NOVA SCOTIA COURT OF APPEAL
Citation: *Gale v. King*, 2023 NSCA 87

Date: 20231212
Docket: CA 526342
Registry: Halifax

Between:

Anne Margaret Gale

Appellant

v.

Christopher Joseph King

Respondent

Judge:	Beaton J.A.
Motion Heard:	November 30, 2023, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Patrick J. Eagan, for the appellant Allison Kouzovnikov, for the respondent

Decision:

[1] The parties were before the Court in Chambers on November 30, 2023, at which time the appellant Ms. Gale sought a stay of the order under appeal. That order was made by the Honourable Justice Robert M. Gregan of the Supreme Court of Nova Scotia, Family Division on July 26, 2023. It reflected his determination of the same date that Ms. Gale was guilty of multiple counts of contempt, and set out the penalty imposed. The terms of the order provide:

> 1. Anne Margaret Gale shall pay a fine in the amount of $60,963.00 which would be the amount of child support payable by Christopher Joseph King to Anne Margaret Gale until the children turn the age of 19. The Court has no faith that Anne Margaret Gale will pay the fine, therefore, the fine shall be paid by way of suspension of child support by Christopher Joseph King and all child support payable or owing by Christopher Joseph King is hereby terminated.
> 2. Anne Margaret Gale has failed to comply with court orders, and direction of the Court for three- and one-half years, resulting in Christopher Joseph King not seeing the children. Anne Margaret Gale shall perform 350 hours of community service work (100 hours for each year, 50 hours for the half year) and shall complete the community service work within 24 months from the date of this order. The community service work shall be completed through probation services.
> 3. The Court has suspended the sentence of imprisonment of 90 days which would be served as an intermittent sentence and will review the status of community service work in 12 months. A warrant of Committal for the 90 days of imprisonment (to be served intermittently) shall be issued, but held until June, 2024.
> 4. This matter will return on June 4, 2024 at 10:00 a.m. for a status update on the community service work.

[2] During the same Chambers appearance, the hearing of the appeal was re-scheduled (at the request of the parties). It will be heard on March 19, 2024. Ms. Gale says a stay of the order is necessary in the interim "to level the playing field" between the parties.

[3] Whether to impose a stay is a discretionary decision, with "a fairly heavy" burden on Ms. Gale to satisfy the Court on a balance of probabilities that a stay is required, recognizing it would deprive Mr. King of the impact of the order (*Muir v. Day*, 2022 NSCA 34 at para. 8).

[4] The analysis to be conducted to assess whether a stay should be granted is long established. I am guided by the principles set out in *Purdy v. Fulton Insurance Agencies Limited* (1990), 100 N.S.R. (2d) 341, which identifies both a primary and secondary test. More recently, these principles were summarized in *Green v. Green*, 2022 NSCA 30:

> [10] The exercise of my discretion in whether to grant a stay is governed by these legal principles:
>
> 1. The filing of a Notice of Appeal does not operate as a stay of execution of the judgment being appealed. That is because a successful party is entitled to the benefit of the judgment obtained. This is in keeping with the companion proposition that an order, although under appeal, is presumed correct unless and until it is set aside.
>
> 2. The power to grant a stay is discretionary. Nova Scotia *Civil Procedure Rule* 90.41(2) provides:
>
> > 90.41 (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.
>
> 3. To succeed on his stay motion, Mr. Green had to establish, on a balance of probabilities:
>
> > i. There is an arguable issue raised by his appeal;
> >
> > ii. If a stay is not granted and the appeal is successful, he will have suffered irreparable harm; and
> >
> > iii. He will suffer greater harm if the stay is not granted than Ms. Green will suffer if the stay is granted.
>
> 4. If none of the three criteria are met, there remains discretionary power to grant a stay providing there are exceptional circumstances that would make it fit and just to grant a stay. This latter branch of the test is akin to a safety valve, catching cases that warrant a stay but fall outside the foregoing and primary three-step test. […]

[5] The parties agree and I am satisfied there is an arguable issue raised on the appeal, and thus the first aspect of the primary test is met.

[6] As to the question of irreparable harm, Ms. Gale argues she will suffer such harm in the absence of a stay, owing to her current financial circumstances. In her affidavit evidence she says she is having difficulty meeting her obligations. She points out she no longer receives the child support payment of $850 per month from Mr. King, which had been in place prior to the imposition of the penalty for contempt. Ms. Gale identifies various of her creditors, the expense of the ongoing litigation with Mr. King, and her effort to curb expenses. Ms. Gale reports the requirement in the order that she perform community service hours prevents her from securing a second job to assist in paying bills. In opposition to the motion, Mr. King submits Ms. Gale's evidence does not permit a conclusion she would suffer irreparable harm without a stay.

