NOVA SCOTIA COURT OF APPEAL
Citation: *Gwinn v. Goldsworthy*, 2020 NSCA 31

Date: 20200323
Docket: CA 496852
Registry: Halifax

Between:

Crystal Dawn Gwinn

Appellant

v.

Jordan Gerald Cordell Goldsworthy

Respondent

Judge:	Bryson, J.A.
Motion Heard:	March 19, 2020, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Crystal Gwinn, appellant in person Patrick Eagan, for the respondent

Decision:

Introduction:

[1] Crystal Dawn Gwinn has appealed the decision of Associate Chief Justice Lawrence O'Neil whereby he ordered the parties' two young children be returned from Riverview, New Brunswick to Porters Lake in Halifax Regional Municipality, (2020 NSSC 50, unreported).

[2] Ms. Gwinn has applied to stay enforcement of the judgment. Ms. Gwinn had counsel for her trial but is now self-represented.

[3] After the birth of their two children, Ms. Gwinn lived with Mr. Goldsworthy in his home in Porters Lake, Nova Scotia with the children. In October of 2018, she left without notice or discussion with Mr. Goldsworthy and relocated to Riverview, New Brunswick. Mr. Goldsworthy had no contact with the children for two months until he was able to locate them. Mr. Goldsworthy then obtained an interim order from the Supreme Court, Family Division, dated December 17, 2018 awarding him supervised parenting time.

[4] Ms. Gwinn has no current partner. Ms. Gwinn currently resides in a house in Riverview with three other children (excluding her children with Mr. Goldsworthy). Like Mr. Goldsworthy, the father of the two elder children lives in the Halifax area. Ms. Gwinn also has a seven-month-old infant.

[5] A.C.J. O'Neil's decision contemplated some negotiation between the parties which apparently did not occur because on March 6, 2020 he issued an order granting interim custody and primary care to Mr. Goldsworthy.

Test for stay:

[6] *Civil Procedure Rule* 90.41(2) permits the court to grant a stay of an order arising from a judgment under appeal.

[7] When considering whether to stay an order, the Court usually applies what is known as the "*Fulton*" test whereby an applicant must show:

1. An arguable issue for appeal;
2. Irreparable harm if the stay were denied;

3. The balance of convenience supports the applicant; or

4. There are exceptional circumstances favouring the issue of a stay.

(*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23)

[8] However, in a case involving children, their interests must be the focus of the Court's attention. In *D.M.F. v. Nova Scotia (Community Services)*, 2004 NSCA 113, Justice Fichaud explained this principle in the context of the traditional *Fulton* test:

> [13] Although the *Fulton* test provides the format for analysis, under s. 2(2) of the *Act* in a child protection case the overriding factor is always the best interests of the child. This reformulates the "irreparable harm" and "balance of convenience" branches of the *Fulton* test. The standard civil tests of irreparable harm to the applicant and balance of convenience between applicant and respondent are sterile in a child custody case. It is not the irreparable harm to the applicant (whether parent or Agency) or the balance of convenience between the litigants (parent and Agency) which governs. Rather the focus is on the child. It is highly unlikely that harm to the child would be compensable in money. So the "irreparable" concept recedes.

Is there an arguable issue on appeal?

[9] Ms. Gwinn lists two grounds of appeal:

1. Evidence was not heard

2. Facts were not applied to the law.

[10] In her affidavit, Ms. Gwinn says, "The factual information that I presented to the Supreme Court family division court case was not heard and/or ignored." In her oral submissions today, Ms. Gwinn elaborated on her perceived shortcomings of Mr. Goldsworthy, which she was disappointed the trial judge did not share.

[11] Ms. Gwinn does not complain of an error of law by the trial judge. She asserts factual errors without describing what they are. The test for overturning a trial decision on an error of fact is clear and material error—or "palpable and overriding error". This is a difficult test to meet because if there were some evidence to sustain a trial judge's finding, the Court of Appeal routinely defers to the trial judge. Even if the trial judge makes an error of fact, unless it was material to the outcome, the error does not result in success on the appeal.

