NOVA SCOTIA COURT OF APPEAL

Citation: ***Smith v. Beaver***, 2006 NSCA 97

Date: 20060803
Docket: CA 265951
Registry: Halifax

Between:

Crystal Dawn Beaver

Applicant/Appellant

v.

Sherman Tyrone Smith

Respondent

Judge: The Honourable Justice Nancy Bateman in Chambers

Application Heard: August 3, 2006, in Halifax, Nova Scotia

Held: Application for a stay dismissed.

Counsel: David A. Grant, for the appellant
Charlene Moore and Patricia Jones (Articled Clerk), for the respondent

Reasons for decision:

[1] Ms. Beaver has applied for a stay of an access order issued in the Nova Scotia Supreme Court (Family Division) April 11, 2006 pursuant to the oral decision of Gass, J. For the reasons set out below I am dismissing the application.

[2] As little information is provided in the material filed by the applicant, I have gleaned much of the background from the detailed written reasons (released June 16, 2006) underlying the order on appeal (**Smith v. Beaver**, 2006 NSSC 196, unreported). What follows is a brief summary of the particulars reviewed in the decision.

[3] Ms. Beaver and Mr. Smith have a child, Kalam, born March 20, 1996, when they were in a relationship. They parted and in June of 2001 agreed to joint custody. An order to that effect was issued in September of 2001. It is my understanding that effective day to day care and control was with Ms. Beaver with access to Mr. Smith. On April 26, 2004 Ms. Beaver applied to vary the order to sole custody and for a review of maintenance. Mr. Smith countered with an application for designated access. On February 10, 2005 a consent order issued for an access assessment which provided for Kalam's involvement in the assessment. At a pre-trial conference in June 2005, after the release of the access assessment, the parties agreed to the requested change to sole custody with Mr. Smith's access and child support remaining to be decided by the court. Those issues came before Justice Gass in February 2006.

[4] Mr. Smith has not had access with Kalam since early 2002. Both parties are living with new partners. Ms. Beaver opposed the resumption of access principally due to violence during the relationship between herself and Mr. Smith and because of the passage of time without access. She was concerned, as well, about Mr. Smith's alleged abuse of alcohol and drugs.

[5] After a detailed review of Ms. Beaver's reasons for opposing the access and of Mr. Smith's response, the judge concluded that both parties had matured beyond the conduct exhibited during their relationship and, while both still exhibited some immaturity and animosity toward one another, it was in Kalam's best interests that contact with his father resume. The judge said in part:

> [36] It is hard to say what has happened here, but either of those approaches is not in his best interests in the short term or in the long term and Kalam needs the benefit of having some professional intervention to assist him in moving forward one way or the other.
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> [37] The reality is that without affording him the opportunity to get to know his father and to give this relationship a chance, Kalam does run the risk of suffering in the long run by the absence of that opportunity. Here is the perfect opportunity for this to be done safely and in an atmosphere where there is the guidance of a third party professional who will determine how, when and if the access should progress.
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> [38] As I have said, I have read all of the material. I have seen the evidence. I have listened to the witnesses and I hae observed the interaction between the parties, and I accept for the most part the recommendations of Mr. Kennedy. I do conclude that it is appropriate for access to be reinstated on the terms as outlined. This would all be done in the course of what would be considered to be a continued access assessment so the assessment is not considered to be complete.
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> [39] Mr. Kennedy would meet with Kalam first and have the first visits with his father in the controlled setting with Mr. Kennedy being present so that he can guide the process and assess it as it goes along and make recommendations. He will prepare an undated report for the court and the matter will be reviewed. We will set a date and time for the review of that before the parties leave the building today. At that time, the court will hear further recommendations from Mr. Kennedy and if the parties are able to agree, fine. If not, the court will make further rulings in that regard.

[6] Notwithstanding the earlier consent order, Ms. Beaver refused to let Kalam participate in the access assessment. In this regard, the judge said:

> [34] The mother has indicated in her evidence, that she is not prepared to comply with any court order and she has already refused to comply, but she does not have the right to take that opportunity away from her son. Her defiance of any order to the contrary in many ways speaks volumes to the court. By refusing to permit her son to participate even in the access assessment, in my view she has not done him any favours. She has not given him the opportunity to sit down with Mr. Kennedy, enabling him to speak freely to an independent, third party, an

> experienced professional trained in these matters. She might have well achieved her objective possibly if, after having spent some time with him, the assessor recommended that it wasn't in Kalam's best interests to resume the access with his father. On the other hand, her mind would have been put at ease because Mr. Kennedy would have had an opportunity to evaluate how the child feels about the conflict between his parents and how he feels about things from here on. He is an independent person. He is not a person in a position to influence Kalam as the child is able to be influenced in his own household.

