FAMLNWS 2021-47
Family Law Newsletters
December 06, 2021

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Supreme Court News

December 2, 2021 was a HUGE day for family law at the Supreme Court of Canada.

Not only did the Court grant leave to hear the mother's appeal from the Ontario Court of Appeal's decision in *N. v. F.* (2021), 62 R.F.L. (8th) 7 (Ont. C.A.) (see our discussion of this case in the October 4, 2021 edition of *TWFL* 2021-38), but it also heard and granted three family law appeals that dealt with, among other things, the standard of appellate review in family law cases and new evidence on appeal (*Alansari v. Kreke*, 2020 CarswellSask 522 (C.A.); *J.D. v. DCP, et al*, 2020 CarswellPEI 73 (C.A.); and *Barendregt v. Grebliunas* (2021), 50 R.F.L. (8th) 1 (B.C. C.A.) — see also our discussion of *Barendregt* in the May 17, 2021 edition of *TWFL* 2021-19). The Court's reasons are not yet available (and may not be available for a while), but we will let you know once they have been released.

A Tale of Two Stays . . . Well . . . Sort of . . .

Titus v. Kynock (2021), 61 R.F.L. (8th) 1 (N.S. C.A.) — Beaton J.A.

Ekeberg v. Swan (2021), 61 R.F.L. (8th) 253 (Alta. C.A.) — Feehan J.A.

Two mobility applications allowed. Two appeals. Two motions to stay pending appeal heard — one in September and one in October. Two very different results.

Titus v. Kynock

On July 12, 2021, Justice Cormier of the Supreme Court of Nova Scotia-Family Division, awarded custody of the parties' 9-year-old child to the mother.

The mother was also granted permission to relocate with the child to Idaho.

The father appealed, and brought a motion asking the Court of Appeal to stay the judge's order pending the appeal. The stay motion was granted.

Pursuant to an interim order in November 2016, the child resided with the parties on a week-about basis. The parties engaged in significant litigation thereafter, appearing in court some 16 times. On April 12, 2018, the parties agreed to a detailed parenting plan, which provided that at the end of the school year, primary care of the (then) 5-year-old child would be with the father, and that the mother would have parenting time every second weekend. The mother agreed to this without a lawyer.

On May 11, 2018, Justice Cormier told the parties she was uncomfortable with the parenting plan because she felt the mother may have agreed to a resolution due to the stress of the situation. The father's lawyer expressed concern that, notwithstanding the agreed-upon parenting plan, it appeared that all issues were being raised again.

The mother engaged counsel and, by the end of 2018, was asking that the issue of interim decision-making authority be determined immediately.

On December 20, 2018, Justice Cormier granted the mother primary care of the child and sole decision-making authority. The father was given parenting time every second weekend. And, absent written agreement or an order of the court, neither party was to relocate with the child outside of Nova Scotia.

While a custody/access assessment was to be underway, COVID-19 intervened, and at the end of October 2020, a new assessor had to be found.

As the parties were unable to find a new assessor, on December 21, 2020, Justice Cormier advised counsel that, upon reviewing the file, she did not feel the completion of an assessment was necessary.

The trial was then held over five days in June 2021, before Justice Cormier. Counsels' final oral submissions were made on July 12, 2021, and Justice Cormier released her decision immediately thereafter. Custody and relocation were determined together. Justice Cormier did not review the history of the matter in her reasons, but observed she was very familiar with the matter.

On the stay motion, Justice Beaton noted that, while the Court was not able to appreciate all of the nuances of the case, it was clear that Justice Cormier was not at all impressed with the father as a parent or co-parent, and was of the view that the mother was the parent to whom the child was most attached and who provided the most stability. In fact, Justice Cormier suggested she had, in fact, considered eliminating all parenting time for the father, but was instead prepared to have it continue on the basis that she trusted the mother to ensure the child's best interests were being met.

