**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Murphy v. Ibrahim*, 2022 NSCA 75

**Date:** 20221208
**Docket:** CA 515381
**Registry:** Halifax

**Between:**

Anna Marie Murphy

Applicant

v.

Rany Samir Ibrahim

Respondent

-and-

Rany Samir Ibrahim

Applicant

v.

Anna Marie Murphy

Respondent

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| **Judge:** | Farrar J.A. |
| **Motion Heard:** | November 17, 2022, in Halifax, Nova Scotia in Chambers |
| **Held:** | The stay motion is allowed in part; the security costs for motion is dismissed. As success was divided, no costs were awarded to either party. |
| **Counsel:** | Anna Murphy, appellant in person<br>Mitchell Broughton, for the respondent |

**Decision:**

[1] On November 17, 2022, I heard two motions in chambers. Ms. Murphy filed a motion to stay the Variation and Supervised Contact Orders of Justice Samuel Moreau, dated May 4, 2022, and his Costs Order of July 28, 2022. Mr. Ibrahim filed a motion for security for costs. Ms. Murphy is self-represented; Mr. Ibrahim is represented by CIR Law.

[2] Both parties filed extensive affidavits on the motions. Ms. Murphy was cross-examined on her affidavit. Mr. Ibrahim was not.

[3] This matter has a long history. At the centre of the dispute is the custody of their child ("the child").

[4] In the Variation Order, Justice Moreau ordered *inter alia*:

- Ms. Murphy was to participate in a psychological assessment performed by a court-appointed assessor.
- Income be imputed to Ms. Murphy in the amount of $30,000 per year;
- Ms. Murphy pay child support to Mr. Ibrahim in the amount of $258 per month;
- Ms. Murphy pay special and ordinary expenses in the amount of $90.46 per month and a one-time contribution of $43.90 towards their child's MSVU summer camp.

[5] The Supervised Contact Order provided for Ms. Murphy to have twelve supervised visits, each 1.5 hours long, with the child at Veith House. At the conclusion of the twelve scheduled visits, Veith House was to forward to the court and to the parties the record it typically prepares in relation to Ms. Murphy's contact with the child. There was no provision in any of the Orders for what was to occur once Ms. Murphy's Veith House visits concluded.

[6] Finally, to finalize matters, Justice Moreau issued a Costs Order requiring Ms. Murphy to pay Mr. Ibrahim $21,000 within 90 days of the date of that Order.

[7] Ms. Murphy appeals and seeks a stay of all of the Orders pending the decision on her appeal. The appeal is scheduled to be heard on May 9, 2023.

[8] During the course of the hearing, it became apparent that Ms. Murphy was also asking the Court to stay the Order of Justice Beryl MacDonald, dated

August 17, 2017. Justice MacDonald's Order was never appealed and it could not be the subject of the stay motion.

[9] For the reasons that follow, I would allow the stay motion, in part, and dismiss the application for security for costs.

**The Stay Motion**

[10] The parties have a long procedural history regarding the parenting arrangements for the child. The procedural history is set out in detail in Justice Moreau's decision (2022 NSSC 46). I will not repeat it here, but will provide a brief summary to contextualize the motions.

[11] In August 2016, Mr. Ibrahim commenced an application under the then *Maintenance and Custody Act* regarding parenting time and to prevent relocation of the child. Ms. Murphy, the child's primary parent at the time, wished to relocate to California and take the child with her.

[12] As the matter progressed, Mr. Ibrahim decided to seek primary care of the child.

[13] The matter went to trial before Justice Beryl MacDonald in 2017. In her Order dated August 17, 2017, referred to earlier, Justice MacDonald changed the primary care parent from Ms. Murphy to Mr. Ibrahim and provided a detailed parenting plan.

[14] On October 20, 2017, Justice MacDonald issued another Order requiring Ms. Murphy to pay costs to Mr. Ibrahim of $20,000. Those costs remain unpaid.

[15] Following Justice MacDonald's Order, there were a number of appearances in the Supreme Court – Family Division. Those appearances are outlined in the decision of Justice Moreau (¶16-40).

[16] The proceeding which resulted in Justice Moreau's Orders that are the subject of this appeal commenced in July 2019 when Ms. Murphy filed a Notice of Application pursuant to s. 41 of the *Parenting and Support Act* seeking primary care and decision making authority for the child. Mr. Ibrahim opposed and sought changes to the parenting arrangements and parenting time provision of Justice MacDonald's Order.

[17] The matter was originally scheduled for trial on March 17-19, 2021. However, the trial was adjourned until September 27-29, 2021 due to the COVID-19 pandemic.

