NOVA SCOTIA COURT OF APPEAL
Citation: *Leyte v. Leyte*, 2019 NSCA 41

Date: 20190523
Docket: CA 487673
Registry: Halifax

Between:

Tracey Anne Leyte

Appellant

v.

Bryan Andrew Leyte

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	May 16, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Tracey Anne Leyte, appellant in person William M. Leahey, for the respondent

Decision:

[1] The appellant requested I stay an interlocutory order to obtain a Voice of the Child Report. At the end of the hearing on May 16, 2019, I dismissed the stay request and explained to the appellant why, with reasons to follow. These are they.

BACKGROUND

[2] The parties have two children, now age eleven and twelve. The parents separated almost five years ago. A separation agreement of February 2015 set up joint custody with the appellant being the primary caregiver. Parenting time for the respondent was defined.

[3] In the spring of 2105, the respondent applied to vary the parenting arrangements specified in the separation agreement. That application has been adjourned from time to time. Eventually dates were set for May 2019. The respondent sought an order for a Voice of the Child Report in December 2018. The appellant subsequently applied for an order to grant permission to place the children in counselling services. The application to alter the parenting arrangement was rescheduled to June 3 and 4, 2019.

[4] Each party opposed the other's application. They had counsel. Affidavits and briefs were filed. Both applications were heard by Associate Chief Justice O'Neil on April 18, 2019.

[5] O'Neil A.C.J.S.C. delivered an oral decision that day. It is unreported. The appellant was successful. Assoc. C.J. O'Neil ordered counselling for the children. On the other hand, the respondent was successful on his request for a Voice of the Child Report.

[6] The subsequent order of May 10, 2019 directed that: a Voice of the Child Report would be completed by Mr. Martin Whitzman if he is available and willing to do the report; the report is to be prepared in accordance with the Voice of the Child Report Guidelines and be filed with the Court on or before May 27, 2019. There are other terms in the order that I need not recite.

[7] On May 2, 2019, the appellant filed her Notice of Application for Leave to Appeal and Notice of Appeal and her Notice of Motion for a stay, returnable May 9, 2019. Her grounds of appeal complain that: the order was "unreasonable" because the children are too young for "such intensive psychological assessment";

the judge wrongly admitted evidence; and, the judge demonstrated reasonable apprehension of bias. I will recite later the actual wording of the grounds of appeal.

[8] The respondent objected to the stay motion being heard on May 9, 2019. The parties appeared via tele-chambers on May 7, 2019. The Chambers judge set filing dates for the Appeal Book and facta. The appeal would be heard on October 11, 2019.

[9] The Chambers judge scheduled the stay motion for May 16, 2019. The parties filed numerous affidavits. The respondent moved to strike various parts of the appellant's affidavits. Each party disavowed leave to cross-examine. I declined to strike the complained of assertions, but assured the respondent that I would place no weight on either irrelevant or unsupportable expressions of opinion.

LEGAL PRINCIPLES

[10] An appeal does not stay the execution or enforcement of a judgment. This well-established tenet is reflected in *Rule* 90.41 of the Nova Scotia *Civil Procedure Rules* which provides:

> 90.41(1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.

[11] However, there may be circumstances where, to ensure that the statutory right to challenge the correctness of a lower court's decision is not rendered illusory, the court scheduled to hear an appeal can grant a stay or some other order. This is recognized in *Rule* 90.41(2):

> 90.41 (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[12] The power to grant relief is discretionary. How that discretionary power should be exercised is guided principally by the test set out by Hallett J.A. in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). Some would argue it was not a new test, but a reaffirmation of the approach already utilized. In any event, the test has two parts.

[13] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: is an arguable issue raised by the appeal; irreparable harm to the appellant should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.

[14] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[15] Justice Hallett expressed it as follows;

> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> [29] (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> [30] (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[16] *Purdy v. Fulton* concerned a money judgment. Justice Hallett recognized that considerations other than irreparable harm have a role where stays are sought of custody and access orders. He wrote:

> [12] The test most commonly applied until recently by this Court for the granting of a stay of execution pending appeal is that the appellant must show that he will suffer irreparable harm that is either difficult to, or cannot be compensated in damages if the stay is not granted and he is eventually successful on the appeal (*Bluenose Lanes Ltd. v. Richardt, Canyon Distributors Ltd. and I.A.C. Ltd.* (1975), 12 N.S.R. (2d) 540; 6 A.P.R. 540 (C,A,); *W.H. Schwartz & Sons Ltd. v. Nova Scotia Labour Relations Board et al.* (1975), 11 N.S.R. (2d) 536; 5 A.P.R. 536 (C.A.)). Stays were not granted in these cases.

> [13] 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:
>
> > "In my opinion, there need to be circumstances of a special and persuasive nature to grant a stay."

[17] Custody and access orders are governed by what is in the best interests of the children. The primacy of best interests does not dissipate on appeal. Numerous decisions that have grappled with stay requests for orders that impact children pending appeal reflect the overlay of best interests into the *Purdy v. Fulton* test.

