COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

92-19-CA

B E T W E E N:

Q.D.T.

APPELLANT

- and -

H.L.D.

RESPONDENT

E N T R E :

Q.D.T.

APPELANT

-et-

H.L.D.

INTIMÉE

Motion heard by:
The Honourable Justice French

Date of hearing:
October 2, 2019

Date of decision:
October 4, 2019

Counsel at hearing:

For the appellant:
Jennifer E. Davis

For the respondent:
Ferne M. Ashford

Motion entendue par :
l'honorable juge French

Date de l'audience :
le 2 octobre 2019

Date de la décision :
le 4 octobre 2019

Avocats à l'audience :

Pour l'appelant :
Jennifer E. Davis

Pour l'intimée :
Ferne M. Ashford

DECISION

[1] Q.D.T. seeks a stay pending appeal of a motion judge's decision allowing H.D.L.'s motion for an order that their daughter's primary residence be with H.D.L. in Edmonton, Alberta, and ending the week on, week off, shared parenting arrangement provided for in a "Consent Order Under the *Divorce Act*" made on April 7, 2017.

[2] H.D.L., the mother, and Q.D.T., the father, married in 2000. They separated in 2014 and, prior to their divorce in April 2017, they shared custody of their son, now 18, and daughter, now 11. That shared custody arrangement was later incorporated in the 2017 Consent Order and it was intended to continue following the expected relocation of both the mother and father to Edmonton. They are both members of the Canadian Armed Forces and, at the time of the Consent Order, they agreed to seek postings there. Recognizing they may not be posted at the same time, the Consent Order provided that the children would not be removed from the Fredericton area, by either parent, without the consent of both parents.

[3] The mother's request for a posting in Edmonton was approved for the 2018 "Active Posting Season" and, in the early summer of 2018, she moved there with her new husband. However, the father remained in New Brunswick, as did their son and daughter, which, in the absence of his consent to a move to Edmonton, was as provided by the Consent Order. The father's plans had changed; in 2018, he planned to leave the Canadian Armed Forces and he applied to university in New Brunswick.

[4] The mother filed the motion to have the children reside with her in Edmonton, claiming the father's decision to remain in New Brunswick and to not co-locate was a change in circumstances and not contemplated by the Consent Order. In January 2019, the motion was heard over four days by a judge of the Court of Queen's Bench.

[5] In a decision issued on August 1, 2019, the judge allowed the mother's motion and ordered the primary residence of the party's 11-year-old daughter be with the

mother in Edmonton. Before the hearing in January, the mother had abandoned her request for an order regarding their son since he was expected to graduate from high school in New Brunswick in June 2019 and was old enough to make his own decisions. At the time of the hearing, his plans to attend university were not firm. He has since graduated and decided to work in Edmonton until his plans for the future are settled. Since arriving in Edmonton, he has stayed with his mother.

[6] Between the hearing of the motion in January and the issue of the decision in August, the circumstances changed in relation to the very reason the mother was motivated to seek a variation of the Consent Order. The father decided to accept a posting to Edmonton during the 2019 Active Posting Season. When he decided to do so is not clear, but it appears that he learned, as early as March 2019, his request for a posting was approved and the mother learned about it as early as May 2019. In any event, neither party took any steps to advise the motion judge that the circumstances had changed, and, as noted, the judge rendered his decision (on August 1, 2019) based on the mother and father living in different provinces. The father moved to Edmonton on August 15, 2019, along with his new partner.

[7] The father filed an appeal of the August 1, 2019 decision. His position is that since he and the mother reside in Edmonton, the week on, week off, shared parenting arrangement provided for in the Consent Order applies or ought to apply. The mother's position is that the daughter's primary residence is with her, as the motion judge ordered.

[8] A complicating factor in the father's motion for a stay is that while the motion judge's decision determined that the daughter should have generous access to the father, it provides, unfortunately but not surprisingly (based on the issue he was required to adjudicate), for the daughter to have access in New Brunswick (including six weeks in the summer, 10 days at Christmas, all of the March break, and other access as agreed). The order does not provide for access in the current circumstances; that is, both parents residing in Edmonton.