[7] Irreparable harm is informed by context, as discussed in *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:
>
> > [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
> >
> > [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[8] The information provided by Ms. Gale gives an overview of her financial situation, but without sufficient detail or specifics to permit a clear understanding of her finances. For example, she identifies an approximate annual salary, with no mention of a monthly or annual deficit, if there is one.

[9] Mr. King challenges that Ms. Gale's information does not establish sufficient detail to allow the court to determine she has discharged her burden. I agree. I am not persuaded, on the evidence put before me, that Ms. Gale has met the test to establish irreparable harm.

[10] As to the third aspect of the primary test, Ms. Gale submits the financial harm she will experience absent a stay is more significant than any harm that would be realized by Mr. King if a stay is permitted. Commonly referred to as the "balance of convenience" test; Ms. Gale must persuade the Court that not imposing a stay will impact her more than imposing a stay would Mr. King. She asserts her circumstances and the difficulty the order creates exceed any burden to be experienced by Mr. King should he have to resume payment of child support pending the outcome of the appeal.

[11] Mr. King maintains the harm to him if a stay is imposed will be greater than that to Ms. Gale without a stay. He relies on *MacNeil v.* Yeadon, 2022 NSCA 32:

> [53] In a number of decisions, judges of this Court have found that the risk an appellant will not be able to recover money paid to satisfy a judgment that is then overturned on appeal constitutes irreparable harm. The most recent expression of this finding is *Wintrup v. Adams*, 2021 NSCA 88. Justice Bourgeois noted the decisions in *MacPhail v. Desrosiers*, 1998 NSCA 5; *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6; and *Szendroi v. Vogler*, 2011 NSCA 37, each of which recited the difficulty of repayment standard.

[12] Mr. King says if he is required to resume payment of child support and Ms. Gale is ultimately unsuccessful on appeal, then he will have no ability to recoup an overpayment of child support because Ms. Gale has no assets which he could attach.

[13] Relying on *Reeves v. Reeves*, 2010 NSCA 6, Ms. Gale argues the order she seeks to stay directly engages the question of the best interests of the children and has a detrimental effect on them. In *Reeves*, Fichaud J.A. recognized the context of the *Purdy v. Fulton* analysis is adjusted in family cases:

> [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. [Citations omitted.]
>
> [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.

See also: *A.P. v. Nova Scotia (Minister of Community Services)*, 2023 NSCA 46 at para. 10 and *Murphy v. Ibrahim*, 2022 NSCA 75 at paras. 27-30.

[14] The relief sought, whether granted or refused, relates to financial matters between the parties. While payment of child support is notionally—if not directly—in the best interests of children, that is distinct from a stay imposed because an order impacts directly on the immediate circumstances of the welfare or safety of the children. Here there is no suggestion the teenaged children of these parties are jeopardized in that direct sense. Rather, the argument is that Ms. Gale's challenging financial situation impacts her children. While likely so, in my view that difficulty cannot ground the imposition of a stay in the context of this case.

[15] In summary, as regards the primary test, I am not persuaded that Ms. Gale will experience irreparable harm if the stay is denied, nor that the balance of convenience favours a stay. I am also not persuaded the best interests of the children of the parties are directly implicated in this case.

[16] The central thrust of Ms. Gale's argument is advanced on the secondary *Purdy* test. She argues there are "exceptional circumstances" present in this case that justify a stay.

[17] In *Landry v. 3171592 Nova Scotia Limited*, 2007 NSCA 111, the elusive ability to meet the exceptional circumstances test was recognized:

> [10] The secondary test in **Fulton**, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:
>
> […]
>
> > 13 While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one

> cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.

[18] The circumstances of this case are not so unusual or unique that a stay is required. While these parties await the hearing and outcome of the appeal, a stay is not needed to respond to an immediate injustice. I do not accept that this case falls within the category of exceptional circumstances.

[19] Had I been persuaded it was appropriate, neither party could point to my authority as a justice sitting in appeal chambers to impose the remedy of a stay of an order generated from a quasi-criminal proceeding. That question is for another day.

[20] The motion is dismissed. Each party shall bear their own costs.

Beaton, J.A.