NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Community Services) v. N.N.M.,***
2007 NSCA 131

Date: 20071228
Docket: C.A. 290027
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

N. N. M. and R. D. M.

Respondents

Restriction on publication: **Pursuant to s. 94(1) Children and Family Services Act.**

Judge:	The Honourable Justice Elizabeth Roscoe
Application Heard:	December 27, 2007, in Halifax, Nova Scotia, In Chambers
Held:	Application for a stay pending appeal is dismissed without costs.
Counsel:	James C. Leiper, for the appellant Julia Cornish, Q.C., for the respondents

Decision:

[1] The Minister of Community Services seeks a stay of execution of an interim order of Justice Mona Lynch pursuant to **Civil Procedure Rule** 62.10, pending the appeal of the order which is scheduled to be heard on March 18, 2008.

[2] The order of Justice Lynch, dated December 19, 2007, provides that the respondents have interim custody of two children, aged three and four, pending a further hearing before her which is scheduled for January 15 and 17, 2008. By orders of Justice Scaravelli, dated October 3, 2007, the children had been placed in the permanent care and custody of the Minister pursuant to s. 42 (1)(f) of the **Children and Family Services Act**, S.N.S. 1990, c. 5. The appeal from the decision of Justice Scaravelli is scheduled to be heard by this Court on January 29, 2008.

[3] The respondents have been the foster parents of the children since September, 2006. According to the affidavit of the respondents, when they learned that the Minister had been granted permanent care and custody of the children they sought the permission of the Minister to apply to adopt the children. They were advised that another family had already been selected as the adoptive parents for the children. Since September 2007, the respondents have been attempting to appeal the decision respecting their suitability as adoptive parents. On December 13, 2007 they were advised by a representative of the Minister that the children would be placed in the adoptive parents' home the following day, perhaps permanently. It was in response to that information that the application for custody was brought on an emergency basis before Justice Lynch on December 18, 2007.

[4] The application before Justice Lynch was initially made pursuant to s. 18 of the **Maintenance and Custody Act,** R.S.N.S. 1989, c. 160. After hearing counsel for the Minister's objection to the jurisdiction of the court under that legislation in the face of a permanent care order, counsel for the respondents argued that Justice Lynch should exercise her inherent *parens patriae* jurisdiction. Justice Lynch decided to exercise her *parens patriae* jurisdiction and found it was in the best interests of the children not to disrupt them until such time as the issue could be fully explored.

[5] On December 19th the respondents received a letter from the Minister's office respecting access visits with the adoptive parents over the holiday season.

They were expected to deliver the children for access visits on several different dates including a two day overnight visit from December 24 to 26th. A further application was made by the respondents to Justice Lynch on December 24 seeking clarification of the earlier order. As well, the Minister requested that Justice Lynch revisit and rescind the December 19 order. After hearing the parties, Justice Lynch issued an order stating: "The children shall remain in the care of the Applicants [i.e. the M.] pending a full hearing of the matter with visits to the adoptive parents proposed by the Minister as set out in the attached letter with the exception of the visit from December 24, 2007 to December 26, 2007 which shall not take place."

[6] To date, no appeal of the December 24 order has been filed.

[7] The Minister's grounds of appeal from the December 19th order are:

> 1. The Learned Trial Judge committed an error of law on holding there was Jurisdiction to make an order specifying placement of the children in the permanent care and custody of the Appellant, the Minister of Community Services.
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> 2. The Learned Trial Judge committed an error of law in that she determined that there was *parens patriae* jurisdiction to make an order regarding custody of the children in the permanent care and custody of the Appellant, the Minister of Community Services.
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> 3. The Trial Judge committed an error of law in that she denied the Appellant, the Minister of Community Services, the opportunity to lead evidence with respect to the circumstances of the children at the time of the Hearing.
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> 4. The Trial Judge committed an error of law and that she failed to show appropriate deference to the decision of the Appellant, the Minister of Community Services regarding placement of the children.
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> 5. The Trial Judge committed an error of law in exercising *parens patriae* jurisdiction where no application had been. [sic]
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> 6. The Trial Judge committed an error of law in exercising *parens patriae* where notice such [sic] an order was contemplated had not been given to the Appellant, the Minister of Community Services.
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> 7. The Learned Trial Judge committed an error of law by failing to allow the Appellant, the Minister of Community Services, a sufficient opportunity to

> respond to the request for an order be made pursuant to the *parens patriae* jurisdiction of the Court.
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> 8. The Learned Trial Judge committed an error of law by making an order despite a binding decision of this Honourable Court in the contrary.
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> 9. The Learned Trial Judge made an error of law in finding there was a gap in the *Children and Family Services Act* which permitted the Court to make an order for custody.
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> 10. The Learned Trial Judge made an error of law in failing to require notice of the application be given to the parties to the orders for permanent care and custody of the children.
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> 11. The Learned Trial Judge made an error of law in exercising *parens patriae* jurisdiction against the Crown.

[8] In **Nova Scotia (Minister of Community Services) v. D.M.F.**, 2004 NSCA 113, Justice Fichaud set out the applicable test on a stay application in a child protection proceeding, such as this:

> ¶ 11 In ***Fulton Insurance Agencies Ltd. v. Purdy*** (1991), 100 N.S.R. (2d) 341 (C.A.) at para. 28, Justice Hallett stated the well known principles which have governed the exercise of discretion under ***Rule*** 62.10(2):
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> > [28] 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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> > [29] (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:

> [30] (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.