Justice Cormier decided that it was not in the child's best interests to stay in the "unhealthy environment" in Nova Scotia that resulted from the negativity directed at the mother by the father.

A stay is, of course, a discretionary remedy. The order under appeal is *presumed* to be correct, until such time as it might be set aside by an appellate court. In fact, in a matter involving children, it must be presumed that the order was made taking into account the best interests of the child: *Green v. Green*, 2021 CarswellNS 80 (C.A.) at para. 11.

The father essentially argued that a stay was necessary because the judge's decision to permit the mother to continue as primary parent in conjunction with a relocation to Idaho would create a profound change in the child's life. He wanted to prevent having the child undergo a relocation before the appeal was determined, so as to prevent the child from having to possibly move twice. He also questioned how the extremely modest financial circumstances of both parents, as put before the judge, could realistically position them to give effect to his parenting time next summer. Finally, the father expressed concern about the mother travelling internationally with the child when neither of them were vaccinated against for COVID-19.

The test on a motion to stay pending appeal is well-known. Generally, it is the test as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F (S.C.C.). In Nova Scotia, the test is set out in *Purdy v. Fulton Insurance Agencies Ltd.*, 1990 CarswellNS 344 (C.A. [In Chambers]). The party moving for a stay must establish:

- there is an arguable issue(s) raised by the appeal (the "genuine issue" test);
- the party will suffer irreparable harm if the stay is not allowed (the "irreparable harm" test); and,
- the party will suffer greater harm if the stay is not granted than would the opposing party if the stay were granted (the "balance of convenience" test).

Alternatively, a stay may also be granted if the case offers exceptional circumstances that make it fit and just to grant a stay: *Y. v. Swinemar*, 2020 CarswellNS 538 (C.A.).

Justice Beaton then cited *Reeves v. Reeves* (2010), 79 R.F.L. (6th) 255 (N.S. C.A. [In Chambers]), in which the Nova Scotia Court of Appeal confirmed that the analysis must be informed by consideration of the best interests of the child:

> [21] . . . 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.

See also *Leyte v. Leyte*, 2019 CarswellNS 351 (C.A.); *J.H. v. A.C.*, 2020 CarswellNS 502 (C.A.); *Young v. Stephens*, 2015 CarswellNS 790 (C.A.); *Slawter v. Bellefontaine* (2011), 9 R.F.L. (7th) 36 (N.S. C.A. [In Chambers]); *Beairsto v. Cook* (2018), 12 R.F.L. (8th) 215 (N.S. C.A.); *Lefebvre v. Lefebvre*, 2002 CarswellOnt 4325 (C.A. [In Chambers]); *Alleyn-Dornn v. Dornn*, 2011 CarswellMan 247 (Q.B.); *P. (D.H.) v. P. (P.L.)* (2012), 29 R.F.L. (7th) 89 (N.B. C.A.); *Baker v. Hunter*, 2015 CarswellAlta 1803 (C.A.); *AR v. JU*, 2020 CarswellAlta 1738 (C.A.); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.).

Here, on the first branch of the test, the father alleged various errors of fact and law, insufficiency of reasons, and apprehension of bias. As any of the alleged grounds, if established on appeal, could arguably result in a successful appeal, Justice Beaton found the arguable issue part of the test had been met.

While this branch of the test is generally not hard to meet — as the moving party need only show there is a "serious issue" and that the appeal is not spurious: *Mudry v. Danisch* (2014), 48 R.F.L. (7th) 176 (Ont. Div. Ct.) — we do wonder if, given the findings against the father, this part of the test might have deserved more analysis. For example, many appellate courts, in considering the "serious issue" or "arguable case" test, will specifically consider the fact that the significant deference standard of review on custody decisions is exacting: *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.); *Elias v. Elias* (2008), 57 R.F.L. (6th) 53 (Sask. C.A. [In Chambers]); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.); *O. (K.) v. O. (T.)* (2015), 67 R.F.L. (7th) 1 (Sask. C.A.); *Froehlich-Fivey v. Fivey* (2016), 85 R.F.L. (7th) 301 (Ont. C.A.); *Bors v. Bors* (2021), 60 R.F.L. (8th) 36 (Ont. C.A.).

