

NOVA SCOTIA COURT OF APPEAL

Citation: Reeves v. Reeves, 2010 NSCA 6

Date: 20100201

Docket: CA 318614

Registry: Halifax

Between:

Natasha Olivia Reeves

Applicant
(Appellant)

v.

Bruce Allen Reeves

Respondent

Judge:

The Honourable Justice Fichaud

Application Heard:

January 28, 2010 in Chambers

Held:

Application for stay of execution is allowed.

Counsel:

James R. Morris, for the applicant

The respondent, Bruce Allen Reeves, in person

Decision:

[1] Ms. Reeves applies for a stay of enforcement of provisions in the Corollary Relief Judgment from the parties' divorce.

Background

[2] I summarize the facts from the trial decision and record, and the affidavits and parties' positions at the hearing of the stay application.

[3] Mr. and Ms. Reeves married in 1999. Their three children were born in May 2001, February 2003 and October 2004. Mr. and Ms. Reeves separated in September 2007. Justice Williams of the Supreme Court of Nova Scotia (Family Division) heard their divorce trial in February and March 2009, and issued a written decision on June 12, 2009 (2009 NSSC 139), followed by a Corollary Relief Judgment ("CRJ") on July 13, 2009.

[4] Mr. Reeves is employed with the Canadian Armed Forces at the Shearwater Base, and in the past has been posted to Greenwood Nova Scotia, Dubai and twice to Afghanistan. His current annual income from the Forces exceeds \$98,000. At the trial Ms. Reeves was unemployed. Since the trial she has become employed as an Educational Program Assistant in schools throughout Halifax Regional Municipality. She earns \$10 per hour and estimates work averaging 20 hours weekly.

[5] The CRJ says that Ms. Reeves has primary care of the children. Mr. Reeves is to have access every second weekend from Friday after school to Monday morning, Wednesday evenings from 4 to 7 PM, and during vacations, holidays and school breaks as specified in the CRJ. Clause 2(a) of the CRJ, states that his weekend access lasts to "Monday morning". Clause 2(a) changed the previous term of his weekend access that ended "Sunday at 4:00 PM" under the earlier Interim Order of the Supreme Court (Family Division).

[6] Ms. Reeves has lived with the children in the matrimonial home in the Porter's Lake area of Halifax Regional Municipality. Mr. Reeves lives with his parents in Bedford. The trial decision (¶ 44-45) described Mr. Reeves' transportation difficulties in accessing the children. Ms. Reeves had the only family vehicle. Mr. Reeves has no vehicle and lives a 1 ½ hour bus ride from the

matrimonial home in Porter's Lake, a bus ride that is unavailable in summer months.

[7] The judge attempted to address Mr. Reeves' transportation difficulties by including in the Corollary Relief Judgment the following clauses (a) and (b) of ¶ 1:

- (a) Upon the sale of the parties' matrimonial home, Natasha Reeves shall move the children within the boundaries of the former City of Dartmouth, Cole Harbour, Eastern Passage or Bedford; and
- (b) The children will be registered in school in one of the aforementioned areas and thereafter the children's school will not be changed without the agreement of the parties or an Order of the Court.

The judge said that public transportation exists in the areas noted in clause 1(a).

[8] Ms. Reeves appealed to the Nova Scotia Court of Appeal. She has three grounds of appeal. She asks the Court of Appeal to vary clauses 1(a) and (b) so that Ms. Reeves may reside with the children anywhere in Halifax Regional Municipality. She also asks that Mr. Reeves' weekend access with the children end Sunday evenings instead of the "Monday mornings" mentioned in clause 2(a) of the CRJ. Her third ground of appeal is irrelevant to this stay motion.

[9] On November 26, 2009, a chambers judge scheduled Ms. Reeves' appeal for hearing on April 13, 2010.

[10] On January 20, 2010, Ms. Reeves filed a motion for a stay of the enforcement of clauses 1(a) and (b) and of clause 2(a)'s Monday morning return time after Mr. Reeves' weekend access. I heard the motion in chambers on January 28. The trigger for the motion was that, on January 9, 2010, Mr. and Mrs. Reeves obtained an acceptable offer for the sale of the matrimonial home, with a quick closing date of January 21, 2010. This activated Ms. Reeves' obligation to relocate under ¶ 1(a) of the CRJ.