[12] The judge made a number of strong findings in favour of Mr. Goldsworthy and against Ms. Gwinn:

> [54] The evidence establishes that Crystal Gwinn can be manipulative and has used referrals to social agencies and the police to advance her position in this custody and access litigation.
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> [55] All charges against Jordan Goldsworthy which she initiated at the time of her quick relocation to Riverview in late October 2018 have been dismissed. Her subsequent referral to child protection authorities in New Brunswick was not done in good faith. It was clearly an effort to enhance her position in this litigation.
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> [56] Her brother Russell Gwinn and his wife, Cheyenne Gwinn both testified and concluded she was untrustworthy, and they now have a strained, if not non-existent relationship with Crystal Gwinn. In assessing the evidence of both Russell Gwinn and Cheyenne Gwinn, I have considered the possible impact of personality conflict as explaining their negative opinions of her.
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> ...
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> [58] Crystal Gwinn has shown poor judgment on important matters related to the children's best interests.
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> ...
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> [63] Legislation in this Province provides a specific process for parents to follow when a parent wishes to relocate with children. Ms. Crystal Gwinn disregarded those requirements. In doing so, she disregarded the best interests of the children. The statutory 'relocation' process exists because the legislature determined that changes of residence for children and relocation of children were matters that should be subject to assessment at the instance of a parent. These safeguards exist to ensure the best interests of children can be fully considered. The legislative changes that put this process in place reflect a child centered approach.

[13] I cannot say that the grounds of appeal have no merit because they are too vague and don't identify any clear error. The onus is on Ms. Gwinn to advance an arguable issue. The threshold is low, but on the record, it is not met. There is no arguable issue. Even so, I will consider the other factors for a stay.

Irreparable harm

[14] Irreparable harm and balance of convenience are tests usually applied to the litigants themselves. Irreparable refers to harm which cannot be compensated in damages either because these cannot be calculated or the respondent cannot pay them. If an applicant is successful in demonstrating irreparable harm, the

respondent may also do so. The court will then balance the harm taking into account the consequence of granting or withholding the stay (*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at ¶59; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 at p. 510).

[15] As Justice Fichaud points out in *D.M.F.*, the involvement of children engages a different kind of inquiry. The focus should be on the children.

[16] A number of findings in the judge's decision favour the conclusion that residing with their father in Porters Lake is in the children's best interests:

> [58] Crystal Gwinn has shown poor judgment on important matters related to the children's best interests.
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> [59] When she left HRM on October 29, 2019 she disrupted the lives of her two oldest children, Ryan and Riley, aged eight (8) and ten (10). Their father, Mr. Dixon, a resident of HRM, was regularly involved in the lives of these children. So too was Jordan Goldsworthy involved in the lives of his two sons.
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> [67] Relocation will deprive the children of the wide support system they have in the Halifax region, including family members and family friends.
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> [68] Mr. Goldsworthy and his family were involved in the daily lives of these children when the family was intact. The children's emotional, social and educational needs including their need for stability and safety will be best served with their relocation to the Halifax region, specifically the Porters Lake region where Mr. Goldsworthy lives and where the children were living prior to being relocated to Riverview.
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> [69] The children have a strong relationship with Mr. Goldsworthy and their paternal grandmother. They do not have a comparable history with or relationship with Ms. Gwinn's mother.

[17] The children began their young lives in Porters Lake. Ms. Gwinn relocated them to New Brunswick without conferring with their father or respecting the legal processes for relocation of children. Ms. Gwinn has the care of three other children from two other partners, including a seven-month-old baby. She is apparently estranged from her brother and sister-in-law who live on the same street.

[18] In her affidavit, Ms. Gwinn says that the harm to herself and the children will be "irreversible" if a stay is not granted because the children have always "been in her care". This is an exaggeration. On the evidence of Mr. Goldsworthy

and the trial judge's decision, there was a joint parenting arrangement after Ms. Gwinn unilaterally removed the children to New Brunswick.

[19] Ms. Gwinn adds that if the children move back to Nova Scotia Mr. Goldsworthy will intentionally "withhold the children from [her] in an effort to harm her". There is no evidence to suggest that this is a realistic concern and there is nothing in the trial judge's decision that supports such a concern. There is evidence that suggests that it was Ms. Gwinn who has withheld the children from Mr. Goldsworthy from time to time.

[20] At the current time, the children have been returned to their father's home in Porters Lake and Ms. Gwinn has them every second weekend.

[21] In *Chiasson v. Sautiere*, 2012 NSCA 91, Justice Farrar summarized the principles where a child's interests are involved in an injunction or stay:

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

[22] In ordering the relocation of the two young children to Porters Lake and into the custody of their father, Associate Chief Justice O'Neil has already taken their best interests into account after the benefit of a two-day trial in which extensive evidence was canvassed. That decision is entitled to deference from me.

[23] Ms. Gwinn has not led any evidence to suggest a risk of harm to the children by honouring the trial judge's order pending appeal. Ms. Gwinn still has access to the children. Even more, it would appear on the record that the *status quo* is in the children's best interests, at least pending appeal. Expressed in another way, the rights and interests of the children would not be so impaired by the time of final judgment that it would be impossible to afford complete relief if the stay is not granted.

[24] The application for a stay is dismissed with costs of $500.00 in the cause of the main appeal.

Bryson, J.A.