[18] At the time of my hearing of these motions, the supervised visits at Veith House had been completed. I was not provided with or advised that any record of those visits had been prepared by Veith House and forwarded to the parties or the Supreme Court – Family Division. Ms. Murphy had not seen the child for approximately two months.

[19] In Mr. Ibrahim's affidavit, he deposes that in August 2022 he became aware through his counsel that the court required a further order prior to scheduling Ms. Murphy's psychological assessment. A further order was prepared by his counsel and forwarded to Mr. Pavel Boubnov, Ms. Murphy's former solicitor. On September 15, 2022, Mr. Ibrahim's counsel sent a letter containing the following to Justice Moreau:

> We represent the Respondent Rany Ibrahim. We write further to Mr. Boubnov's Motion by Correspondence of September 2, 2022. In addition to the issue of the cost of the Psychological Assessment with parental component, Mr. Ibrahim requests clarification regarding whether your Lordship intends to make a further determination regarding Ms. Murphy's regular parenting time after receiving the assessment results, or if Ms. Murphy must file a new Variation Application to have this determined.
>
> Additionally, we understand that Ms. Murphy's Veith House parenting time is set to conclude on September 18, 2022. Unfortunately, Ms. Murphy's assessment has yet to be conducted, and the Assessment Order has yet to even be filed due to Ms. Murphy's assertion that the cost of the assessment should be covered by the Department of Justice.
>
> For Ms. Murphy to continue supervised visits beyond September 18, 2022, there would need to be an extension to the Supervised Access Order until the Psychological Assessment with parental component is completed. Mr. Ibrahim request [*sic*] your Lordship issue a further Veith House Order until the [*sic*] Ms. Murphy's assessment has been completed.

[20] That letter was copied to Ms. Murphy. Apparently, the matter was stalled because Ms. Murphy would be required to pay for the assessment, which she had no ability to do. The Variation Order provides:

> 5. Anna Murphy shall fully participate in and complete a Psychological Assessment with Parental Component which assessment shall be performed by a Court appointed assessor.

[21] There is no indication in that Order that Ms. Murphy would, in any way, have to bear the costs of the preparation of the assessment.

[22] The delay in the preparation of the psychological assessment is also problematic. The trial was held in September 2021. The trial judge's decision was released on February 11, 2022. The Order requiring a psychological assessment was not taken out until May 4, 2022. The issue of requiring another Order (if, in fact, another Order is required) was not identified until August 2022, almost one year after the trial of this matter.

[23] Justice Moreau made the psychological assessment a pre-condition to any further variation Ms. Murphy may seek. The Variation Order provides:

> 6. In the event Anna Murphy requests a hearing be scheduled with respect to varying any provision of this order, she must first file with the Court and provide to Rany Ibrahim the following:
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> a. a certified copy of the original Psychological Assessment including the assessor's recommendation. […]

[24] In response to Mr. Ibrahim's counsel's letter of September 15, 2022, on October 3, 2022, Associate Chief Justice Lawrence O'Neil wrote to the parties as follows:

> Thank-you for your communication dated September 16th [*sic*] and September 22nd, 2022 respectively and directed to Justice Moreau. The matter was referred to me for review.
>
> I wish to advise:
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> (1) in the circumstances, Mr. Boubnov is not required to file a motion to be removed as solicitor of record. Ms. Murphy has retained new counsel, Ms. Wolfe.
>
> (2) The Court will prepare an order extending the supervised access order.
>
> (3) Court staff will be asked to clarify options for funding the psychological assessment ordered by Justice Moreau (paragraph 95, A.M. v. R.I., 2022 NSSC 46).
>
> Should you not hear further over the next month on the issue of funding of the psychological assessment, please advise.

[25] At the time of my hearing of this matter, there was no evidence provided to me that an Order extending the visitations for Ms. Murphy had been issued. Nor

was I provided with any information regarding the funding of the psychological assessment and when it would be completed.

**Analysis**

[26] I am satisfied that Ms. Murphy has raised an arguable issue in her grounds of appeal. I will not address that issue further.

[27] In *Reeves v. Reeves*, 2010 NSCA 6, Fichaud J.A. set out the modified *Fulton* test to be applied on stay applications involving children:

> [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. [authorities omitted]
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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.

[28] In *Slawter v. Bellefontaine*, 2011 NSCA 90, the applicant sought a stay of an order allowing the parties' children to move to British Columbia. The respondent and the children had already relocated when the motion was heard.

[29] Justice Saunders stated at ¶21, in cases involving the welfare of children or in situations where custody or access are in issue, the test to be applied is whether there are "circumstances of a special and persuasive nature" justifying the stay. Justice Saunders went on to quote the summary of the test, set out in *Reeves*, at ¶18-21.

