COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

114-23-CA

D.P.

APPELLANT

- and -

S.M.M.B.

RESPONDENT

D. P. v. S.M.M.B., 2023 NBCA 106

Motion heard by:
The Honourable Chief Justice Richard

Date of hearing:
November 30, 2023

Date of decision:
December 12, 2023

Counsel at hearing:

For the appellant:
Jonathan Martin

For the respondent:
Jennifer L. Donovan

D.P.

APPELANT

- et -

S.M.M.B.

INTIMÉE

D.P. c. S.M.M.B., 2023 NBCA 106

Motion entendue par :
l'honorable juge en chef Richard

Date de l'audience :
le 30 novembre 2023

Date de la décision :
le 12 décembre 2023

Avocats à l'audience :

Pour l'appelant :
Jonathan Martin

Pour l'intimée :
Jennifer L. Donovan

DECISION

[1] In a decision dated October 19, 2023, a judge of the Family Division of the Court of King's Bench introduced her reasons with the following paragraph:

> Trial judges in family court do difficult work. They are tasked with making decisions about the future care of a child following the break-up of a parental relationship. Trials amount to a complete stranger conducting a merciless intrusion into a family's intimate details, all to determine the best course for a child's future care in the fact of opposing viewpoints. Add to this the complexity of a relocation, where one parent seeks to move a child away from the other parent, and an already tough decision becomes even more difficult.

[2] In the detailed reasons for the decision that followed this candid observation, the judge allowed a mother to relocate to Quebec with her 20-month-old son so the mother could pursue career goals and be closer to her extended family. In her reasons, the judge acknowledged the dedication of both parents and their respective love for their child.

[3] This matter came to the Family Division through two separate motions during a divorce case. The first motion was filed by the mother, who sought the court's approval to move with their child. In response, the father filed the second motion, contesting the relocation and requesting shared decision-making rights and an alternating week-on/week-off parenting schedule with his son. Both parties urged the court to expedite the hearing on the relocation matter and the judge acquiesced. Following a trial focused on this issue, the judge issued a final verdict on the relocation request and an interim parenting arrangement, pursuant to which the father was granted a week of parenting time each fall and spring, a week during the Christmas holidays, and an uninterrupted month in the summer.

[4] The father is appealing the order that flowed from the judge's decision. By notice of motion, he seeks a stay of the judge's interim decision and "an interim order

providing for sufficient parenting time pending the appeal." In opposing the father's motion, the mother pointed out that interim orders are interlocutory in nature and therefore leave to appeal is required.

[5] The parties agree that the process followed in the present led the court to make **both** a final order (regarding relocation) and an interim parenting order flowing the relocation. No one has argued that the process was flawed. In the very exceptional circumstances of this case, where there is a right to appeal the relocation order and leave is required to appeal the parenting order that stems from it, I granted leave to appeal at the hearing of the motion. I did this to enable the Court of Appeal to consider the entire matter. That said, I was at the time, and remain now, mindful of what I wrote in *Legault v. Rattray*, [2003] N.B.J. No. 442 (QL) (C.A.), regarding the purpose of interim orders in family law matters and the high degree of deference these orders attract. I will return to *Legault* momentarily.

[6] I am not convinced I should stay the execution of the interim parenting order. The parenting order is a natural consequence of the relocation and considers the realities of the situation, including the age of the child, the need for stability and the impracticalities of more frequent visits because of the distance between the residences of the two parents.

[7] In *C.D. v. A.B.*, [2004] N.B.R. (2d) 138, [2004] N.B.J. No. 443 (QL) (C.A.), I observed that the standard tripartite test for the determination of a motion for a stay in child custody matters is somewhat modified. The standard test, taken from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL), requires consideration of (1) whether the appellant has a meaningful issue to be considered on appeal; (2) whether the appellant will suffer irreparable harm if the stay is not granted; and, (3) whether the balance of convenience favours granting the stay. The modification in child custody cases concerns the second element, where the irreparable harm component is stated to be the risk of irreparable harm to the child, rather than irreparable harm to the appellant.

[8] For this motion, I am prepared to accept that the appellant has met the first element of the test and will say no more regarding the prospects of his appeal. I am not convinced, however, that he has demonstrated risk of irreparable harm to the child by the interim parenting arrangements pending the disposition of his appeal. As observed in *Sypher v. Sypher*, [1986] O.J. No. 536 (QL) (C.A.), and adopted in *Legault*, an interim order is designed to provide a reasonably acceptable solution to a difficult problem until a trial. For me to interfere with the interim solution formulated in the Family Division on the grounds of a risk of irreparable harm to the child would require a proper evidentiary foundation. Such a foundation has not been established in the current case. As the case is presented, it simply invites me to substitute the father's own assessment of the best interest of the child for that of the trial judge. Obviously, the law requires much more to justify an appellate judge staying an interim parenting order.

[9] In the end, on the evidence before me, I am not convinced the child risks any irreparable harm by the interim parenting order. It is therefore not necessary for me to address the third element of the *RJR-MacDonald* test.

[10] For these reasons, while I grant the father leave to appeal the interim parenting order as part of his appeal against the final relocation order, his motion for a stay of the parenting order pending the determination of the appeal is dismissed. I order him to pay costs in the amount of $1,000.00. To ensure the parties can make their arrangements respecting the parenting order over the holiday season without fear of being disrupted by a further court order, pursuant to the power set out in s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, I direct that this decision be published first in English and, thereafter, at the earliest possible time, in French.