¶ 12 In child protection cases special principles infuse the Fulton tests. These principles have been summarized by Justice Cromwell in ***Minister of Community Services v. B.F.***, [2003] N.S.J. No. 421, 2003 NSCA 125 at paras. 13, 19, and 22, by Justice Saunders in Family and Children's Services of Annapolis Co. v. J.D., [2004] N.S.J. No. 35, 2004 NSCA 15 at paras. 10 - 14, Justice Bateman in ***D.D. v. Nova Scotia (Minister of Community Services)***, [2003] N.S.J. No. 477, 2003 NSCA 146 at paras. 9 - 1 and Justice Flinn in ***C.A.S. of Halifax v. B.M.J.*** (2000), 189 N.S.R. (2d) 192 at paras. 29 - 31. I will summarize these principles without reproducing the cited passages.

¶ 13 Although the ***Fulton*** test provides the format for analysis, under s. 2(2) of the Act in a child protection case the overriding factor is always the best interests of the child. This reformulates the "irreparable harm" and "balance of convenience" branches of the ***Fulton*** test. The standard civil tests of irreparable harm to the applicant and balance of convenience between applicant and respondent are sterile in a child custody case. It is not the irreparable harm to the applicant (whether parent or Agency) or the balance of convenience between the litigants (parent and Agency) which governs. Rather the focus is on the child. It is highly unlikely that harm to the child would be compensable in money. So the "irreparable" concept recedes.

¶ 14 In ***B.F.***, at para. 19, Justice Cromwell summarized the approach:

> The applicants must show a risk of harm produced by the combination of the continuing in force of the order under appeal and the delay until the result of the proposed appeal is known. The risk is that if the stay is withheld, their rights and the interests of the children will be so impaired by the time of final judgment that it will be too late to afford complete relief. On the other hand, this risk must be balanced with the risk of harm to the children if the stay is granted. The risk to be considered is that of harm to the children that could result from staying an order that may be affirmed on further review to be both lawful and in their best interests.

¶ 15 This perspective also affects the deference which the judge considering a stay application must give to the trial judge's findings. The determination of the child's best interests is a delicate fact-driven balance at the core of the rationale for appellate deference. For these reasons, in ***B.M.J.*** at para. 31, Justice Flinn said that the Court of Appeal "shows considerable deference to the decision of a trial judge in custody matters" and will only interfere if the trial judge has "gone

> wrong in principle, or has overlooked material evidence." Justice Cromwell noted in B.F. at para. 13 that, because of the need for stability and finality in child custody, generally there must be "circumstances of a 'special and persuasive nature', usually connected to the risk of harm to the children, in order to persuade the court to grant a stay."
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> ...
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> ¶ 20 In a child protection case, consideration of irreparable harm and balance of convenience distills into an analysis of whether denial of the stay would harm the child and, if so, whether the stay's issuance or denial would better serve, or cause less harm to, the child's interest.
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> [emphasis added]

[9] In this case, the Minister has raised several arguable issues for the appeal, which is conceded by the respondents.

[10] The ultimate issue then is whether the denial of the stay would harm the children and, if so, whether the stay's issuance or denial would better serve, or cause less harm to the interests of the children.

[11] The Minister's argument is that the order granted by Justice Lynch is so fundamentally flawed that the appeal from it will undoubtedly be successful. Therefore, not issuing a stay is simply delaying the inevitable, that is, that the children will be placed for adoption with the family the Minister has chosen. Further delay is harmful to the children it is submitted. The Minister argues that the respondents' only method of proceeding is to apply to terminate the order for permanent care after the appeal of it has been determined. In any event, it is argued, the respondents will not be able to apply for adoption of children without the Minister's consent. (s. 74(7), **Children and Family Services Act**). Since the Minister has chosen the family she prefers as the adoptive parents, further delay in placing the children with that family is harmful to them.

[12] The respondents argue that no harm will come to the children if they are allowed to stay with them in the home where they have lived for the past 16 months. It is submitted that maintaining the status quo pending the final decision of Justice Lynch after the January hearing is in the best interest of the children. In the affidavit of Mrs. M. filed on the stay application, she states that when the

children returned from a visit with the prospective adoptive parents they exhibited abnormal behavioural problems.

[13] I conclude that the application for a stay pending appeal should be dismissed. First of all, since the December 24 order has not been appealed staying the order of December 19 achieves nothing. But even if I were considering a stay of the December 24 order, I would find that the Minister has not shown that denial of the stay would harm the children, or that the stay would better serve the children's interests than would compliance with Justice Lynch's order. The rights and interests of the children will not be so impaired by the additional delay that it will be too late to afford complete relief from the order of Justice Lynch if the appeal is allowed. There was absolutely no evidence before Justice Lynch or before me that the children are at any risk of harm in the care of the M.'s pending final resolution of the matter before Justice Lynch to be heard in January, or the appeal to be heard in March.

[14] I would for these reasons dismiss the application for a stay pending appeal, without costs.

Roscoe, J.A.