Justice Beaton might also have considered the fact that a stay pending appeal would delay putting in place a structure the trial judge believed to be in the child's best interests and prolong the very circumstances determined to be *not* in the child's best interests: *K.K. v. M.M.*, 2021 CarswellOnt 8220 (C.A.) at para. 28; *D.C. v. T.B.*, 2021 CarswellOnt 11173 (C.A.). Of course, it may also be the case that the ground relating to the paucity of reasons or reasonable apprehension of bias seemed of particular concern to Justice Beaton.

In any case, Justice Beaton then went on to consider the second and third branches of the test, as modified for a case involving decision-making and mobility.

There is no standard definition for "irreparable harm." It is informed by context: *O'Connor v. Nova Scotia (Deputy Minister of the Priorities & Planning Secretariat)*, 2001 CarswellNS 82 (C.A. [In Chambers]). Here, again, the notion of irreparable harm had to be considered with a focus on the best interests of the child: will the child suffer irreparable harm resulting from the granting or denial of the stay: *AR v. JU*, 2020 CarswellAlta 1738 (C.A.). Furthermore, the court is concerned with the best interests of the child — not those of the parents: *S. (C.L.) v. S. (B.R.)* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.).

It is also usually stated that a finding of irreparable harm will not be made out on account of "mere disruption" to the child's life. Rather, there must be evidence of special circumstances that demonstrate potential harm to the child, or some harm that

is "real and significant" — something more than a transitory disturbance: *Lloyd-Martinez v. Martinez*, 2021 CarswellAlta 75 (C.A.); *Millington v. Millington*, 2021 CarswellAlta 1654 (C.A.).

In most mobility cases, as here, it is usually the case that, regardless of whether a stay pending appeal is granted, there is going to be a significant change in the child's life going forward. If the stay was not granted but the appeal was successful, the child would have to return to Nova Scotia. Alternatively, if the stay was granted but the appeal was not successful, the child's relocation to Idaho would still happen, just at a later date. To Justice Beaton, the situation was obvious: awarding the stay meant only *one* potential relocation of the child instead of two.

As determined by Justice Beaton:

> [53] Either outcome portends significant changes in [the child's] world. In my view, the least disruptive outcome is best for [the child], being the one which involves the least potential for further upheaval. [The child's] best interests are better served by remaining in Nova Scotia pending determination of the appeal, rather than relocating to Idaho with the potential — should the appeal be successful — of having to move back to Nova Scotia at some later date.

Justice Beaton was persuaded that the child would suffer irreparable harm if the mother and the child moved to Idaho while the potential for having to move back to Nova Scotia was a real possibility. (We have to wonder if it would amount to irreparable harm just to move to Idaho — sorry to anyone with family in Idaho.)

Now; we know what you're thinking. You're thinking if the possibility of multiple moves suffices to meet the irreparable harm test, then a stay will always be granted. Justice Beaton tried to address this concern:

> [56] To be clear, I do not mean to suggest that in each case where a stay is sought the possibility of multiple transitions will always meet the irreparable harm test. However, I am satisfied that in the circumstances of this particular case, for this child, there is irreparable harm found in possible multiple transitions, particularly given the evidence of the child's mental health difficulties and anxiety about air travel.

On the third branch of the test — the balance of convenience — the court must consider balance of convenience to the child and whether the child would suffer greater harm if a stay were not imposed than if it were granted.

