NOVA SCOTIA COURT OF APPEAL
Citation: ***Slawter v. Bellefontaine***, 2011 NSCA 90

Date: 20110928
Docket: CA 355688
Registry: Halifax

Between:

Leslie Michael Slawter

Appellant

v.

Amanda Lynn Rose Bellefontaine

Respondent

Judge:	The Honourable Mr. Justice Jamie W.S. Saunders
Motion Heard:	September 22, 2011, in Halifax, Nova Scotia, in Chambers
Held:	Motion for stay dismissed.
Counsel:	Spencer Dellapinna, for the appellant Shelley Hounsell-Gray, for the respondent

Decision:

[1] This case came before me in Chambers on September 22nd. I reserved judgment to give further consideration to the record and submissions.

[2] The appellant father moves for a stay of a decision rendered orally by Justice R. James Williams of the Nova Scotia Supreme Court (Family Division) on August 22, 2011.

[3] The motion is vigorously opposed by the respondent. Both parties are represented by counsel.

[4] The material facts may be briefly described. The parties have two children together, Lacey, age 5, and Faith, age 2. The children were born and reared in the greater Dartmouth area. They are multi-racial; the appellant's side of the family having African and Indian heritage while the respondent's family is Caucasian.

[5] By a consent order issued by the NSSC (Fam. Div.) on June 10, 2010, the parties agreed to be bound by a shared parenting arrangement on a 4-week rotating schedule, with the appellant entitled to parenting time for 11 nights, and the respondent for 17 nights. Holidays and similar occasions were alternating, and shared. The order also included a mobility clause preventing either parent from relocating with the children outside of Nova Scotia without the other's written consent or a court order.

[6] On May 16, 2011, the respondent commenced a variation application asking that she be permitted to relocate with the children to Kelowna, British Columbia. She intended to follow her parents who had purchased a home there.

[7] The variation hearing took place on August 8-9, 2011, before Williams, J. The order, confirming the directions given in his oral decision, has not yet been taken out.

[8] In an oral decision rendered August 22, 2011, Williams, J. ordered that:

1. The variation be granted, replacing the previous order;

2. The Respondent have sole custody of the children;

3. The Respondent may relocate with the children from Porter's Lake, Nova Scotia to Kelowna, British Columbia;

4. The Appellant may have two weeks of supervised access with the children each year at the home of the Appellant's mother Linda Slawter in the Halifax Regional Municipality, Nova Scotia;

5. Before the move, the Appellant shall have (supervised) access with the children for a minimum of five consecutive days at the home of Linda Slawter;

6. The dates of the yearly two weeks of access, beginning in 2012, shall be at the discretion of Amanda Bellefontaine and arranged in coordination with Linda Slawter;

7. The travel costs associated with the children's access visits to Nova Scotia shall be covered by Amanda Bellefontaine and/or her parents Gerald and Mary Bellefontaine;

8. The Appellant may have telephone and Skype contact with the children from the home of Linda Slawter;

9. Starting in 2012, and each year thereafter, the Respondent and/or Gerald and Mary Bellefontaine shall arrange for Linda Slawter to visit the children in Kelowna, British Columbia for one week. The Respondent and/or Gerald and Mary Bellefontaine shall cover Linda Slawter's cost of travel to British Columbia and provide accommodations for Ms. Slawter; and

10. Provided that both parties and Mary and Gerald Bellefontaine consent by signing the order, Mary and Gerald Bellefontaine shall be granted leave and standing to be added as parties to this proceeding.

[9] In support of his motion for a stay, the appellant filed an affidavit sworn September 14, 2011 in which he states his belief that the respondent may already

have relocated to British Columbia with their children without first giving the appellant supervised access for a minimum of five consecutive days as required by Justice Williams.

[10] In terms of relief, he asks that the entire decision of Justice Williams be stayed pending appeal or, in the alternative, that the mobility provisions of the decision be stayed such that the respondent and the two children be required to return to and continue to reside in Dartmouth and that the appellant have access to the children on such terms as I deem appropriate.

