NOVA SCOTIA COURT OF APPEAL
Citation: ***Chiasson v. Sautiere***, 2012 NSCA 91

Date: 20120827
Docket: CA 394221
Registry: Halifax

Between:

Paul Ian Chiasson

Applicant/Appellant

v.

Elizabeth Ann Sautiere

Respondent

Judge:	Justice David P.S. Farrar
Motion Heard:	August 23, 2012, in Halifax, Nova Scotia, in Chambers
Held:	Motion for a stay dismissed.
Counsel:	Elizabeth Newton and Sarah Harris, for the applicant/appellant Tanya Jones, for the respondent

Decision:

[1] The appellant, Paul Chiasson, moved for a stay of the Order of Justice Beryl A. MacDonald dated August 21, 2012, which granted custody of the parties' nine year old daughter to the respondent, Elizabeth Ann Sautiere and allowed her to relocate to Ottawa, Ontario with the child.

[2] The stay motion was heard on August 23, 2012. At the conclusion of argument I reserved decision to give further consideration to the parties' submissions.

[3] For the reasons that follow, I would dismiss the motion without costs.

Background

[4] The parties have one child together, Isabella, age 9. Ms. Sautiere has another child, Andrew, who is 14 years of age with whom Isabella has lived her entire life.

[5] Mr. Chiasson and Ms. Sautiere started a relationship in September, 2001, and Ms. Sauitere became pregnant with Isabella in December, 2001. Isabella was born in September, 2002. Mr. Chiasson lived with Ms. Sautiere and her son for a period of time (approximately three months) but moved out prior to Isabella being born. Isabella has always been in Ms. Sautiere's primary care. There has never been an order in place addressing Mr. Chiasson's access with Isabella. Access with Mr. Chiasson and his family was arranged by consent between the parties. The only order governing the parties' relationship was an order acknowledging that Mr. Chiasson was the child's father and confirming that he was to pay maintenance.

[6] On October 7, 2010, Mr. Chiasson filed a Variation Application to prevent Ms. Sautiere from moving to Ottawa with Isabella.

[7] Ms. Sautiere filed a response to that application requesting, among other things, permission to change her daughter's residence from Halifax to Ottawa for an intended move in the summer of 2012.

[8] The variation hearing took place on April 18 and 19, 2012, before MacDonald, J. She gave an oral decision on April 20, 2012. A Variation Order confirming the directions given in her oral judgment was issued on August 21, 2012. The relevant provisions of the Order for this motion are:

1. Ms. Sautiere would have sole custody of Isabella and that Ms. Sautiere may relocate with Isabella from Halifax to Ottawa, Ontario.

2. Mr. Chiasson would have access for five consecutive weeks during the summer school year.

3. The parties would alternate access during the Christmas season.

4. Mr. Chiasson would have access during the school spring break.

5. Mr. Chiasson would have telephone or "virtual visitation" every Sunday, Tuesday and Thursday evening at 7:30 p.m. Ottawa time.

6. Mr. Chiasson would have access at other times as agreed between the parties.

7. The parties would equally share the cost of transporting the child to and from Halifax.

[9] Ms. Sautiere located to Ottawa in June, 2012 with Isabella. Isabella returned to Halifax and was with Mr. Chiasson for five consecutive weeks from July 15, 2012, to August 19, 2012. She has now returned to Ottawa and is living with her mother.

[10] In support of his motion for a stay, the appellant filed an affidavit sworn August 8, 2012, in which he states that Ms. Sautiere has, and he believes will continue to try to thwart his access and parenting with Isabella. He bases this belief on Ms. Sautiere's conduct since MacDonald, J.'s decision and the history of their relationship.

[11] In terms of relief he asks that the Variation Order be stayed pending appeal or, in the alternative, that the mobility provisions of the order be stayed such that Isabella would be required to return to and continue to reside in Halifax with him and that Ms. Sautiere would have access to the child on such terms as I deem appropriate.

[12] The Notice of Appeal filed by the appellant on May 25, 2012, advances two principal grounds of appeal. Only the ground of appeal relating to mobility is in issue on this motion. Mr. Chiasson says the judge erred in permitting Isabella to move with Ms. Sautiere to Ottawa. He then sets out a number of errors he says the trial judge made in her consideration of the factors to be taken into account in determining mobility. In his Affidavit he sets out two major concerns with the judge's decision, they are:

1. MacDonald, J. failed to give appropriate weight to Ms. Sautiere's reason for relocating Isabella and the fact that the relocation was not in Isabella's best interests;

2. MacDonald, J. failed to properly consider Ms. Sautiere's historic lack of co-operation in facilitating his access and parenting with Isabella.

Issue

[13] Should the Variation Order dated August 21, 2012, be stayed pending appeal?

Discussion

[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.

[15] In **Reeves v. Reeves**, 2010 NSCA 6, Fichaud, J.A. succinctly summarized the principles from the authorities as follows:

> [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.