[30] Decisions from this Court continue to use the framework set out in *Reeves* and *Slawter* (see, for example, *Chiasson v. Sautiere*, 2012 NSCA 91; *Titus v. Kynock*, 2021 NSCA 64).

[31] Having determined there is an arguable issue, the primary consideration for me is whether the child's interest would be better served by the stay than by denial of the stay. This is done having regard to the deference owed to the trial judge's findings and the principle that persuasive special circumstances are needed to interfere with the children's stability of lifestyle.

[32] I appreciate that the trial judge found that it was in the best interests of the child that Ms. Murphy's visitation be supervised and she undergo a psychological assessment. He found:

> [89] I find various aspects of the mother's conduct to be highly concerning. The effects on J. will be more impactful as he grows older. I find the evidence confirms it is in J.'s best interest that his contact with the mother be supervised. The case law affirms supervised access is not a long term solution. *D.S. v. R.T.S.*, 2017 NSSC 155.

[33] The trial judge noted that supervised access is not a long-term solution. I suspect that is why he only ordered twelve, 1.5 hour sessions at Veith House. I am also of the view that he must have assumed by the time that the Veith House visits were over a psychological assessment would have been prepared, and the parties could move forward with the parenting arrangements. Unfortunately, that has not occurred. The trial judge could not have envisioned that more than a year after the trial and ten months after his decision no progress would have been made in this matter.

[34] Ms. Murphy has not had contact with the child since September. Associate Chief Justice O'Neil said that an Order would be issued providing for further supervised access at Veith House. That has not occurred.

[35] I find that it is not in the best interests of the child to be denied visitation with his mother.

[36] I am also of the view that it is not in the best interests of the child that it be a pre-condition to moving forward that a psychological assessment be prepared. One has not been scheduled in more than a year after the trial of this matter, and it does not appear as though one will be prepared any time soon.

[37] Finally, I will discuss in more detail when addressing the motion for security of costs, the costs awarded by the trial judge are an impediment for Ms. Murphy not only in moving forward with her appeal, but in having the means and ability to spend proper parenting time with the child.

[38] I am also mindful of the time that will elapse until the appeal until this matter is heard. It is presently scheduled for May 9, 2023. Realistically, a decision may take two to three months after that. If the status quo remains, it could be six to nine months or longer before the issues can be dealt with.

[39] As a result, I would stay the following provisions of the Orders:

(a) The limitation on the number of supervised visits Ms. Murphy may have at Veith House (Supervised Contact Order);

(b) The requirement that a psychological assessment is a pre-condition for a variation of the Variation Order. To be clear, I am not staying the preparation of a psychological assessment. I am only staying that it is a pre-condition to Ms. Murphy seeking to vary the Variation Order; and

(c) The Costs Order dated July 28, 2022.

[40] I would not stay any other provisions of the Orders.

[41] I would hope in light of this decision that a further Order from the Supreme Court – Family Division (if necessary) will allow for additional supervised visits at Veith House and presumably transition into unsupervised visits as was implicit in Justice Moreau's decision and Orders.

[42] As I did during the hearing of these motions and will do so again, I urge these parties to consider judicial mediation in an effort to resolve their issues.

[43] The motion for a stay is allowed in part.

**Motion for Security for Costs**

[44] Mr. Ibrahim seeks $8,400 as security for costs on this appeal.

[45] Ms. Murphy was cross-examined in some detail about her finances. It is apparent that she is impecunious. She is unemployed and on social assistance. She still owes the costs awarded by Justice MacDonald, and she is in arrears in child support. She receives approximately $600 per month for a living allowance. Her apartment rent is twice that amount and she is being subsidized by her mother.

[46] In *Withenshaw v. Withenshaw*, 2022 NSCA 62, Chief Justice Wood set out the test for security for costs:

[5] A motion for security for costs is governed by *Civil Procedure Rule* 90.42 which provides:

> (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.
>
> (2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[6] An order to require an appellant to post security for costs is discretionary. The test applied by the Court places the onus on an applicant to establish "special circumstances" in order for the discretion to be exercised in their favour. Beveridge, JA described the approach to be taken in *Sable Mary Seismic Inc. v. Geophysical Services Inc.,* 2011 NSCA 40:

> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.,* 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
>
> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman,* at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.
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> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.,* 2006 NSCA 131.
>
> [7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before

> granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[47] As I indicated earlier, I am satisfied that Ms. Murphy has an arguable appeal. I am also satisfied Ms. Murphy would be effectively denied her right to appeal as a result of her impecuniosity.

[48] As a result, I am not prepared to exercise my discretion in granting an order for security for costs.

[49] The motion for security for costs is dismissed.

**Conclusion**

[50] The stay motion is allowed in part, the security costs for motion is dismissed. As success on the motions was divided I would not order costs payable to either party.

Farrar J.A.