Docket No.: CA 167893
Date: 20001229

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Stoddard v. Atwood*, 2000 NSCA 152]

BETWEEN:

STACEY TREVOR STODDARD

Appellant/Applicant

- and -

WENDY JOY ATWOOD

Respondent

DECISION

Counsel: The applicant in person
The respondent did not appear
Application Heard: December 28th, 2000
Decision Delivered: December 29th, 2000

BEFORE THE HONOURABLE JUSTICE FLINN
IN CHAMBERS

FLINN , J.A. (In Chambers):

[1] This is an application for a stay of execution on a judgment, pending the hearing of an appeal of that judgment. The judgment is for child support.

[2] On the 16th of November, 2000 Chief Judge Comeau of the Family Court of the Province of Nova Scotia issued an order further to a hearing held on November 10th, 2000. The order provided that the appellant was a possible father of a child of the respondent born in 1984; and that the appellant was to pay through the Maintenance and Enforcement Program the sum $247 per month for the support of the child commencing on the lst day of December, 2000.

[3] I have not been provided with a copy of the reasons for judgment of Judge Comeau. I have been provided solely with a copy of the order.

[4] The substance of the appellant's application before me is that if he is required to continue paying the child support payments that he will not have the financial ability to retain counsel to conduct his appeal. He submits that his appeal has merit and that he will stand to lose any paid funds to the respondent if he is successful in his appeal.

[5] The application for the stay of execution is made pursuant to Rule 62.10 which provides:

> (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
>
> (3) An order under Rule 62.10(2) may be granted on such terms as the Judge deems just.

[6] The test that must be applied in determining whether or not to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
>
> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

(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.

[7] Considering the first part of the **Fulton** test, the balance of convenience here must favour the child who, as has been determined, is in need of his father's financial support.

[8] Further I am not satisfied that the appellant will suffer any irreparable harm if the judgment is not stayed, and he is successful on the appeal. This appeal has been set down to be hear on April 6, 2001. By that date, the appellant will have made five payments of $247 per month under the family court order. I have no evidence before me as to the appellant's income; and, as a result, the appellant has not demonstrated to me that he will suffer any irreparable harm if I do not stay the child support payment pending the hearing of the appeal.

[9] This application, therefore, does not pass the first part of the **Fulton** test.

[10] With respect to the second part of the **Fulton** test, there are, quite

simply, no exceptional circumstances here that would make it fit and just that a stay be granted in this case.

[11] The application is therefore dismissed.

Flinn, J.A.