[11] According to Ms. Reeves' affidavit for the motion, on October 23, 2009 Ms. Reeves and the children relocated from the matrimonial home to a detached three-bedroom home also in the Porter's Lake area. Her affidavit says the new residence

is “approximately 1.5 kilometers closer to the Halifax/Dartmouth Metro area than the matrimonial home and that much closer to [Mr. Reeves’] home and work place”. Her affidavit says that the residence was available at an “affordable rent of \$850” through a family friend and that rent for a comparable space in the areas specified by clause 1(a) of the CRJ would be higher. Her affidavit says the new home is about 34.2 kilometers from Mr. Reeves’ residence and 21.6 kilometers from his place of work at Shearwater.

[12] Ms. Reeves’ affidavit says that the new residence enables the children to remain in O’Connell Drive Elementary School, the only school the children have known. The children are in Grades 3, 1 and Primary. Her affidavit describes the features and programs of the school. Her affidavit says that, in her view, it is not in the children’s best interests to change schools in mid term.

[13] As to extra curricular activities, Ms. Reeves’ affidavit says that Porter’s Lake has “good community centres, community resources, and activities”, that they are “close to family, friends and neighbours, who provide a healthy support system for the children and me”, and that Ms. Reeves’ parents are a “relatively short drive away”.

[14] Ms. Reeves’ affidavit says that Mr. Reeves has not yet obtained a motor vehicle “but has regular access to one provided by his family for access and errands”. Mr. Reeves acknowledged that he has used vehicles of friends or relatives to pick up his children on Friday evenings, and that he has never actually had to use the bus to Porter’s Lake for access to his children. He said that transportation difficulties have prevented him from exercising the Wednesday evening (4 to 7 PM) access that is provided in the CRJ.

[15] According to Ms. Reeves’ affidavit, the proceeds of sale of the matrimonial home should satisfy their matrimonial debts and enable Mr. Reeves to acquire a vehicle so he could drive to Porter’s Lake for the children. Mr. Reeves acknowledged at the chambers hearing that he received house proceeds of at least \$11,500 net of matrimonial debts. Ms. Reeves’ counsel says that Mr. Reeves’ net payout is several thousand dollars higher. Mr. Reeves said he is looking at buying a car sometime.

[16] Respecting Mr. Reeves’ access to Monday morning, Ms. Reeves’ affidavit says her new job requires that she begin work at 7:15 AM. Mr. Reeves said he

leaves for work at 6:50 AM, and that Ms. Reeves appears before 6 AM on Mondays to pick up the children. He says the children wake up at 5:30 AM and prepare for their mother's arrival. Mr. Reeves says the children are not disturbed by this 5:30 AM wake up. Ms. Reeves says the early wake up Monday mornings is stressful for the children. She requests a stay of the Monday morning terminal time, and a substitution of Sunday evening for the termination of Mr. Reeves' weekend access.

[17] The interim order of May 7, 2008 issued by Family Division Justice Beryl MacDonald had provided that Mr. Reeves' weekend access ended at 4 PM Sundays. The CRJ of July 13, 2009 replaced the 4 PM Sunday time with access to end Monday mornings. The written decision for corollary relief did not explain the reason for this change. At the stay hearing Mr. Reeves said that, even after the CRJ and until mid-December 2009, he and Ms. Reeves continued the Sunday evening pickup. This was for the children's convenience. But then, according to Mr. Reeves, in December 2009 Ms. Reeves began to insist on his compliance with other timing provisions, and he reciprocated by insisting on the Monday morning changeover for his weekend access.

Legal Principles

[18] *Rule* 90.41(2) authorizes a judge to stay the enforcement of the judgment under appeal "on such terms as may be just".

[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. *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.

[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.

Application of Legal Principles

[22] The two grounds of appeal relevant to this motion request the Court of Appeal to eliminate the requirement that Ms. Reeves move the children from Porter's Lake and change Mr. Reeves' post-weekend return of the children from Monday morning to Sunday evening. In my view, these grounds involve arguable issues. My reasons will be apparent from the discussion that follows. This satisfies the first element of the test for a stay.

[23] The main issue is whether Ms. Reeves has established that the children's interests would be better served by the requested stays than by denial of the stays. I must consider this in light of the deference due to the trial judge's findings and the principle that persuasive special circumstances are needed to interfere with the children's stability of lifestyle.

[24] I will first address the requested stay of clauses 1(a) and (b) of the CRJ. The appeal will be heard on April 13, 2010, likely followed by a decision several weeks later. So the requested stay would endure for about three months.

[25] The children now attend their elementary school in Porter's Lake, in Grades 3, 1 and Primary. That is the only school they have ever attended. Denying the stay of clauses 1(a) and (b) would require them to change schools during February or March, in mid school term. Issuance of the stay would mean that (1) if Ms. Reeves' appeal succeeds, they would not have to move, and (2) if her appeal fails, likely they could move after this school year and start at their new school in September 2010. The children could avoid the disruption of changing schools in the middle of the school year. School is central to children aged five, six and eight. I accept Ms. Reeves' view that a mid-year change of schools, added to the stresses of the move of residence and loss of friends from their former school and neighborhood, would disrupt their young lives and their schooling.

