NOVA SCOTIA COURT OF APPEAL
Citation: *Tobin v. McCluskey*, 2024 NSCA 74

Date: 20240724
Docket: CA 530311
Registry: Halifax

Between:

Anne Claire Tobin (Polomark)

Appellant

v.

Andrew McCluskey

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	July 18, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion for stay pending appeal dismissed with costs
Counsel:	Supriya Joshi, for the appellant Meaghan Johnston, for the respondent

Decision:

[1] On July 18, 2024, I heard a motion brought by Ms. Polomark seeking to stay an order issued by Justice Cindy G. Cormier on December 21, 2023 (reasons reported as 2023 NSSC 404). That order, amongst other things, directed that Ms. Polomark's daughter, born September 4, 2011, be returned from British Columbia where they had been residing, and to be placed in the primary care of her father, Mr. McCluskey in Halifax.

[2] The motion was contested by Mr. McCluskey. After having heard from the parties, I reserved my decision. For the reasons that follow, I would dismiss the motion.

Background

[3] Until June 2022, the child resided in Halifax, Nova Scotia. By court order, she resided in the primary care of her mother, Ms. Polomark, but had specified parenting time with her father, Mr. McCluskey.

[4] On May 19, 2022, Mr. McCluskey filed a Notice of Application with the Nova Scotia Supreme Court (Family Division) in which he alleged that Ms. Polomark had been consistently denying him his court-ordered parenting time with the child since February 2022. As part of the application, he requested a variation to the existing order placing the child in his primary care.

[5] On June 28, 2022, Ms. Polomark and the child left Nova Scotia for British Columbia. She provided no notice to Mr. McCluskey the child was being removed from Nova Scotia, notwithstanding that court-ordered summer block access was about to begin between him and the child. What followed was a two year effort by Mr. McCluskey to have the child returned to Nova Scotia.

[6] From Justice Cormier's written reasons, it is clear that Ms. Polomark was repeatedly directed to return the child to Nova Scotia. I note:

- During a scheduled court conference on August 11, 2022, Ms. Polomark did not attend, but Justice Cormier directed her through her lawyer that the child was to be immediately returned to Nova Scotia. The child was not returned as directed;

- During a scheduled court appearance on September 21, 2022, Justice Cormier ordered the child be returned to Nova Scotia on or before October 1, 2022. The child was not returned as ordered;

- Ms. Polomark failed to attend in person as directed an interim hearing on October 19, 2022. Appearing virtually, Ms. Polomark confirmed the child had not yet been returned to Nova Scotia. Justice Cormier once again ordered the child be returned to Nova Scotia immediately. The child was not returned as ordered; and

- During a court appearance on February 21, 2023, Ms. Polomark appeared virtually, contrary to previous directions to appear in person. She represented to the court the child, still in British Columbia, would be returned to Nova Scotia on or before March 13, 2023. The child was not returned as promised.

[7] The hearing of Mr. McCluskey's application to vary and Ms. Polomark's application for relocation was spread out over several days, concluding on June 6, 2023. Post-trial written submissions were filed by Mr. McCluskey in June and August 2023, with Ms. Polomark's submissions being filed in November, 2023.

[8] On December 14, 2023, Justice Cormier advised the parties of her decision, with an order being issued December 21, 2023. Justice Cormier's order placed the child in Mr. McCluskey's primary care and directed she was to be returned to Halifax no later than December 24, 2023. Amongst other provisions, it was ordered that parenting time between Ms. Polomark and the child would be supervised for an initial period of six months by Veith House.

[9] The child did not return to Nova Scotia as ordered by Justice Cormier. She remained in the care of her mother in British Columbia.

