, J.A.

Concurred in:

Fichaud, J.A.

Scanlan, J.A.