

NOVA SCOTIA COURT OF APPEAL
Citation: *Gillespie v. Paterson*, 2006 NSCA 133

Date: 20061208
Docket: CA 274637
Registry: Halifax

Between:

Connie Lynne Gillespie

Appellant/Applicant

v.

James Harley Paterson

Respondent

Judge:

The Honourable Justice Thomas Cromwell

Application Heard:

December 7, 2006, in Halifax, Nova Scotia, in Chambers

Held:

Application granted.

Counsel:

Peter Katsihtis, for the appellant
Terrance G. Sheppard, for the respondent

Decision:

[1] In connection with ongoing custody proceedings respecting the parties' 12 year old daughter, Lynch, J. issued orders requiring the appellant to produce medical, employment, counselling and police records. These orders were made at a pretrial conference. A further organizational pretrial was set for March 12th and the trial is set for June 5 through 8, 2007.

[2] The appellant has appealed the production orders and will ask the court to set those orders aside. She applies to me in chambers for a stay of these production orders pending hearing and disposition of the appeal. The appeal has been set down for hearing on March 21st, 2007.

[3] The test usually applied in deciding whether to grant a stay of execution is, of course, that set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A., in Chambers). The party seeking the stay must convince the court that there is an arguable issue raised on the appeal, that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm, and that the balance of convenience favours granting the stay. Alternatively, even if the three-part primary test is not satisfied, a stay may nonetheless be granted if the party seeking the stay persuades the court that there are "exceptional circumstances that would make it fit and just that the stay be granted ...": **Fulton, supra**, at paras. 29 and 30.

[4] As Hallett, J.A. pointed out in **Fulton** at para. 13, the court has taken a different approach to applications for stays of custody orders. In those cases, the court has required the applicant to show that there are circumstances of a "special and persuasive nature": see, for example, **Ryan v. Ryan** (1999), 175 N.S.R. (2d) 370; **Children's Aid Society of Halifax v. B.M.J.** (2000), 189 N.S.R. (2d) 192. The rationale for the different approach in custody cases (including related orders made under the **Children and Family Services Act**, S.N.S. 1990, c. 5) is that the question of custody of a child is a matter which peculiarly lies within the discretion of the judge who hears the case and that the best interests of the child, which is the paramount consideration, is fact driven: see **B.M.J.** at para. 31.

[5] The production orders which are the subject of this appeal were made in the context of a custody case even though the orders themselves do not affect custody

or access in relation to the child. I, therefore, propose to follow the approach adopted by both parties before me and analyze the stay application in accordance with the **Fulton** test, while paying full attention to the best interests of the child who is at the centre of this litigation. In the view I take of the matter, I need not finally determine whether the **Fulton** approach or the custody order approach should be applied. In my opinion, both approaches lead, in this case, to the same result.

[6] For the reasons which follow, I direct that the production orders issued by Lynch, J. in this matter be stayed until March 21st, 2007, or until further order of the Court. My order will be subject to certain conditions which I will describe in due course.

[7] Turning to the first requirement of the **Fulton** test, I accept that there are arguable issues raised by the appeal. At least some of the documentation which is the subject of these production orders is generally considered to be of a highly confidential nature. Without in any way expressing an opinion on the ultimate merit of the appeal, I am satisfied that there are arguable issues arising out of the competing interests of privacy and full disclosure that will have to be addressed.

[8] I turn to the second requirement, that of irreparable harm. I am satisfied that the appellant will suffer irreparable harm if the orders for production are not stayed and the appeal ultimately succeeds. The essence of irreparable harm is that it is a wrong which cannot be undone or cured: see, for example, **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311. As I said in **O'Connor v. Nova Scotia** (2001), 193 N.S.R. (2d) 8 (C.A., in chambers), the forced disclosure of otherwise confidential information cannot be undone or compensated by money damages. Once the disclosure has been made the right of appeal becomes academic: see **O'Connor, supra**, at para. 20.

[9] In my view, this principle applies in the present case. If the enforceability of these production orders is not stayed and the appeal ultimately succeeds, the appellant will have suffered irreparable harm in the sense that it will not be possible to restore the appellant's rights of privacy in this information.

[10] In reaching this conclusion, I have not overlooked the submissions ably made by Mr. Sheppard on behalf of the respondent that many of the issues to which this confidential and private information is likely to relate had been put in

issue by the appellant herself in these proceedings. On reflection, my view is that this point will be more properly considered by the panel of the Court which will deal with the appeal on its merits. The fact remains that, if the stay is denied, the production of these records cannot be undone even if the appeal succeeds. That, in my view, constitutes irreparable harm given the nature of these records.

[11] The respondent's principal submission in opposing the stay is that delaying production until the appeal is heard will put at risk the trial dates which have been set in the Family Division. If I were persuaded that this were the case, I would not grant the stay sought by the appellant. It is, in my view, crystal clear that the best interests of the child require the most prompt resolution of the custody and access issues in relation to the child that the court system can provide. Had I been persuaded that an order staying these production orders would put the trial dates currently fixed for June, 2007, in jeopardy, I would find that the best interests of the child in the prompt resolution of the custody and access issues would weigh more heavily than the risk of irreparable harm to the appellant should the stay be denied.

[12] However, I am satisfied that the stay of these production orders will not place the trial dates in jeopardy. The appeal has been set for March 21st. I was advised by both counsel in chambers that the judge who will be presiding at the trial has dates available for an organizational pretrial in April of 2007. Therefore, provided that the appeal has been heard and determined before the end of March, 2007, there is no reason to think that the June trial dates will be placed in jeopardy. I am confident that a panel of this Court, recognizing the importance of a prompt decision in this matter, will be able to provide its decision as to whether the records should be produced or not before the end of March, 2007. I am, therefore, of the view that the respondent will not suffer any irreparable harm should a stay be granted and that the best interests of the child will not, in any way, be detrimentally affected by that stay.

[13] I, therefore, order that the production orders issued by Lynch, J. on November 24th, 2006, be stayed until 4:30 p.m. on March 21st, 2007, which is the date set for the hearing of the appeal. Whether the stay ought to be continued beyond that date will be for the panel of the Court which hears the appeal.

[14] Both the interests of justice and the best interests of the child, in my view, require that the stay be granted on a number of conditions. Those conditions are as follows:

1. The parties shall immediately book a new date for an organizational pretrial conference in the Family Division on the assumption that the appeal concerning production orders will be finally resolved by this Court on or before March 30th, 2007.
2. The stay is conditional on the appellant perfecting the appeal in accordance with the schedule set in chambers this morning. For clarity, the stay is conditional on the appellant perfecting the appeal on or before January 31st, 2007.
3. The stay is conditional on the appeal proceeding on March 21st, 2007. If the appeal does not proceed on that day, or is rescheduled to another day in the meantime, the stay is dissolved and it will be necessary to reapply to the Court for directions.
4. Notwithstanding the stay of the production orders, the appellant will collect all of the information required to be produced by the orders and be in a position to produce that material as directed by Lynch, J.'s orders immediately upon the Court giving its judgment on the appeal or the stay ceasing to have affect as the case may be.
5. Finally, if contrary to the information provided to me in Chambers today, the effect of this stay is to place the June trial dates in jeopardy, counsel for the respondent is at liberty to reapply in Chambers to vacate the stay or for further directions.

[15] Having heard both counsel on the issue of costs, I have decided that there will be no costs for any party in relation to this stay application. However, the appellant will pay to the respondent his reasonable disbursements in connection with the application given the respondent's assistance in compiling a suitable record for the hearing in chambers.

Cromwell, J.A.