[9] The father's motion to this Court seeks a stay of the entirety of the motion judge's order, with the objective of effectively reviving the week on, week off, shared parenting arrangement under the Consent Order. The mother opposes this. Since his arrival in Edmonton in mid-August, the daughter has had access to the father every second weekend (Friday and Saturday, overnight). At the hearing, the mother indicated she is open to more generous access.

[10] I am satisfied the father has met the first part of the test under Rule 62.26 for a stay; the appeal poses a serious challenge to the decision under appeal. The focus of the second and third parts of the test is the best interests of the daughter. As stated in *L.A.A. v. W.J.V.*, [2019] N.B.J. No. 115 (QL):

> Generally, when responding to a request for stay pending appeal, the Court is required "to consider: (1) whether the appeal poses a serious challenge to the decision under appeal; (2) whether the applicant would suffer irreparable harm without the stay; and (3) whether the balance of convenience favours the order sought" (see: *Schelew v. Schelew* (2013), 407 N.B.R. (2d) 240, [2013] N.B.J. No. 226, para 9, per Richard J.A. (as he then was)). When the requested stay relates to the custody of a child, the second and third parts of the analysis are modified to focus on the best interests of the child. Not surprisingly, this is because in assessing whether a stay should be granted, and indeed in all child custody matters, "the overriding principle is always the best interests of the child" (*M.D. v. G.D.*, [2005] N.B.J. No. 411 (QL), per Drapeau, C.J.N.B. (as he then was), at para. 6; see also: *R.L. v. J.L.*, [2017] N.B.J. No. 255, per Quigg J.A.; *P.R.H. v. M.E.L.*, [2009] N.B.J. No. 7; *Bullen v. Losier* (2005), 284 N.B.R. (2d) 318, [2005] N.B.J. No. 68 (QL), per Richard J.A. (as he then was)).
>
> […] Practically speaking, in relation to these issues, "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" (*Reeves v. Reeves*, 2010 NSCA 6, [2010] N.S.J. No. 34 (QL), at para. 21). [paras. 8-9]

[11] I am not persuaded by the father that a stay of the judge's order respecting the primary residence of the daughter is in her best interest, pending the appeal. As would be expected, the judge's decision addressed more than the issue of whether the father remaining in New Brunswick constituted a change in circumstances since the making of the Consent Order. Having decided that issue affirmatively, he then addressed the best interests of the daughter in light of the evidence presented during the four-day hearing, including two Voice of the Child reports, and he made findings regarding her best interests which, although they may be challenged on appeal, should not be disregarded merely by the fact the parents once again reside in the same city. Moreover, the daughter's contact with her mother between the summers of 2018 and 2019 was very limited and the parties expect that an appeal may be able to be heard within months.

[12] However, I am convinced that the motion judge's order for access, in New Brunswick, ought to be stayed. The mother submits I should not make any order for access since the child can rely on her to facilitate adequate access to the father in the absence of an order that addresses access with the father in Edmonton. I disagree it is appropriate to leave in place, pending appeal, an order for access that does not reflect the circumstances that have overtaken the decision under appeal. The daughter's best interests are not served by an order for access that does not reflect in any way her current circumstances. Therefore, I order that, pending the disposition of the father's appeal, the access provisions of the motion judge's order are stayed, and in their place, the daughter shall have access to the father:

1) Thursday October 10, 2019, from after school until Monday morning, at which time he will deliver her to school or, if there is no school, to the mother by 9:00 a.m., and continuing every second Thursday thereafter;
2) every other Thursday from after school until Friday morning, at which time he will deliver her to school or, if there is no school to the mother by 9:00 a.m.;

3) on Thanksgiving Day and Remembrance Day (which follow the daughter's weekends with the father), she is to be returned to the mother by 10:00 a.m. Monday;
4) at Christmas, from Thursday, December 19, 2019, from 10:00 a.m. to Wednesday, December 26th, 2019, by 10:00 a.m.;
5) on her March break, until Wednesday by noon; and
6) at such other time as the parties acting reasonably may agree.

[13] As success has been divided, I make no order to pay costs.

[14] Considering the urgency to settle disputed access, I order the reasons be published in English with the French version to follow pursuant to s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5,