On this branch, COVID-19 served benefit to the father. Justice Beaton was of the view that relocation during a period of great uncertainty about international travel was not wise. She took judicial notice that the United States, at the time, was not allowing "non-essential" travel by Canadians into the U.S. Furthermore, neither the mother nor the child were vaccinated against COVID-19, and while the child was too young, the mother was clear that she had no intention of being vaccinated. That created the potential for complications should the child have to return to Nova Scotia.

Ultimately, Justice Beaton was persuaded that the child's best interests were best served by minimizing the potential number of relocations and the potential risks and uncertainty regarding international travel during the pandemic.

As we move on to consider *Ekeberg* — decided the month after *Titus* — keep in mind that the primary reason for allowing the stay was to avoid a possible second relocation for the child should the appeal be successful.

Ekeberg v. Swan

The mother was granted permission to relocate from Edmonton to Manitoba with the parties' 6-year-old child in the context of a high-conflict parenting case. The father sought a stay pending his appeal.

The chambers judge recognized that the mobility issue had to be decided based solely on the best interests of the child, and that it was in the best interests of the child to have maximum contact with both parents, if possible. In doing so, the chambers judge properly directed himself to the factors in s. 18(2) of the *Family Law Act*, S.A. 2003, c. F-4.5.

The father had moved closer to the mother's home in Alberta to make it possible for him to co-parent. He had a home-based business which allowed him the flexibility to manage his own schedule and spend as much time as possible with the child.

The mother wanted to move to Manitoba — where she would live in a house gifted to her by her family — for employment and for financial security.

At the motion, it was determined that the mother had been the child's primary caregiver since birth. The father's parenting time had been increasing over time through multiple court orders and there was, at the time, a parenting schedule in which the father had parenting time 10 days out of every 35 days.

The chambers judge found that the plans for the care of the child presented by each parent were equal, and that the primary factor was the history of care. As it would be too traumatic to take the child away from his primary caregiver, the move was allowed, subject to the father getting very generous time when the child was not in school.

As did Justice Beaton, Justice Feehan of the Alberta Court of Appeal set out the well-known test for a stay pending appeal: serious question; irreparable harm; and balance of convenience.

And, as did Justice Beaton, Justice Feehan recognized that the test was to be modified to focus on the best interests of the child: *AR v. JU*, 2020 CarswellAlta 1738 (C.A.); and not the best interests or wishes of the parents: *S. (C.L.) v. S. (B.R.)* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.). Again, irreparable harm to a child cannot be based on mere disruption; there must be evidence of special circumstances that demonstrate potential harm to the child, or some harm that is "real and significant" and is more than a transitory disturbance: *Lloyd-Martinez v. Martinez*, 2021 CarswellAlta 75 (C.A.); *Millington v. Millington*, 2021 CarswellAlta 1654 (C.A.).

The father argued that the chambers judge erred in failing to address the legal test of the best interests of the child, and in failing to specifically reference *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.). (Does *Gordon v. Goertz* even matter anymore?)

Here, unlike *Titus*, Justice Feehan specifically took into account the exacting standard of review applicable to child-related issues. He noted that parenting orders and mobility orders attract a high degree of deference (unless the chambers judge had made an error in principle), and that an appellate court must not intervene to vary such an order unless the chambers judge had erred in law or made a material error in the appreciation of the facts that affected the conclusion reached.

The father strenuously argued against what he called the "yo-yo" effect. He argued that, if a stay was not granted, but the appeal was allowed, the child would be uprooted twice. It was this that greatly concerned Justice Beaton in *Titus*.

But here, the father had a problem. According to the parenting schedule, the child was actually *supposed* to be in Manitoba. However, when the mother drove from Manitoba to Alberta to pick up the child and return with him to Manitoba, the father refused to surrender the child as was required. Therefore, the father was the one that was throwing the yo-yo. As a result, Justice Feehan found this factor unpersuasive. To be clear, it is not that Justice Feehan was suggesting the prospect of multiple moves will never be a concern. Rather, he suggested that in *this* situation, where the child was moving regularly between Albert and Manitoba, it did not cause irreparable harm.

