NOVA SCOTIA COURT OF APPEAL
Citation: *Green v. Green*, 2021 NSCA 15

Date: 20210209
Docket: CA 503028
Registry: Halifax

Between:

Kelsey Daniel Forbes Green

Appellant

v.

Heidi Kathleen Green

Respondent

Judge:	Beaton J.A.
Motion Heard:	February 4, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Kelsey Green, appellant in person Heidi Green, respondent in person

Decision:

[1] The Appellant Mr. Green and the Respondent Ms. Green are currently engaged in litigation in the Supreme Court of Nova Scotia, Family Division. Mr. Green filed with this Court a Notice of Application for Leave to Appeal (Interlocutory) on December 31, 2020, seeking to appeal an Interim Variation Order ("the Order") issued by Justice Theresa Forgeron ("the judge") dated December 17, 2020. In that Order the judge, in contemplation of the eventual release of a corollary relief order, varied certain provisions of an interim consent order previously made concerning the parties and their children and directed: (i) the primary residence and primary care of the parties' three children with Ms. Green, (ii) limitations with respect to counselling, therapy or assessment for the children, (iii) parental communications through use of a "parenting app", with specifics as to information to be exchanged in those communications, (iv) Mr. Green's parenting time with the children.

[2] On January 13, 2021 Mr. Green filed a motion for a stay of execution of the Order. At a separate motion for date and directions held January 20, 2021, Ms. Green advised she would oppose Mr. Green's stay motion. The motion was heard on February 4, 2021. At that time both parties were cross-examined on their respective affidavits filed in relation to the motion. At the conclusion of the hearing I reserved my decision. The motion is dismissed for the reasons that follow.

[3] The imposition of a stay of execution is a discretionary remedy (*327991 Nova Scotia Limited v. N2 Packaging Systems, LLC*, 2021 NSCA 2 at para. 54). The judge entertaining a stay motion is entitled to presume the order under appeal is correct, until such time as it might be set aside by the panel assigned to consider the appeal (*327991 Nova Scotia Limited*, *supra*, at para. 55; *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 19). Given that presumption, the burden rests with Mr. Green, as the party seeking the stay to satisfy the Court on a balance of probabilities that the stay is required.

[4] Civil Procedure Rule 90.41(2) sets out the Court's powers on the motion for a stay:

> 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.

[5] There is nothing in the impugned Order upon which to "execute" in the sense it is not an order about money or chattels. It is, first and foremost, an order about the parties' children; any stay imposed would relate to enforcement of the Order. Mr. Green asserted a stay is necessary because his children are in an "emergency situation" and the lack of a stay will be to their detriment. He also argued the imposition of a stay would "support" the children's relationship with him.

[6] Ms. Green, in opposition to a stay of the Order, maintained the focus of Mr. Green's efforts is misguided, as instead of concerning himself with the qualifications or decisions of those people and institutions involved with the family, he should focus his efforts on spending time with his children in ways that make them comfortable and can strengthen their relationships with him.

[7] The long-established test governing whether to grant a stay is found in the frequently cited decision *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23. The party moving for the imposition of the stay must satisfy the Court that:

1. there is an arguable issue(s) raised by the appeal;
2. the party will suffer irreparable harm if the stay is not allowed;
3. the party will suffer greater harm if the stay is not granted than would the opposing party if the stay were granted.

[8] These three elements comprise the so-called primary test. If the Court is not convinced on the primary test, it may be persuaded there exist exceptional circumstances that make it fit and just to grant a stay—the so-called secondary test. As noted in *Y. v. Swinemar*, 2020 NSCA 56:

> [15] … This latter branch of the test is akin to a safety valve, catching cases that warrant a stay but fall outside the primary three step test (*La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5 at ¶22).

[9] In assessing each party's arguments pursuant to the criteria set out in *Fulton*, I bear in mind the nature of the Order. As noted earlier, the impugned Order is temporary in nature as specifically contemplated in the recitals to the Order. In addition, it not only informs the parties' obligations to one another, it also impacts

upon their children, as it addresses matters concerning the children's residence and health, communications between the parents and parenting time.