[18] Justice Fichaud in *Reeves v. Reeves*, 2010 NSCA 6 summarized these authorities:

> [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**. *Fulton*, page 344. *Ellis v. Ellis* (1997), 163 N.S.R. (2d) 397, at p. 398. *Nova Scotia (Minister of Community Services) v. J.G.B.*, 2002 NSCA 34, at para. 7. *D.D. v. Nova Scotia (Minister of Community Services)*, 2003 NSCA 146, at para. 9-11. *Minister of Community Services v. B.F.*, [2003] N.S.J. No. 421 (Q.L.) (C.A.), at para. 13, 19. *Family and Children's Services of Annapolis County v. J.D.*, 2004 NSCA 15, at para. 10-14. *Minister of Community Services v. D.M.F.*, 2004 NSCA 113, at para. 12-15, 20. *Family and Children's Services of Cumberland County v. D.Mc.*, 2006 NSCA 28, at para. 12-13. *The Children's Aid Society of Cape Breton-Victoria v. L.D.*, 2006 NSCA 32 at para. 18-19. *Gillespie v. Paterson*, 2006 NSCA 133 at para. 3-4. *Crewe v. Crewe*, 2008 NSCA 68, at para. 7.
>
> [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.
>
> [Emphasis added]

[19] These are the principles that apply (see also: *Slawter v. Bellefontaine*, 2011 NSCA 90; *T.G. v. Nova Scotia (Community Services)*, 2012 NSCA 71; *Beairsto v. Cook*, 2018 NSCA 50).

APPLICATION OF THE PRINCIPLES

[20] The burden is on the applicant appellant to satisfy the test to justify a stay. This is one of those rare cases where the stay motion fails because the appellant has failed to demonstrate that there is an arguable issue on appeal (see: Farrar J.A. in *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSCA 14).

[21] The test for an arguable issue is not onerous. The Application for Leave to Appeal must contain realistic grounds which, if established, appear to be of sufficient substance to be capable of convincing a panel of the Court to allow the appeal. Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 articulated how to assess if an arguable issue is made out:

> [11] "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[22] The appellant does not have an automatic right of appeal. The Decision and consequent Order in question were interlocutory. Section 40 of the *Judicature Act*, R.S.N.S. 1989, c. 240 provides that there is no appeal from any interlocutory order, save by leave of the Court of Appeal:

> 40. There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules or by leave of the Court of Appeal.

[23] Interlocutory appeals thus require leave. Leave can be granted by a single judge, but the issue of leave is, absent a statutory directive otherwise, usually dealt with by the panel scheduled to hear the appeal.

[24] There are legions of cases that emphasize that interlocutory appeals, especially from discretionary decisions, require the appellant to demonstrate clear legal error or that the order would cause a patent injustice (see: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26).

[25] Saunders J.A. in *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89 summarized these principles :

> [27] The standard of review in matters such as this is well settled. We will only intervene if we are persuaded that wrong principles of law have been applied, or that failing to intervene would produce an obvious injustice. The threshold for overturning a discretionary order is considerable and is not easily displaced. As this Court said in *A.B. v. Bragg Communications*, 2011 NSCA 26:
>
> > [31] ... Clear error of law or a substantial injustice must be established. ...
> >
> > [33] ... appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. ...
>
> [28] Thus, in the absence of a clear error of law or a substantial injustice we will refuse to intervene. Appeals from interlocutory matters create delay, run up costs for the parties, and tie up the court's own resources while other proceedings in the system wait to be tried. A judge hearing motions in Chambers develops a well-honed proficiency in the exercise of discretion, especially in cases where he or she has heard the witnesses being examined first hand. These are some of the reasons why the standard of review is strictly applied where any party attempts to set aside a discretionary, interlocutory order.

[26] The decision by Associate Chief Justice O'Neil was an interlocutory discretionary order. It was made pursuant to s. 32F of the *Judicature Act*:

> 32F (1) Upon application or on the judge's own motion, a judge of the Supreme Court (Family Division) may direct a family counsellor, social worker, probation

> officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.

[27] To demonstrate that she has an arguable issue, the appellant must be able to identify how the judge erred in law or that the result of the order would cause a patent injustice. Earlier, I paraphrased the appellant's grounds of appeal (para 7). The appellant framed her grounds of appeal as follows:

> (1) The order for the voice of the child report for [names redacted] was unreasonable. Both children ages 11 and 12 are too young for such intensive psychological assessment. Justice O'Neil even stated "Typically court would not order it for such young children but children will have chance to tell us what they want". Young children at this age lack the maturity to determine such decisions. This can cause undue stress to both children.
>
> (2) Wrongful admissions of evidence presented by Respondent's lawyer Mr. William Leahey. Justice O'Neil allowed Mr. William Leahy to enter evidence that was not previously submitted as exhibits. Proper court process was not followed. Evidence is required to be submitted in exhibits prior to hearing. One example is the entry of Leanne Sample's affidavit dated October 31/2018. Justice O'Neil allowed this affidavit to be submitted as an exhibit, despite the fact that she was not present at this hearing. She was not a witness and this evidence could not be cross examined.
>
> (3) Reasonable apprehension of bias. Typically when a voice of a child report has been requested, there is protocol to follow. The court provides each party with a list of current assessors for the voice of a child report. From that list each party picks three assessors. The availability of the assessors are checked. The one with availability will be chosen. On April 18/2019, Mr. William Leahey requested that Martin Whitzman complete the voice of the child report. Justice O'Neil agreed. The correct court process was not followed. This presents as reasonable bias. Another example of bias was when I was a witness, I was questioned for close to an hour and a half from 11:50 am to 13:16 pm. No lunch break was granted. Mr. Leahey stated he had to be back to his office in the afternoon. Therefore, no lunch break was given.

