Date: 20011129
Docket: C.A. 171094

NOVA SCOTIA COURT OF APPEAL

[Cite as: Mombourquette v. MacDougall 2001 NSCA 174]

BETWEEN:

KAREN A. MACDOUGALL

Appellant

- and -

LESTER JOSEPH MOMBOURQUETTE

Respondent

DECISION

Counsel:	Tanya G. Nicholson for the appellant Brian J. Hebert for the respondent
Application Heard:	November 29, 2001
Decision Delivered:	November 29, 2001

BEFORE THE HONOURABLE CHIEF JUSTICE CONSTANCE R. GLUBE
IN CHAMBERS

GLUBE, C.J.N.S.: (In Chambers)

[1] This is an application for a stay of execution pending appeal of an order by Justice Legere dated July 12, 2001, which granted access to the respondent under certain specific conditions. This order was made after a lengthy hearing over a protracted period of time and a lengthy decision evaluating a considerable amount of expert evidence. Using the test in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341, the main argument of the applicant is that the beginning of therapy at this time would be harmful to the child and that it may be unnecessary if in fact the appeal is allowed and access is denied. Further it is submitted that because of the possible harm, that the balance of convenience is in favour of granting the stay.

[2] I am aware that the interests of the child are paramount; certainly they are in custody cases and also when dealing with access. However, I have no evidence before me of any specific harm that would be suffered by this child. I sought to determine what the applicant's position was on the issue of special circumstances as set out in **Routledge v. Routledge** [1986] N.S.J. No. 195, where the decision discussed that when you are dealing with children that special circumstances may be the basis for granting the stay. Again it was suggested by the applicant that the answer was that the child was not in therapy and that therapy would be harmful.

[3] In the case of **Children's Aid Society of Halifax v. B.M.J.** [2000] N.S.J. No. 405, Justice Flinn, in referring to special circumstances at para. 29, stated:

> ... that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted. (**Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.)

[4] Also, in para. 34, he states:

> Therefore, in order for me to stay execution of the trial judge's order, pending the hearing of an appeal by the Agency, and to interfere - albeit on a temporary basis - with what the trial judge decided was in the children's best interests, the Agency must demonstrate, with evidence, that there are circumstances of a special and persuasive nature which warrant such a stay.

[5] Further, at para. 35, he states in part:

> It is not appropriate that the evidence in support of this application come from the Agency's counsel. It is a long established rule that a lawyer should not be both counsel and witness in a case, especially where the issues are contested.

[6] Unfortunately, in this case the affidavits from both sides are sworn by counsel and not by the parties involved.

[7] There is no evidence that therapy will cause harm to the child at this time and without that evidence, I am unable to find that the balance of convenience is in favour of the child or of granting the stay. I am also unable to find that there are any special circumstances to warrant granting of this stay. There are no costs awarded on the stay application.

[8] The application is dismissed.

Glube, C.J.N.S.