[10] The *Fulton* test was developed and is applied in the civil context; here the civil context includes the added layer of a family law matrix. The analysis as to whether Mr. Green has met the burden of establishing the necessity of a stay takes place against the backdrop of a more foundational consideration. As discussed by Derrick J.A. in *J.H. v. A.C.*, 2020 NSCA 54:

> [18] However, the "*Fulton*" criteria are not the focus in a case involving children. The focus there is on the children's best interests. The fundamental question to be answered is whether the applicant has demonstrated circumstances of a special and persuasive nature that a stay would better serve, or cause less harm to, the children (*Young v. Stephens*, 2015 NSCA 86, para. 7, per Bourgeois, J.A.).
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> [19] Justice Bourgeois, in *Young v. Stephens*, explained the origins of the onus borne by an applicant for a stay in cases involving children citing Farrar, J.A. in *Chiasson v. Sautiere*, 2012 NSCA 91:
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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:
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> > > [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. ...

[11] Thus the primary and secondary tests must be analyzed recognizing, in addition to the presumption that the Order is correct, the presumption that it has been made in the best interests of the children. Here, the itemized narrative paragraphs that appear before and introduce the numbered provisions of the Order—referred to as the recitals—enumerate a brief history of the circumstances that propelled the judge to render the Order and to draft its contents. In that sense the recitals serve as facts found by the judge, and as such are owed considerable deference. I note that in two of those recitals, the judge made specific reference to the Order being imposed in the best interests of the children.

[12] Mr. Green's affidavit in support of his motion set out some of the procedural history of the litigation between the parties and referenced certain professional reports concerning the children that have been generated during the litigation, in particular a Parental Capacity Assessment spanning roughly one hundred pages. He is critical of the contents and conclusions it draws.

[13] The affidavit made a number of assertions framed as Mr. Green's beliefs or views, coupled with his opinions, which are not admissible in evidence where the person providing them has not been qualified as an expert. I have not considered those aspects of Mr. Green's evidence in assessing the merits of the motion as they are, with respect, at best irrelevant or at worst inadmissible. Cast in its best light, it was only a portion of Mr. Green's Affidavit (paras. 62–75) that more directly addressed the matters the Court must consider under the primary and secondary tests.

[14] The entirety of his Affidavit makes it clear Mr. Green holds firm views about what is best for his children, and why he disagrees with the impugned Order. Respectfully, those views do not assist me in answering whether Mr. Green's materials and submissions have met the test for a stay.

[15] Cross-examination of Mr. Green also highlighted certain aspects of the history of the parties' litigation, including his acknowledgement that he has, at various times, filed complaints with the supervisors of and/or regulatory bodies responsible for various professionals who have provided services to the family. These include a psychologist, social workers and a police officer. He has also applied to access information and records of various bodies intersecting with the

family, through this province's *Freedom of Information and Protection of Privacy Act*.

[16] Ms. Green opposed the motion, asserting in her Affidavit that Mr. Green has failed to "…put forth any real evidence to substantiate grounds for a stay of this interim order." She was cross-examined at length and her evidence depicted a family that has struggled with the fallout from the intensity of the litigation and what she maintains is Mr. Green's focus on "coming after" her rather than on his relationship with his children.

[17] Numerous past incidents referred to and critiques of the other parent referenced through each party's respective cross-examination of the other allowed two key themes to emerge:

1. Mr. Green is concerned about the mental health of his children, and
2. Ms. Green is satisfied the children are currently coping well under the circumstances and not in need of any additional mental health supports beyond those now in place.

[18] Regarding the first aspect of the primary test—whether the appeal raises an arguable issue(s)—I am not in a position, sitting as a single judge of the Court on a chambers motion, to delve into the merits of the appeal at this early stage. That task will belong to to the panel assigned to consider the appeal. Rather, I must assess whether I am satisfied there is an arguable issue(s) such that either party *could* be successful on appeal (*327991 Nova Scotia Limited*, *supra*, at para. 61).

[19] The concept of an "arguable issue" was considered by Beveridge J.A. in *Colpitts*, supra:

> [26] A judge hearing a stay application should not engage in a prolonged examination of the merits of an appeal. An arguable issue is a low threshold. 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 (C.A.) articulated how to assess if an arguable issue is made out:
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> > [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.
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> …
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> [29] To demonstrate that he has an arguable issue, the appellant must be able to identify a ground of appeal that has a realistic chance of being able to convince a panel of the Court that the judge erred in law or that the result of the order would cause a patent injustice.