[10] On January 25, 2024, Ms. Polomark filed a Notice of Appeal in which she set out the following grounds of appeal:

- Erroneous application of the Best Interests of the child analysis
- Neglect of relevant evidence and police reports
- Flawed assessment of credibility and facts
- Procedural irregularities and denial of fair hearing

- Legal error in assessing relocation and custodial rights
- Inadequate consideration of the child's expressed wishes and safety concerns
- The trial judge demonstrated an apprehension of bias
- The trial judge failed to consider history of childcare from 2022 to present
- The trial judge failed to consider the factors under s. 18 of the Parenting and Support Act
- Any other grounds of appeal following the review of transcript

[11] From the affidavits on file it appears that Mr. McCluskey made a number of requests for the child to be returned to Nova Scotia in compliance with the December 2023 order. The child was not returned in response to these requests. Ms. Polomark's evidence on the motion was that the child was refusing to leave British Columbia and was afraid of her father.

[12] On April 18, 2024, Ms. Polomark was arrested in British Columbia due to a criminal charge laid against her in Nova Scotia. Ms. Polomark was charged with abduction of a child contrary to s. 282(1) of the *Criminal Code*. She was released on bail conditions and returned to British Columbia on May 19, 2024.

[13] Upon learning of Mr. Polomark's arrest, Mr. McCluskey travelled to British Columbia on April 20, 2024 in an attempt to retrieve the child who was staying with maternal relatives.

[14] Mr. McCluskey stayed in British Columbia and with police assistance initiated contact with the child and arranged for re-introduction counselling. He decided to stay in British Columbia until the end of the school year in order to permit the child to finish the school year. It would appear that during this time, the child continued to reside with a maternal uncle, but had contact with both Mr. McCluskey and Ms. Polomark.

[15] While in British Columbia, Mr. McCluskey applied for and received an order from the Provincial Court of British Columbia recognizing Justice Cormier's December 2023 order. As a result of a contested hearing on June 14, 2024, the Provincial Court ordered:

1. Upon being satisfied that Andrew McCluskey has been wrongfully denied parenting time by Anne Tobin, aka Anne Polomark, this court orders under s. 231(4) of the Family Law Act that a police officer apprehend [the child], born September 4, 2011 (the "child"), and take the child to Andrew McCluskey if the child is not voluntarily brought into the care of Andrew McCluskey by 6:00 p.m. today, June 14, 2024.

2. For the purposes of locating and apprehending [the child], a police officer may enter and search any place he or she has reasonable and probable grounds for believing the child to be.

[16] Pursuant to the above order, the child was transferred to the custody of Mr. McCluskey by police on June 14, 2024 and they returned to Halifax on June 20, 2024.

[17] On July 5, 2024, Ms. Polomark filed a Notice of Motion seeking to stay the order under appeal.

Legal Principles

[18] A motion for stay pending appeal is governed by *Civil Procedure Rule* 90.41(2) which provides:

> 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.

[19] Normally this Court applies the well-known *Fulton* test when considering a motion for stay. However, that test gives way where the interests of children are engaged. In *Reeves v. Reeves*, 2010 NSCA 6, Justice Fichaud explained:

> [19] In *Fulton Insurance Agencies Ltd. v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A.), at ¶ 28, Justice Hallett stated the well known principles that govern the exercise of the discretion under the former *Rule* 62.10(2) and the current *Rule* 90.41(2). To summarize, a stay may issue if the applicant shows either (a) an arguable issue for appeal, that denial of the stay would cause the applicant irreparable harm and that the balance of convenience favors a stay or (2) there are exceptional circumstances.

> [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. . .
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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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> [Emphasis added]

[20] This modified test has been consistently applied by the Court, placing the best interests of the child in the analytical forefront. See for example, *Chiasson v. Sautiere*, 2012 NSCA 91; *J.H. v. A.C.*, 2020 NSCA 54; *Murphy v. Ibrahim*, 2022 NSCA 75; *MacDonald v. MacDonald*, 2024 NSCA 58.

Analysis

Arguable grounds of appeal

[21] Notwithstanding Ms. Johnston's able submissions regarding the strength of the grounds of appeal, I am satisfied that on their face, the grounds as pled, are arguable. Ms. Polomark has surpassed this hurdle.

