

NOVA SCOTIA COURT OF APPEAL

Citation: *C.B. v. T.M.*, 2012 NSCA 75

Date: 20120713

Docket: CA 390624

Registry: Halifax

Between:

C.B.

Appellant

v.

T.M.

Respondent

Judge: Fichaud, J.A.

Motion Heard: July 12, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion for stay dismissed, with costs of \$500 in the cause

Counsel: Damian Penny for the appellant
Brandon Rolle for the respondent

Reasons for judgment:

[1] Ms. C.B. and Mr. T.M. are parents of a daughter, Ch. aged six. After a trial, Judge Jean M. DeWolfe of the Family Court determined that C.B. shall have primary care of Ch., and that T.M. shall have access. The access would transition from supervised to unsupervised.

[2] C.B. appeals the ruling to the Court of Appeal. The hearing of the appeal is scheduled for December 2012. On the appeal C.B. contends that T.M. should have no access.

[3] On July 12, 2012, C.B. moved in Chambers for a stay of the Family Court's order that T.M. have access. In support of the motion, C.B. filed her affidavit. The brief filed by C.B.'s counsel says "extremely serious allegations of sexual misconduct have been made against the Respondent". The allegation is that T.M. committed acts of physical and sexual abuse toward Ch.

[4] Rule 90.41(2) authorizes a judge to stay the enforcement of a judgment under appeal "on such terms as may be just". In *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A. Chambers), at para 28, Justice Hallett stated the principles that governed the discretion under the former Rule 62.10(2) and govern the current 90.41(2), namely: a stay may issue if the applicant shows either (a) an arguable issue for appeal, that the denial of the stay would cause the applicant irreparable harm and that the balance of convenience favours a stay, or (b) there are exceptional circumstances.

[5] As noted in *Reeves v. Reeves*, 2010 NSCA 6:

[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 best interest. The child's interests prevail over those of the parents, usually the named litigants, on matters of irreparable harm and balance of convenience. [citations 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 in 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.

[6] I will apply those principles to this motion.

[7] C.B.'s affidavit for the motion says:

7. The proceedings in the Nova Scotia Family Court concerned some very disturbing allegations against the Respondent [T.M.] concerning his relationship with our daughter ..."

The affidavit then includes hearsay that a social worker contacted the Department of Community Services "identifying sexual and physical abuse and trauma". Neither the social worker nor any representative of the Department offered any evidence on the motion. C.B.'s affidavit contains no direct evidence of any misconduct by T.M. C.B.'s direct evidence in her affidavit is:

15. [Ch.] has been spending more time with me since I have been off work therefore more contact with her mom has decreased her anxiety and no contact with Mr. [T.M.] has brought stability to her life. To bring Mr. [T.M.] back into [Ch.]'s life would destabilize her and the risk to her functioning is not outweighed [sic - by?] the parent-child relationship.

[8] C.B.'s affidavit and her counsel's brief for the motion did not include Judge DeWolfe's reasons for judgment. Those reasons were attached to T.M.'s affidavit.

[9] Judge DeWolfe's 49 page oral decision reviewed the evidence, and discussed Ms. C.B.'s testimony, including her allegations of abuse by T.M. The judge found elements of C.B.'s testimony to be "incredible", containing "inconsistencies" and "exaggeration", raising "credibility concerns", and "not credible in many respects".

[10] The judge accepted the testimony of Dr. Gerald Hann, a psychologist who prepared an assessment for the Court, and who was qualified as an expert in diagnosing sexual abuse in children. The judge said "I am satisfied that overall Dr.

Hann's assessment is valid and useful to this court". The judge's reasons state that Dr. Hann "concluded that he did not believe [Ch.] had been sexually abused and that the most likely explanation was a combination of an anxiety disorder in [Ch.] heightened by what he perceived to be an anxiety and personality psychopathology in Ms. [C.B.]".

[11] The judge found:

...I'm not satisfied that Mr. [T.M.] is the abusive, manipulative person that Ms. [C.B.] makes him out to be.

I also find that Mr. [T.M.] has not been physically abusive to the children, and I find that it has not been proven that he sexually assaulted [Ch.].

[12] To summarize, for this stay motion, I have C.B.'s allegation of abuse by Mr. T.M. There are findings by the trial judge, after hearing testimony, that there was no abuse, and that C.B.'s credibility is questionable. The submission by C.B.'s counsel for the motion basically repeats the allegations at the trial, but her affidavit contains no evidence to show that the judge's findings were mistaken.

[13] As I said in *Reeves*, para 21, such a fact driven matter is at the core of the rationale for appellate deference, for which a judge on a stay motion shows considerable deference to the findings of the trial judge. Mere allegations, unsupported by evidence, do not pierce the deference, upset the findings or support a stay.

[14] Under our *Rules*, an appeal does not automatically stay the lower court's order. Rather, the onus is on the appellant to establish, by evidence, the prerequisites for a stay. C.B. has not established that it is in Ch.'s better interests that access to her father be stayed. Rather, as the judge found, and I agree, it is in Ch.'s better interests that she have contact with her father.

[15] I dismiss the motion for a stay. I quantify costs of this motion at \$500, to be payable in the cause.

Fichaud, J.A.