[26] The judge's principal reason for requiring Ms. Reeves to move from Porter's Lake was to ease Mr. Reeves access to the children, given that he did not own a vehicle. He has now either received, or will receive, at least \$11,500 (possibly more) net of matrimonial debts, from the sale of the matrimonial home. One would hope that this amount, along with his income exceeding \$98,000 per annum, might allow him to acquire a car so he could drive to Porter's Lake. Then the main reason for what the judge acknowledged as the "unusual" forced move of Ms. Reeves and the children would disappear. However, in deference to the trial judge's concern about Mr. Reeves' transportation impediments, I prefer not to rely on the possibility that Mr. Reeves would buy a car.

[27] Ms. Reeves uses her vehicle to drive to Mr. Reeves' home in Bedford to pick up the children on Monday mornings. She could use her vehicle to drop off the children with Mr. Reeves and to pick up the children again, for each of Mr. Reeves' periods of access. This should eliminate Mr. Reeves' concern about transportation of the children for access. Mr. Reeves said at the stay hearing that he has not exercised his Wednesday access because he had no vehicle. If Ms. Reeves drives the children to Mr. Reeves' residence and picks them up again, Mr. Reeves and the children will enjoy the Wednesday access that to date has been foregone.

[28] Rule 90.41(2) allows a stay "on such terms as may be just". I will stay the enforcement of clauses 1(a) and (b) of the CRJ, until the judgment of the Court of

Appeal on Ms. Reeves' appeal, on the terms that Ms. Reeves drives the children to Mr. Reeves' residence for the start of their scheduled access and pick up the children by vehicle at his residence at the end of his scheduled access. Of course this condition will not apply if the parties agree otherwise on any particular occasion. If, as one would hope, Mr. Reeves acquires a vehicle during the period of this stay, these terms will cease, and the stay will be unconditional until the judgment of the Court of Appeal on Ms. Reeves' appeal. In my view, the stay on these terms is just under *Rule* 90.41(2), responds to special and persuasive circumstances to serve the children's interests by avoiding a needless disruption of their schooling in mid-term, and gives appropriate deference to the trial judge's decision.

[29] I move to the second aspect of the stay application.

[30] Before the CRJ of July 13, 2009, the Interim Order of the Supreme Court (Family Division) dated May 7, 2008, provided that Mr. Reeves' weekend access ended at 4:00 PM on Sundays. The written decision for the CRJ states no reason for the change from Sunday afternoon to Monday morning, and does not discuss the impact on the children of a 5:30 AM wake up, so Ms. Reeves could pick them up before Mr. Reeves leaves for work in the early morning. A judge on a stay application should defer to the fact driven assessments of the trial judge. But here the judge's decision says little on the point to which I can defer. The decision has just the bare conclusion that access should continue to Monday mornings.

[31] This leaves me with the parties' evidence and positions expressed at the stay hearing. The reactions of Mr. and Ms. Reeves to the Sunday time were instructive. For over four months after the CRJ, they continued the earlier practice (from the Interim Order) that Ms. Reeves would pick up the children at 4:00 PM on Sundays. This indicates to me their concern about a 5:30 AM Monday wake up for these young children. At the stay hearing Mr. Reeves said that, starting in December 2009, he started to insist on the Monday pickup only because Ms. Reeves had insisted on his compliance with another time limit in the CRJ. The Monday pickup was his rejoinder to Ms. Reeves.

[32] In my view, the requirement that these youngsters wake up at 5:30 AM each Monday, to be picked up and moved before boarding the school bus, must be stressful. I accept Ms. Reeves' evidence on this point. The trial decision says nothing to address this needless stress to the children. The parents' conduct since

the CRJ, until Mr. Reeves' change of heart in December 2009, indicates their view of their children's best interest on the matter. In my view, there is a persuasive and special circumstance to justify a stay. I will stay the enforcement of the requirement in clause 2(a) of the CRJ that Mr. Reeves' weekend access last until "Monday morning". The stay will last until the judgment of the Court of Appeal on Ms. Reeves' appeal. The result of the stay would be that the weekend access would last until "Sunday at 4:00 PM", according to clause 6 of the Interim Order that preceded the CRJ.

Conclusion

[33] I will issue stays on the terms stated earlier (¶ 28, 32). Costs will be in the cause.

Fichaud, J.A.