[11] The notice of appeal filed by the appellant on September 15, 2011, advances three principal grounds of appeal (each with various subsidiary grounds). It reads:

> **Grounds of appeal**
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> The grounds of appeal are:
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> (1) That the learned judge erred in granting the Applicant's request to vary the custody order to allow her to move with the two children to British Columbia, the particulars of which are:
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> a. That the learned judge failed to consider, or properly consider, that both the evidence and the learned judge's finding was that neither party could finance physical access;
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> b. That the move was granted on the expectation or basis that the Applicant's parents would finance the access visits, and in doing so the learned judge failed to consider, or properly consider, that there was:
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> i. no evidence of the Applicant's parents' ability to finance the access,
>
> ii. no evidence of the Applicant's parents' willingness to finance the access,
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> iii. such a plan was not before the court thus preventing the Respondent from considering such a plan, cross examining on such a plan, or making submissions on such a plan, and

iv. the court had no jurisdiction to consider or order such a plan as the Applicant's parents were not parties to the proceeding.

c. That learned judge erred in failing to consider, or appropriately weighing, all of the relevant factors and considerations when granting the Applicant's request to vary the custody order.

d. Other such errors that may become apparent upon review of the transcript.

(2) That the learned judge erred in ordering that the Respondent's physical parenting time be limited to two weeks each year, the particulars of which are that:

a. The learned judge erred in determining such amount of parenting time was in the best interests of the children, or erred in ordering such amount of parenting time when it was not in the best interests of the children,

b. That the learned judge failed to consider, or properly consider, that such amount of parenting time was far less than the Applicant proposed or was agreeable to,

c. The learned judge erred in failing to consider, properly consider, or appropriately weigh, all of the relevant factors and considerations in ordering such amount of parenting time, and

d. other such errors that may become apparent upon review of the transcript.

(3) That the learned judge erred in ordering that the Respondent's parenting time must be supervised, the particulars of which are that:

a. That the learned judge failed to consider, or properly consider, that the Respondent's parenting time was never supervised before,

b. That the learned judge failed to consider, or properly consider, that neither party requested the Respondent's parenting time be supervised,

c. That the learned judge failed to consider, or properly consider, that no third parties recommended the Respondent's parenting time be supervised,

d. there was no, or insufficient, evidentiary or factual basis to order supervised access or determine that supervised access was in the best interests of the children,

e. supervised access was not included in any of the pleadings, evidence, or submissions thus preventing the Respondent from having the opportunity to address the issue by leading evidence on the point, cross examining evidence on the point, or making submissions on the point, and

f. other such errors that may become apparent upon review of the transcript.

[12] In Chambers I spent considerable time with counsel narrowing the issues and reviewing the options as to how to proceed. The record established that since the hearing in the Family Division the respondent and her two children have now relocated to Kelowna, British Columbia. The appellant had filed an affidavit and was present in court for cross-examination, if required. If I were prepared to receive the appellant's affidavit (which respondent's counsel said had been filed short of time), then I was advised that the respondent would also wish to be heard, either by affidavit or videoconferencing between Halifax and Kelowna. Obviously, such latter options would require an adjournment.

[13] Counsel also reported that the tapes of the hearing before Justice Williams were now in the hands of the court reporter. They expected that the transcription would be completed by October 10th and that the appeal book could be filed by November 1st. I was told that the variation hearing before Williams, J. lasted two days and that he had taken about an hour to deliver his oral decision from the Bench.

[14] While the respondent had not filed an affidavit for the hearing, her counsel had reproduced in her written brief a detailed account of certain portions of Justice Williams' oral decision which she typed while listening to her set of the audiotapes from the hearing. In doing so, Ms. Hounsel-Gray expressed the *caveat* that while she tried to be as accurate as possible in transcribing Justice Williams' reasons, she

was not a certified court reporter. Obviously, she had only reproduced a small portion of the trial judge's complete decision but in her submission the extracts were representative of his strong findings of fact and conclusions favouring the respondent.

[15] After hearing all of that, I expressed the view that it would not be in anyone's best interests, least of all these two children who were, after all, the primary focus of the motion for a stay, to have to adjourn the proceedings to permit the respondent to file a lengthy affidavit and/or "attend" to testify by videoconferencing in Kelowna.