[16] Saunders, J.A. more recently rearticulated the test in **Slawter v. Bellefontaine**, 2011 NSCA 90:

> [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. ...

[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).

Application of the Test

[18] It is the permission granted to Ms. Sautiere to move to Ottawa with Isabella that drives the appellant's motion for a total or a partial stay. I will assume that Mr. Chiasson's Notice of Appeal raises an arguable issue on the mobility issue. I will limit my analysis to whether he has demonstrated circumstances of a special

and persuasive nature to satisfy me that issuing the stay would better serve or cause less harm to Isabella.

[19] The determination of a child's best interests is a delicate fact-driven exercise at the core of the rationale for appellate deference. The judge on a stay motion must show considerable deference to the findings of the trial judge. However, evidence of relevance after the hearing if it were not before the trial could affect the analysis. Mr. Chiasson points to three circumstances that have occurred since the decision of MacDonald, J. which he says support the granting of the stay. They are:

1. Ms. Sautiere moved to Ottawa without giving him adequate notice. He says he found out from Isabella on Friday, June 15, 2012, that they were moving on Monday, June 18, 2012, and that he did not have an opportunity to say good-bye to her in person.

2. That he was not provided with an Ottawa telephone number.

3. He was not provided with an address in Ottawa.

[20] However, at the hearing of this matter Mr. Chiasson's counsel acknowledged that he has an address for Isabella in Ottawa and he has always had a Halifax number for Ms. Sautiere's cell phone which is operational in Ottawa. It is unfortunate that Mr. Chiasson did not get to see his daughter before she left for Ottawa but that is not sufficient to persuade me that it is necessary to grant a stay.

[21] Mr. Chiasson also refers to Ms. Sautiere's historical conduct in not co-operating in facilitating his access. This is the same argument which he made before MacDonald, J. who, after hearing the evidence of both parties and their witnesses at the hearing over two days, concluded:

> ...the evidence does not satisfy me that Ms. Sautiere has impeded those relationships or has unreasonably refused to allow the child to be in the care of Mr. Chiasson and his family upon their request.

[22] MacDonald, J. continued:

> ...there is nothing in the evidence before me to indicate that the decisions she has made have negatively impacted this child. All the evidence suggests that Isabella is a happy, healthy, well-adjusted child. ...

[23] I am not satisfied that there is any basis for Mr. Chiasson's belief that Ms. Sautiere would frustrate his contact with Isabella or try to interfere with his relationship with her.

[24] I will now turn to Mr. Chiasson's other concern and basis for seeking a stay; that is the uncertainty that Isabella will face in Ottawa which he says will make it difficult for her socially, emotionally and academically.

[25] The choices that MacDonald, J. had before her were to allow Isabella to move to Ottawa with the only custodial parent she has ever known and continue to live with her step-brother and mother. The other alternative was to change the custodial arrangement, separate Isabella from her custodial parent and her step-brother and require her to stay in Halifax.

[26] I refer again to the passage quoted above where the judge concluded that Ms. Sautiere's decisions have not in any way negatively impacted Isabella. MacDonald, J. continued:

> I am satisfied that if this child moved to Ottawa, her mother would be attentive to her education needs and all of her other needs and she would seek out help with any educational deficiencies and if any behavioural problems occur as a result of adjustment issues.

[27] In her decision, MacDonald, J. made strong findings of fact favouring Ms. Sautiere's proposed move to Ottawa. While I appreciate that Mr. Chiasson intends to challenge the judge's findings and the weight given to those findings, there is nothing in the documentation filed in support of the stay which would cause me to doubt their being well-founded.

[28] I do not accept Mr. Chiasson's submission that the move to Ottawa, because it separates him from his daughter, constitutes "circumstances of a special and persuasive nature". If that were the case, in every mobility case where a parent had moved with the child from one province to another, it would trigger a stay and

compel a return of the child to the former place of residence pending appeal. In each case a judge must look at all of the circumstances before deciding whether granting or denying a stay would best serve the child's interests. As I see it, this is precisely what MacDonald, J. did when she was deciding the application to vary.

[29] MacDonald, J.'s thoughtful and clearly stated factual findings provide the strongest reasons for rejecting the motion for a stay. After hearing two days of evidence from the parties and others associated with Isabella (an advantage denied to me on appeal), she found that it was in the best interest of Isabella to allow her to move to Ottawa with her mother.

[30] The effect of the appellant being granted a stay would mean that Isabella would have to move back to Halifax and commence school here with the potential of having to move back to Ottawa should the appeal be unsuccessful. I cannot conclude that this would be in her best interest.

[31] For all of these reasons, I am satisfied that granting a stay (whether total or partial) would not serve Isabella's best interests. Consequently the motion for a stay is dismissed.

[32] However, considering the parties' financial situation there will be no order of costs.

Farrar, J.A.