[20] A review of the Notice of Appeal outlines what Mr. Green says was the failure of the judge to consider various instruments of legislation and family law principles in making the Order. In addition, it asserts the judge's failure to provide a "discernable path of reasoning". These items appear to express assertions of both errors of law and errors of mixed fact and law.

[21] Errors of law, or errors of mixed fact and law, if established on appeal, could arguably result in the appeal being successful. This preliminary observation should not be interpreted as prejudging the question of leave to appeal, which is also reserved for the panel considering the appeal. In the absence of a more complete understanding of the record of the proceedings before the judge it is difficult to say more, but not necessary in light of my other conclusions on the primary test which follow.

[22] The second and third branches of the primary test require reframing to take into account the context of this case. In *Reeves v. Reeves*, 2010 NSCA 6 Fichaud J.A. explained the need to adjust the *Fulton* analysis to the unique subject matter:

> [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 ¶ 7. *D.D. v. Nova Scotia (Minister of Community Services),* 2003 NSCA 146, at ¶ 9-11. *Minister of Community Services v. B.F.*, [2003] N.S.J. No. 421 (Q.L.) (C.A.), at ¶ 13, 19. *Family and Children's Services of Annapolis County v. J.D.,* 2004 NSCA 15, at ¶ 10-14. *Minister of Community Services v. D.M.F.,* 2004 NSCA 113, at ¶ 12-15, 20. *Family and Children's Services of Cumberland County v. D.Mc.,* 2006 NSCA 28, at ¶ 12-13. *The Children's Aid Society of Cape Breton-Victoria v. L.D.,* 2006 NSCA 32 at ¶ 18-19. *Gillespie v. Paterson,* 2006 NSCA 133 at ¶ 3-4. *Crewe v. Crewe,* 2008 NSCA 68, at ¶ 7.
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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.

Recognizing the "modified *Fulton* test", I turn to consideration of the Order in relation to the second and third branches of the test.

[23] As to the second branch of the primary test—whether Mr. Green will suffer irreparable harm if the stay is not permitted—it is difficult to conjure a harm to Mr. Green that is not tied up in his apparent disagreement with the Order. With regard to the question of the best interests of the children, Mr. Green is concerned about the provisions in the Order that provide for counselling or treatment for the children.

[24] In *Colpitts, supra,* Beveridge J.A. referenced the irreparable harm component of the test:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor,* 2001 NSCA 47:
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> > [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney*

> *General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[25] Placing the matter in context here, there has been no evidence put before me that would persuade me Mr. Green or the children could not return to any pre-Order circumstances should his appeal be successful. Mr. Green argued the children are at risk of serious harm if they are not able to access professional assistance in the manner of counselling, treatment or therapy for the duration of the Order. His expression of concern relates to these provisions of the Order:

> 5. Nothing in this interim order prevents the children, with their consent, from continuing with counselling, therapy, or assessment with their therapist, Dr. Susan Potter or the counsellor employed at the children's school. Further, nothing in this interim order prevents the children from accessing counselling, therapy, or assessment for emergency mental health care provided the counsellor, therapist, or assessor is designated by Heidi Green should an emergency arise which emergency requires the child or children to seek counselling, therapy, or assessment. Heidi Green must inform Kelsey Green if the children resume therapy with Dr. Susan Potter or if the child or children participate in emergency counselling, therapy, or assessment.
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> *Parenting App for Parental Communication*
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> 6. To assist with conflict-free parental communication, the parties will enrol [*sic*] in a Parenting App such as Talking Parents. Subject to paragraph 7, the Parenting App will be the sole forum through which the parties will communicate. The parties' communication must be polite and child focused. Neither party will communicate about their own feelings or their theories about why the children are acting or responding as they do or why the other parent is acting or responding as they do. Parental communication is not expected to be lengthy.

[26] The evidence provided on the motion satisfies me the children are able to seek professional assistance or access resources pursuant to the Order. The difficulty is that Mr. Green wants any such action to be shepherded by officials at the IWK, and not by Ms. Green as the Order provides. The Order is temporary in nature, and I have not been persuaded it puts the children in any imminent danger or at risk. To the contrary, it also contemplates the possibility an emergency could

arise that would necessitate additional intervention by way of mental health supports, and provides instructions concerning the same. While Mr. Green argued the definition of "emergency" is not provided or is unclear, with respect, semantics do not improve the argument.