[16] I asked counsel whether they would be prepared to proceed with the hearing on the basis of the record before me. In other words, counsels' respective briefs; the appellant's affidavit; and the three pages from the brief filed by Ms. Hounsel-Gray in which she transcribed portions of Justice Williams' decision. I gave counsel time to consider my suggestion and to seek instructions from their clients, if necessary.

[17] Each immediately replied that they were prepared to proceed on that basis and had instructions from their clients to do so. The respondent's counsel also confirmed that she would not seek leave to cross-examine the appellant on his affidavit.

[18] Finally, both counsel confirmed that they wished me to conduct the hearing, and decide the issue, without taking the time to secure and listen to an audiotape of Justice Williams' decision.

[19] Based on counsels' agreement, I then heard their submissions on a record established by consent which consists of the appellant's affidavit sworn September 14, 2011; the portions of Justice Williams' decision typed by Ms. Hounsel-Gray and reproduced at pages 2, 3, 4 and 5 of her Brief to the Court dated September 19 (which, for clarity, will be reproduced verbatim later in this decision); counsels' respective written and oral submissions including their case authorities; the pleadings; and the draft orders exchanged by counsel following Williams, J.'s decision and which were the subject of negotiation between the two.

[20] Having described the course of action taken during the hearing in Chambers, I will now address the merits of the appellant's motion for a stay.

[21] The law is well-settled. In cases involving the welfare of children 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 (N.S.C.A.) and the principle has been consistently applied ever since. See, for example, **Children's Aid Society of Halifax v. B.M.J.**, 2000 NSCA 144; **Ryan v. Ryan**, 2001 NSCA 145; **R.B.N. v. M.J.N.**, 2002 NSCA 165; **Minister of Community Services v B.F.**, 2003 NSCA 125; **D.D. v. Nova Scotia (Minister of Community Services)**, 2003 NSCA 146; **J.W. v. D.W.**, 2005 NSCA 10; **Zinck v. Fraser**, 2005 NSCA 106; **Smith v. Beaver**, 2006 NSCA 97; **Crewe v. Crewe**, 2008 NSCA 68; **McAleer v. Farnell**, 2007 NSCA 78; **Gillespie v. Paterson**, 2006 NSCA 133; **Grant v. Grant**, 2008 NSCA 51; **Ross-Johnson v. Johnson**, 2009 NSCA 83; **Reeves v. Reeves**, 2010 NSCA 6 and **Godin v. Godin**, 2011 NSCA 19.

[22] In **Reeves, supra,** Justice Fichaud provided a helpful distillation of the legal principles that form the test:

Legal Principles

> [18] *Rule* 90.41(2) authorizes a judge to stay the enforcement of the judgment under appeal "on such terms as may be just".
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> [19] In *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A.), at ¶ 28, Justice Hallett stated the well known principles that govern the exercise of the discretion under the former *Rule* 62.10(2) and the current *Rule* 90.41(2). To summarize, a stay may issue if the applicant shows either (a) an arguable issue for appeal, that denial of the stay would cause the applicant irreparable harm and that the balance of convenience favors a stay or (2) there are exceptional circumstances.
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> [20] *Fulton's* test is modified in stay applications involving the welfare of children, including issues of custody or access. That is because, in children's cases, the court's prime directive is to consider the child's bests interest. The child's interests prevail over those of the parents, usually the named litigants, on matters of irreparable harm and balance of convenience. [Case References Omitted]

> [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.

[23] Of the three grounds listed in the appellant's notice of appeal, it is really the first ground dealing with the permission granted to the respondent to move to British Columbia with her two children that drives the appellant's motion for a total, or a partial stay. I will assume that the appellant's notice of appeal raises arguable issues. I will limit my analysis to whether the appellant has demonstrated circumstances of a special and persuasive nature sufficient to satisfy me that issuing the stay would better serve, or cause less harm to, their two children's interests.

[24] The point made by the appellant in his affidavit is that my compelling the respondent's return to Dartmouth with their two children would best serve their interests by restoring the *status quo*, especially if he were ultimately successful with his appeal when it is heard next year. Put another way, he says their quick return to Nova Scotia would better serve their interests by minimizing the disruption caused by the move to British Columbia, only to have to return to this Province in any event.