[7] As is evident from para. 39 of the decision, above, the judge ordered that Mr. Kennedy, the social worker who prepared the access report, would supervise and control the initial visits between father and son. He would update his report and the matter of access would return to the court for review (June 22, 2006). It is from that order that Ms. Beaver appealed and that order which she now wishes to stay.

[8] As stated above, the order on appeal issued April 11, 2006. Ms. Beaver filed a Notice of Appeal May 11. On June 8 counsel for the parties appeared in this Court and dates for the appeal hearing were set. Meanwhile, on June 7, 2006 Mr. Smith had applied in the Supreme Court (Family Division) for leave to commence contempt proceedings against Ms. Beaver for allegedly failing to comply with the April 11th order.

[9] Apparently Ms. Beaver was found to be in contempt of that order as, on July 6, 2006 her counsel filed a notice in this Court purporting to appeal a June 22, 2006 "decision" of Gass, J. and seeking a stay of the contempt finding and of the April 11 order. A single affidavit from Ms. Beaver was filed in support of both applications. The notice of appeal in the contempt matter was rejected by the Court because it was the initiation of a new appeal and not accompanied by filing fees. Accordingly, the application for the stay of the contempt determination (if there is a formal order issued, it has not been filed) cannot proceed as there is no properly launched appeal of that order.

[10] Ms. Beaver nevertheless pursues the application to stay the April access order. While counsel for the respondent has not raised the issue, I question whether the appeal of the April 11 order is timely within the **Civil Procedure Rules**. Generally a notice of appeal must be filed within thirty days, however, the

time frame within which to appeal an interim order is ten days (**CP Rule** 62.02). Although there is sometimes confusion as to whether an order in a family proceeding, particularly variation orders, are interlocutory or final, the order issued by Gass, J. certainly has the hallmarks of an interim order. It was clearly intended to be a first order in the matter with an access update required and close review date set. Effectively, that court indicated its intent to continue to superintend the proceedings over a short time frame.

[11] Ms. Beaver did not move to appeal the April order with any dispatch, waiting until the last day to file her notice. Nor did she then promptly pursue the setting down of the appeal, waiting another month to appear in Chambers to do so. It was not until she was found in contempt that she applied to stay the original order. As a result, matters have proceeded in both the Family Division and this Court - an untenable and unnecessary result. It is to avoid that very situation that interim orders are to be appealed within a short time frame.

[12] It is unnecessary for me to finally decide at this point whether the appeal is filed out of time as I am not satisfied, in any event, that the stay application has merit.

[13] As I have said above, Ms. Beaver has filed a single affidavit in support of both the stay of the main action and of the contempt. Removing from consideration the portions of that ten paragraph affidavit that relate to the contempt issue, I am left with the following "evidence":

> Kalam has not seen his father since 2001;
>
> If she is required to permit Mr. Kennedy to establish access between Kalam and his father Ms. Beaver will "loose any benefit that [one] might have obtained on appeal";
>
> Ms. Beaver believes she has a good appeal because the judge failed to take into account the length of time since Mr. Smith had had access;

> She believes Mr. Smith was "high" when he testified in the main action.

[14] I have ignored the many assertions of fact contained in the parties' memoranda, none of which are supported by affidavits.

[15] The general test for a stay application is as set out in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347, *per* Hallett, J.A.:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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>> (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:
>>
>> (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] In child custody cases, the three part test is not strictly applied, however, there must be circumstances of a special and persuasive nature in order to grant the stay (**Children's Aid Society of Halifax v. B.M.J.** (2000), 189 N.S.R. (2d) 192; N.S.J. No. 405 (Q.L.) (C.A.)).

[17] There is simply nothing here of a "special and persuasive nature". There is no evidence before me that the child would suffer harm if access was reintroduced

in the manner directed; the continuation of access has not been finally determined; the reasons for judgment are detailed and address each issue raised by Ms. Beaver on this appeal; contrary to the assertion of Ms. Beaver in her grounds of appeal, the judge expressly considered the fact that Kalam had not had access with his father for some time; the trial judge had the advantage of hearing the witnesses reviewing the evidence in thoughtful and thorough reasons. No legal error or overriding error of fact is apparent on the face of the judgment which would cause me to second guess her decision.

[18] For the above reasons, the application is dismissed. This application was so wanting in substance and procedure, I am persuaded it is appropriate to take the unusual step of awarding costs of the application to Mr. Smith. In view of Ms. Beaver's modest financial capacity, I would fix costs in the nominal amount of $250 inclusive of disbursements. Costs shall not be payable until any and all arrears of child support are satisfied by Mr. Smith.

Bateman, J.A.