[27] Two of the recitals the judge provided in the Order are also, in my view, of key importance on this branch of the test. They are:

> UPON the Court granting an interim variation order as a holding order aimed at de-escalating the conflict to create a short-term protective order pending the release of the court's final decision; and
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> UPON this order being made without prejudice to a final ruling and without establishing a *status quo* …

[28] It is compelling that the judge's identification of the "without prejudice" nature of the Order avoids giving either party an advantage over the other in relation to whatever might be the terms of the final decision rendered. It means there is nothing in the Order that implicates either parent in terms of creating a state of affairs that binds either of them in future, absent a stay. I am not persuaded that without a stay there would be any deprivation or harm to Mr. Green, or to the children, of an irreparable nature.

[29] Regarding the third branch of the primary test—that the balance of convenience demonstrates Mr. Green would suffer greater harm if a stay were not imposed than would Ms. Green if it were granted—similarly the evidence on the motion does not persuade me Mr. Green has met this branch of the test. I do not see that he would suffer greater harm than would Ms. Green in the absence of a stay. More importantly, I do not see the children will suffer any harm, much less a greater harm, without the imposition of a stay.

[30] The impugned Order contains several recitals outlining the judge's conclusions as to why it was necessary to impose it:

> **UPON** the court being concerned about the impact of the escalating conflict on the children's best interests given the trial evidence, including the evidence of experts involved with the children; and
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> **UPON** the court varying the terms of the interim consent order in the children's best interests pending a review and analysis of the evidence, law, and legal submissions; and
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> …

> **UPON** the court designating Heika Sarty-Boutilier, with her consent, to act as an interim parenting time facilitator; and
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> …
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> **UPON** it appearing that Heika Sarty-Boutilier's involvement did not de-escalate the parenting conflict and thus her facilitation is no longer required; and
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> **UPON** the court providing further conditions and amending the terms of the interim variation decision in the best interests of the children pending the release of the final divorce decision;

[31] Mr. Green's concerns about his children's mental health would, it appears from the evidence, be rooted in prior incidents that well pre-date the timing of the Order. Mr. Green did not provide the Court with specific evidence, beyond his expressions of concern for his children, that would illustrate or support a conclusion that the imposition of the Order as it stands has created a state of affairs that compromises their best interests. Nothing in the evidence put before me could reasonably lead to a conclusion Mr. Green is unequally disadvantaged, relative to Ms. Green, if a stay is not imposed, nor that the Order is contrary to the children's best interests.

[32] The secondary test—a determination of exceptional circumstances—was explained by Roscoe J.A. in *Landry v. 3171592 Nova Scotia Limited*, 2007 NSCA 111:

> [10] The secondary test in **Fulton**, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:
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> > 11 Very few cases have been decided on the basis of the secondary test in **Fulton**. Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in **Brett v. Amica Material Lifestyles Inc.** (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for **Fulton's** secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> > 12 While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show

> that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in **Fulton** itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.
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> 13 While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly. [Emphasis added]

[33] The evidence does not support, nor do the arguments persuade me, the secondary test has been met. The Order provides directions to the parents concerning their interactions with their children and one another. It is identified as being temporary in duration and made in the best interests of the children to stem negative impacts of conflict.

[34] Mr. Green's disagreement with the Order does not constitute unjust circumstances, and certainly not exceptional circumstances. I have not been persuaded there are any exceptional circumstance identified that would render it unjust to Mr. Green or the children should the Order continue pending completion of the appeal. The interests of justice do not require the imposition of a stay.

[35] In the same vein I am unable to discern anything in the evidence of either party that could permit me to conclude there are "circumstances of a special and persuasive nature" that would justify a stay of the Order. Mr. Green has not met the burden to establish "… that a stay of the Order would better serve or cause less harm to the children" (*J.H. v. A.C.*, *supra* at para. 31). I conclude the temporary Order does not adversely impact the best interests of the children.

[36] Mr. Green's motion for a stay is dismissed. Ms. Green sough costs on the motion. Mr. Green shall pay forthwith costs in the amount of $750.00.

Beaton J.A.