While the Court accepted there was a serious question to be tried, Justice Feehan did not accept there would be any irreparable harm to the child if the stay was not granted. In fact, he found that granting the stay would be more prejudicial to the child.

Playing with Non-Suits? Probably More Safe to Play with Matches.

J.L. v. Children's Aid Society of Ottawa and S.D., 2021 CarswellOnt 13474 (Div. Ct.) — Corbett, Kristjanson, and Swartz JJ.

In *J.L.*, the Children's Aid Society of Ottawa (the "Society") apprehended the parties' very young child at birth, and sought an order placing the child in extended Society care. The mother, S.D., did not oppose the relief sought by the Society, but did

want access to the child. The father, J.L., took the position that the child should be placed in his care without any restrictions whatsoever.

The Society called seven witnesses in support of its case. When the Society completed the evidence in support of its case, and instead of giving evidence of his own, the father moved for a non-suit, which is, as the Ontario Court of Appeal explained in *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 CarswellOnt 3697 (C.A.) ("*FL Receivables*"), a motion "to dismiss the action on the ground that the plaintiff [or applicant] has failed to make out a case for the defendant [or respondent] to answer."

In other words, the father took the position that the Society had not established even a *prima facie* case that the child was in need of protection. As a result, argued the father, the Society's case should be dismissed, and the child should be returned to his care.

After the parties argued the motion for a non-suit, the trial judge reserved her decision.

When the trial resumed the following week, the trial judge dismissed the motion for non-suit and made a finding, on a final basis and without having heard any evidence from the father, that the child was in need of protection.

But that was not the end of the matter, as the trial judge then allowed the father to lead evidence in support of his position that, notwithstanding the finding that the child was in need of protection, the child should nevertheless be returned to the father's care.

After hearing the father's evidence, the trial judge rejected the father's request to have the child returned to his care, and determined that the child should be placed in extended Society care.

The father appealed. Although he raised numerous grounds of appeal, the Divisional Court focused on only one — that the trial judge had not dealt with the motion for a non-suit correctly.

In granting the father's appeal and ordering a new trial, the Divisional Court started by reviewing how a motion for a non-suit is *supposed* to work:

> [13] . . . When [a motion for a non-suit is] brought, the trial court should observe the following process:
>
> (1) **The moving party is to be put to its election whether to call evidence.**
>
> (2) **Where the moving party elects to call evidence, the trial judge hears the non-suit motion but reserves decision until the end of the case** — that is — until all evidence and arguments have been completed on all issues.
>
> (3) **Where the moving party elects to call no evidence, then, and only then, should the trial judge provide a final decision** on the non-suit issue.
>
> (4) **All the evidence is heard on both the protection and the disposition issues in one stage** of the trial. A non-suit motion on the "protection" issue is not a basis on which to bifurcate the trial into separate hearings on the "protection" and "disposition" issues. Thus, even where a moving party elects to call no evidence on the protection issue, if the moving party intends to call evidence on the disposition issue, the trial judge is to reserve on the non-suit until after all the evidence has been completed. [emphasis added]

As a result of this process, motions for a non-suit are rarely used or useful in non-jury civil trials. As the Ontario Court of Appeal stated in *FL Receivables*:

> [13] Still, **I question whether in this province a non-suit motion in a civil non-jury trial has much value**. In Ontario, when a defendant moves for a non-suit, the defendant must elect whether to call evidence. See *Ontario v. O.P.S.E.U.* (1990), 37 O.A.C. 218 (Ont. Div. Ct.) at para. 40. **If the defendant elects to call evidence, the judge reserves on the motion until the end of the case**. If the defendant elects to call no evidence — as [the defendant] elected in this case — then the judge rules on the motion immediately after it has been made.