[25] With respect, I think the appellant's proposal would simply perpetuate the harmful environment Justice Williams found so disturbing. It was these very serious concerns which troubled the judge and anchored his decision to authorize the respondent's move to Kelowna with her children, as being the best way to improve their situation. Further, the *status quo* is Kelowna. Ordering a stay would disrupt the environment in which the children now find themselves, and where one of them has started school. Let me quote from Justice Williams' decision as transcribed by Ms. Hounsel-Gray and reproduced in her Brief:

Between June, 2010 and May 2011 the parenting arrangement referred to in the order (of June 10, 2010) was not followed. Mr. Slawter did not provide care to the children as agreed. A significant amount of his contact with the children occurred on Saturday and Sunday when Ms. Bellefontaine took the children to Mr. Slawter's mother's house (Linda Slawter), where Mr. Slawter would usually, but not always visit.

Ms. Bellefontaine and Mr. Slawter have an unhealthy conflictual relationship. In May 2011 Mr. Slawter was convicted of section 264 of the *Criminal Code*: uttering threats to cause bodily harm to Ms. Bellefontaine in relation to events that occurred on June 3, 2010. The threat was made against Ms. Bellefontaine. Mr. Slawter was placed on probation for two years on July 19, 2011. The parties' relationship is unhealthy, conflictual and confrontational. Both have yelled and screamed at each other.

Ms. Bellefontaine, partly because of Mr. Slawter's intimidating behaviour, moved in with her parents in June or July 2010. Ms. Bellefontaine is, I conclude, emotionally and financially dependent upon her parents. Her parents have bought a home in Kelowna, BC and plan to move there.

Mr. Slawter gave evidence that he has diabetes that is difficult to control and that this affects his behaviour. He also gave evidence that he has been diagnosed with, more recently, it appears with dementia.

All of these changes impact on the children and their care and the ability of the parents to care for them. They also impact on the exposure to conflict and risk of harm to the children.

The children have been harmed because of the conflict between the parties. I conclude that she had a difficult time removing herself from Mr. Bellefontaine (Slawter) and she could not have been able to do so without the assistance of her parents. I conclude that she has been the primary parent of these children.

... Mr. Slawter has not paid child support for the children.

... Mr. Slawter has refused to leave Ms. Bellefontaine's residence on more then one occasion. He has at times engaged in stalking like behaviour hovering outside windows and following her. He denies this behaviour but I conclude that it occurred. He has slashed the seats of a car that was being removed from him. He has been removed from the children's hospital by security and has been convicted of uttering threats against Ms. Bellefontaine and a previous girlfriend.

Mr. Slawter displays little responsibility either for himself or the care of his children. With respect to his own health he acknowledges that he is not supposed

> to drink, but acknowledges that he does drink one beer. Mr. Slawter's evidence was contradictory and inconsistent at times. ... Mr. Slawter has little credibility. Ms. Bellefontaine's evidence is preferred to his where their evidence differs. Mr. Slawter at times uses bullying behaviour and imposes himself on others. ... At the end of the day his evidence suggests that he is not responsible for his own behaviour.
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> ...
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> Ms. Bellefontaine's reasons for the move are here, I conclude, related to the children and their care. She has had problems parenting on her own, financial and more general she needs support to provide and for the children; to be able to control Mr. Slawter's involvement in her life and that of the children. I conclude the relationship with Mr. Slawter, between Mr. Slawter and Ms. Bellefontaine and the conflict that it has consistently engendered over the last number of years is a danger to the children. Ms. Bellefontaine has not in the past been able to deal with Mr. Slawter on her own. Her parents have assisted her and the children. Her parents are moving and are willing to provide support to her and the children, if she and the children move too.
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> Mr. Slawter can not assist Mr. Bellefontaine (Ms.) financially. He did not exercise his rights to shared care when he had the chance. He has difficulty looking after himself, has demonstrated he is unable to look after dogs. At times has exhibited behaviour that is a threat to the emotional health of not only the children but Ms. Bellefontaine also. Both Mr. Slawter and Ms. Bellefontaine need assistance parenting.
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> Were Ms. Bellefontaine to remain in Nova Scotia with him the welfare of the children would be compromised financially, they would be vulnerable to continued conflict between Mr. Slawter and Ms .Bellefontaine. Ms. Bellefontaine would largely be on her own in providing care for the children and protecting them from that conflict. I do not believe she could do so. I conclude that it is in the best interests of these children to move to British Columbia.