The best interests of the child

[22] The more important determination is whether the issuance of the stay would better serve the interests of the child than maintaining the order under appeal. In doing so, deference must be afforded to the factual findings of the trial judge. I note in particular that Justice Cormier found:

- Ms. Polomark unilaterally and surreptitiously decided to move the child to British Columbia without giving notice to Mr. McCluskey;

- Once in British Columbia, Ms. Polomark provided Mr. McCluskey with very little information about the child and did not want him to know her address or contact information;

- Until removed from Nova Scotia, Mr. McCluskey had been a very involved parent;

- Contrary to Ms. Polomark's assertions, there was no reason for her or the child to fear Mr. McCluskey, as he had never been a threat to either of them. Ms. Polomark's suggestions she had been harassed and abused by Mr. McCluskey were unfounded;

- While in British Columbia, Ms. Polomark failed to keep the child in contact with her extended family members in Nova Scotia;

- Ms. Polomark failed to provide full financial disclosure;

- Ms. Polomark had no viable plan or any real intention of ensuring Mr. McCluskey has a meaningful parenting relationship with the child; and

- Ms. Polomark actively encouraged and facilitated the child's stated fear and rejection of Mr. McCluskey.

[23] Ms. Polomark's objective in seeking a stay is to have the child returned to her care in British Columbia. She has filed evidence asserting the child shares a close relationship with her, and has flourished in British Columbia. She says it is likely that the child has been traumatized by her forced removal from British Columbia and return to Nova Scotia. In her oral submissions, Ms. Polomark says, if the stay is granted, she will ensure Mr. McCluskey has meaningful contact with the child.

[24] In his affidavit, Mr. McCluskey says the child is settling in well and their relationship normalizing with the passage of time. He resides in the same home that the child has stayed in since the age of 5. The child has reconnected with her

best friend and has started sporting activities. Mr. McCluskey and the child have started counselling. He says he will follow the provisions of the order, including co-operating with arrangements Ms. Polomark may make for her supervised access.

[25] In her submissions, Mr. McCluskey's counsel asserts that should the stay be granted and the child returned to British Columbia, it is highly probable Ms. Polomark will not return the child in the event her appeal is dismissed. Her past conduct is the best predictor of her future actions and she has no respect for court orders.

[26] Justice Cormier made strong factual findings and concluded it was in the child's best interests to be placed in the primary care of Mr. McCluskey. The child is now in Halifax after significant effort on Mr. McCluskey's part. I am not satisfied that granting the stay and returning the child to Ms. Polomark's care in British Columbia is in the child's best interests. I am satisfied that remaining in the primary care of Mr. McCluskey pursuant to the December 21, 2023 order is in the child's best interests. In reaching these conclusions I note in particular:

- Ms. Polomark has been charged with a serious criminal offence. If convicted, she may face a term of imprisonment or conditions that impact on her ability to care for the child. Returning the child to Ms. Polomark's care in light of this uncertainty is not in her best interests;

- If returned to British Columbia, it is more probable than not, that Ms. Polomark will not facilitate meaningful parenting time between Mr. McCluskey and the child. Stopping the efforts underway to rebuild the child's relationship with her father would be detrimental to her well-being. Remaining with Mr. McCluskey will allow the child to continue counselling to rebuild her relationship with her father;

- If a stay is granted and Ms. Polomark's appeal is ultimately dismissed, then the child will again need to move from British Columbia back to Halifax, causing unnecessary disruption and emotional turmoil. More likely however, is that Ms. Polomark will not facilitate the return and the child will remain in British Columbia contrary to the court order; and

- Mr. McCluskey is willing to facilitate the child having meaningful contact with her maternal family, including her half-brothers.

Conclusion

[27] For the reasons above, the motion for stay is dismissed. I am satisfied that costs should be paid forthwith by Ms. Polomark to Mr. McCluskey in the sum of $1,500.00, inclusive of disbursements.

Bourgeois, J.A.