> [14] **A non-suit motion adds to the time and expense of a trial. And because of the election requirement, it has little practical value**. Perhaps a defendant bringing the motion sees a tactical advantage in being able to argue first. **To succeed on the motion, however, the defendant must show that the plaintiff has put forward no case to answer, in most lawsuits an onerous task. Why not simply take on the less onerous task of showing that the plaintiff's claim should fail?** It is small wonder that most commentators consider that in civil judge alone trials, non-suit motions gain little and are becoming obsolete. See *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005) at 274, and John Sopinka, Donald B. Houston & Melanie Sopinka, *The Trial of an Action*, 2d ed. (Toronto: Butterworths Canada, 1999) at 151-52. [emphasis added]

In this case, had the father been put to the election, and had he elected to call further evidence, the trial judge would have heard the motion, but reserved her decision until the end of the case. The father would have then proceeded to call evidence about all of the issues in the case. Alternatively, had the father elected *not* to call any evidence, the trial judge would have then proceeded to decide the case solely on the basis of the evidence that had already been put forward by the Society.

Unfortunately for the parties and the child, that is not how things actually unfolded in this case. The trial judge did not put the father to his election, and the father never made his position on this critical issue clear.

Instead, the trial judge dismissed the motion for a non-suit and found, based solely on the evidence presented by the Society, that the child was in need of protection. However, instead of also deciding the rest of the issues in the case, she then allowed the father to call evidence about "the proper disposition for the child, in light of the finding that he was in need of protection."

In granting the father's appeal, the Divisional Court found that the trial judge had erred by not putting the father to his election as to whether to call evidence on the issue of whether the child was in need of protection.

The Society tried to argue that, notwithstanding this error, the appeal should be dismissed because the father had implicitly elected not to call evidence, and had ultimately been able to put forward all of his evidence during the second phase of the trial. The Divisional Court, however, rejected these arguments, because the process whereby adverse findings had been made against the father before he had even presented any evidence had been "fundamentally unfair" and, given the nature of the issues that were at stake, the unfairness could "be remedied only by a new trial during which the [father] has an opportunity to present evidence before a decision is made."

The Divisional Court also made it clear that in child protection cases where a motion for a non-suit is brought, the issue of disposition should *not* be tried separately from the question of whether the child is in need of protection:

> [14] **Evidence related to disposition and protection issues are often related. Truncating the trial process, as happened here, leads to risks that a second trial may be required if an appellate court disagrees with a decision granting a non-suit. The task of the trial court is to decide all the issues required for the matter to be laid to rest after a full trial.** We appreciate that there are cases where some trial efficiency could be gained by ruling on the protection issue first, before spending trial time to hear evidence on disposition. The same can be said in civil proceedings, where the time spent hearing evidence on damages could be saved if the court first decides the issue of liability. "Some efficiency" in the trial process, though, comes at the price of the overall efficiency of the system — the risk of multiple appeals and orders for new trials, where a trial court has not heard evidence and decided all the issues raised at trial. **Our model of trial practice generally rejects bifurcated proceedings, and this model is to be followed in trial protection proceedings.**
>
> . . . . .
>
> [25] Child protection trials often used to follow a bifurcated trial process. Some of the language of the trial judge (distinguishing between the "adjudicative" and "dispositional" stages of the trial) hearkens back to this old practice. Such **a two-stage process is not contemplated in the legislation and is not sound trial practice. The distinct issues of protection and disposition are addressed by the trial judge in her decision after hearing all of the evidence.** In this respect, a child protection trial follows the same trial process that is followed in civil non-jury and family trials. The trial

> judge hears all the evidence — on liability and on remedies — and then decides all issues. **Where a non-suit motion is brought, the court is not to revert to the old practice of a bifurcated proceeding.** [emphasis added]

As a result, the Divisional Court ordered a new trial.

Unfortunately for trial counsel, the Court's decision did not end there. Instead, the Court made it clear that it "place[d] primary responsibility for this situation on the shoulders of trial counsel." Ouch.

End of Document