[28] In ground (1), the appellant does not even allege the application judge erred in law. It reveals nothing more than a complaint about how the judge exercised his discretion. The judge, after ordering counselling, dealt with the Voice of the Child Report as follows:

> With respect to the voice of the child report, I can tell you –I will acknowledge how unusual it is for me to order voice of the child report, when we have children of these young ages.

> Let me explain to you why I'm prepared nevertheless to order it. My reasoning is similar. The court is presented with circumstances, after hearing from both parents, where any insight into the operations of the life inside these homes will be very valuable. The view of these children—involving these young children, to some extent, they're so far into it now, the reason I would not typically order these young children to be subject o a voice of the child report, is in the hope of protecting them, or at least minimizing their involvement in it. But they're in it. And maybe the one good that come out of it—may come out of their being interviewed is that they'll tell us what they're really thinking, and what they may tell us is that they'd let their parents—like leave them the heck out of their conflict.

[29] The appellant disagrees with how the application judge exercised his discretion. That is not an arguable ground of appeal.

[30] A judge who wrongly admits evidence may commit reversible legal error. Although ground (2) refers to wrongful admissions and cites "one example", at the stay hearing the appellant clarified that the Sample affidavit was in fact her sole complaint. I am not satisfied this represents an arguable issue.

[31] I do not have Ms. Sample's affidavit, but its contents were set out in the respondent's affidavit of December 13, 2018. Mr. Leyte described the purpose of Ms. Sample's affidavit as being to provide evidence of the high level of conflict and animosity between the parties. Apparently, there was meeting in 2016 between Ms. Sample and the appellant. According to Ms. Sample, the appellant made allegations impugning his professional conduct. The appellant was cross-examined about the meeting. She denied saying things to try to hurt Mr. Leyte's career.

[32] The appellant had counsel for the April 18, 2019 hearing. I do not have a transcript of the hearing, but the respondent produced by affidavit a number of documents, including the pre-hearing briefs. The appellant did not object to the admission of the Sample affidavit, nor is there any indication that there was a request to cross-examine Ms. Sample.

[33] Furthermore, as Mr. Leahey points out, the purpose of the Sample affidavit was to demonstrate that the parties had a high-conflict relationship. Not only is that evident from the affidavits of the parties themselves, appellant's counsel agreed that this was a high-conflict case. Hence, the need for counselling for the children.

[34] I am not satisfied that there is any basis to suggest the affidavit was improperly admitted. Nor can it realistically be argued that even if wrongly admitted, it had anything to do with how the application judge exercised his discretion to order the Voice of the Child Report.

[35] The third ground of appeal alleges reasonable apprehension of bias. The appellant cites two examples to demonstrate her allegation: the list of current assessors was not used; and, she did not get a lunch break. Neither present a realistic basis to be able to convince a panel that the application judge demonstrated bias or that she reasonably apprehended bias.

[36] When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias (*R. v. S.(R.D.)*, [1997] 3 S.C.R. 484). The test is a two-fold objective one: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold" (*R. v. S.(R.D.)*, at para. 111).

[37] It is simply not arguable that a reasonable person, fully informed could be convinced that either example demonstrated bias. First, the Voice of the Child Report Guidelines 2015 specifies that the policy for assessor selection does not apply if the parties make private arrangements for a Voice of the Child Report.

[38] The respondent, as early as December 2018, suggested the well-respected psychologist Mr. Martin Whitzman be retained to do the Voice of the Child Report, should the Court order one be done. Counsel for the appellant never suggested Mr. Whitzman was not an appropriate assessor or that an assessor be chosen in any other fashion. In fact, the appellant on the stay motion eschewed any suggestion that Mr. Whitzman was or would in any way be biased in the preparation of the report.

[39] It is not realistic to suggest that it is arguable that any reasonably informed person would apprehend bias because there was no lunch break. The appellant acknowledged that she had counsel at the hearing and neither she nor her lawyer asked for a lunch break.

[40] As I said earlier, it is an unusual case where a stay motion fails on the basis that the appellant does not present at least one arguable issue. This is such a case.

Even if it could be said that the appellant's grounds are arguable, I am not satisfied that irreparable harm would result, nor that the balance of convenience would favour a stay.

[41] The motion for a stay is dismissed. I award costs of $1,000.00 payable in the cause, but if the appeal is abandoned, in the cause on the application scheduled for June 3-4, 2019.

Beveridge, J.A.