[26] In his decision, Williams, J. made strong findings of fact favouring the respondent's proposed move to Kelowna. He found that the children had suffered harm and would continue to suffer harm if they remained in their home in Nova Scotia with both parents. It is clear from Justice Williams' reasons that, in his view, the appellant was not a credible witness and that whenever his evidence differed from the respondent's, the judge preferred and accepted the respondent's testimony. A trial judge's findings of fact and credibility are owed considerable deference, especially in family law matters. While I appreciate that the appellant

intends to challenge such findings on appeal they are owed considerable weight and there is nothing on this record which would cause me to doubt their being well-founded.

[27] The judge found that the respondent was far better off in rearing the two children with the assistance of her parents. He saw that as a way to reduce the tension and conflict and better serve the children's interests.

[28] Significantly, he recognized the important role played by both sets of grandparents in the lives of these two young children. This prompted his direction that the respondent's parents would be obliged to pay for the trip and accommodations of the appellant's mother once a year for a week long visit to Kelowna. Similarly, they would pay for the children's annual visit to Nova Scotia where the appellant would have access, but always under supervision from his own mother.

[29] I do not accept the appellant's submission that the mere fact the respondent and their children have moved across the country constitutes "circumstances of a special and persuasive nature". If that were so, every mobility case where a parent had moved with the children from one jurisdiction to another, would trigger a stay and compel the return of that parent to the former place of residence, pending appeal. A court-sanctioned relocation would invariably trigger a successful stay to reverse the move. Simply stating such a proposition reveals its inherent flaw. Rather, in every case, one must look at all of the circumstances, including the fact that a move has or is about to take place, before deciding whether granting or denying a stay would best serve the children's interests. As I see it, this is precisely what Williams, J. did when deciding the application to vary.

[30] It is common ground that neither parent has the financial means to travel across the country. The appellant says the respondent's parents could surely afford to pay for the return of the two children to Nova Scotia, since they had the money to finance their move to Kelowna. Further, the appellant says that if Mr. and Mrs. Bellefontaine have not yet sold their home in Nova Scotia, their daughter could "presumably" return from Kelowna and move into that empty house. Or failing that, an apartment. When I asked how she could possibly afford an apartment, appellant's counsel replied that she could "try to get her other job back" or try to

get a similar job in Halifax, or failing that could obtain social assistance. In my view, all of that is so speculative as to invalidate any serious support for a stay.

[31] It seems to me that Justice Williams' very thoughtful and clearly stated factual findings provide the strongest reasons for rejecting the appellant's motion. After seeing the parties and hearing their testimony first-hand (an advantage denied to me on appeal), Justice Williams found that these children had suffered harm as a result of their parents' conflict and to leave them in that continuing relationship would expose them to similar or greater risk.

[32] Further, he found that each parent needed the assistance of their respective parents (i.e., the two children's grandparents) in order to cope.

[33] The effect of the appellant being granted a stay would mean that the respondent would have to move back from Kelowna with the children, thereby depriving her of her parents' support, and resume a relationship in an environment the trial judge said would place the children at risk.

[34] Justice Williams found that the appellant did not share in the parenting arrangements even though the consent order from June, 2010 spoke to that. The judge found that the more appropriate arrangement had to be supervised access on account of the appellant's violent, unpredictable and threatening behaviour.

[35] For all of these reasons I am satisfied that granting a stay (whether total or partial) would not serve, and in fact would cause harm to, these children's interests. Consequently, the motion for a stay is dismissed.

[36] I direct that the:

> Appeal Book is due November 1, 2011
> Appellant's factum is due November 28, 2011
> Respondent's factum is due December 21, 2011
> Appeal is to be heard Wednesday, January 25, 2012 at 2:00 p.m.

[37] Considering the parties' financial situation, there will be no order of costs.

[38] As I said at the hearing, I wish to commend both counsel for the quality of their written and oral advocacy.

Saunders, J.A.