

COURT OF APPEAL OF
NEW BRUNSWICK



COUR D'APPEL DU
NOUVEAU-BRUNSWICK

100-20-CA

T.B. APPELLANT T.B. APPELANTE

- and - - et -

R.G. RESPONDENT R.G. INTIMÉ

T.B. v. R.G. 2021 NBCA 8

T.B. c. R.G., 2021 NBCA 8

CORAM:

The Honourable Justice Green
The Honourable Justice Baird
The Honourable Justice LaVigne

CORAM :

l'honorable juge Green
l'honorable juge Baird
l'honorable juge LaVigne

Appeal from a decision of the Court of Queen's
Bench:
December 23, 2020

Appel d'une décision de la Cour du Banc de la
Reine :
le 23 décembre 2020

History of Case:

Historique de la cause :

Decision under appeal:
Unreported

Décision frappée d'appel :
inédite

Preliminary or incidental proceedings:
None

Procédures préliminaires ou accessoires :
aucune

Appeal heard:
February 23, 2021

Appel entendu :
le 23 février 2021

Judgment rendered:
February 23, 2021

Jugement rendu :
le 23 février 2021

Counsel at hearing:

Avocats à l'audience :

For the appellant:
Jennifer Lynn Hanson

Pour l'appelante :
Jennifer Lynn Hanson

For the respondent:
Tianna L. Gerber

Pour l'intimé :
Tianna L. Gerber

THE COURT

The appeal is allowed. Reasons will follow.

LA COUR

L'appel est accueilli. Les motifs suivront.

The following is the judgment delivered by

THE COURT

(Orally)

I. Introduction

[1] With leave, the mother appeals an interim decision issued by a motion judge, by which he denied the mother's request that she be allowed to exercise access to the parties' three children in Ontario, while awaiting his decision on an interim motion heard September 3, 2020, to determine the issues of custody and access of the children.

[2] The appeal is allowed. The decision is set aside. Reasons will follow.

II. Proportionality and Rule 62

[3] Rule 62.21(1) of the *Rules of Court* authorizes the Court to make the decision or order that ought to have been made in first instance: see *J.H. v. T.H.*, 2014 NBCA 52, 422 N.B.R. (2d) 388, at para. 11, where the Court relied on the proportionality rule and decided the issue itself instead of remitting it to the Court of Queen's Bench. In this case, the Court has at its disposition the evidence adduced in the Court of Queen's Bench and is therefore able to make the determination that should have been made in the first instance.

III. New Order in the Best Interests of the Children

[4] There is no written agreement or order of a court dealing with the custody of the children. However, as per s. 129(1) of the *Family Services Act*, S.N.B. 1980, c. F-2.2, in such a situation there is a presumption that where a child has more than one parent, the parents jointly have custody of that child. There is nothing on the record that has displaced this presumption. Therefore, we acknowledge that the parties have joint custody of their children, namely, K.M.L.G. (4 years old), R.M.O.G. (3 years old) and C.G.J.G. (almost 1 year old).

[5] Considering the best interests of the children, the following order is issued pursuant to the *Family Services Act*:

Scheduled extended access. The children will be in their father's care, except for the following scheduled access when they will be in their mother's care. The mother may exercise this access in New Brunswick or in Ontario at her residence situated at 113 South Bank Drive, Bracebridge, Ontario. The first access period will be from Saturday, March 6, 2021, at 10 a.m., to Saturday, April 3, 2021, at 7 p.m.; then from Saturday, May 29, 2021, at 10 a.m., to Saturday, June 26, 2021, at 7 p.m., and so on, on a 4-week/8-week/4-week/8-week schedule.

Pandemic restrictions and safeguards. During the contemplated four-week periods of extended access, the children may travel between New Brunswick to the mother's residence in Bracebridge, Ontario, to the extent such travel is permitted by all federal and provincial health restrictions associated with the COVID-19 pandemic. At all times during the extended access visit, the mother shall ensure compliance with applicable and prevailing federal, provincial and/or local public health directives and safety protocols relating to COVID-19, including but not limited to isolation, the wearing of masks, social distancing, and hand-washing.

Travel information to be provided to the father. At least 24 hours before the beginning of each extended access visit, the mother shall provide the father with information concerning her plans for transporting the children from New Brunswick to Ontario (including the specific routes to be used) as well as her plans for the children's return trip from her residence in Ontario to the father's residence in New Brunswick at the end of the visit. The children are not to travel outside Canada.

Return of the children to the father's residence. The mother will be responsible for picking up the children at the father's residence at the beginning of the access

visits and shall return the children to the father's residence in New Brunswick at or before the end of each scheduled access. In the event the mother cannot exercise any scheduled access visit, or part thereof, with the children, she shall make all reasonable efforts to provide the father with a minimum 48 hours of notice in that regard.

Transfer of children's belongings: The children's car seats, Medicare cards, medications, favourite toys and suitable clothing are to be transported with the children.

Cost of travel: The mother alone shall be responsible for the costs associated with the children travelling between New Brunswick and Ontario, and the making of all associated travel arrangements.

Daily electronic/video access: While the children are in the care of one parent, the other parent is entitled to a minimum of 20 minutes of daily uninterrupted electronic/video access to take place at 6 p.m. local time, based on the children's residence at the time, and will continue for as long as the children are engaged in the conversation with the other party. The parent who has the physical care of the children will make the contact with the other parent and will ensure the children's needs are met during the call but will not supervise or control the nature of the call.

Medical information. Each parent shall immediately inform the other of any medical issues affecting the children that require treatment, including details of the problem, the place where the children are being treated, the name of the physician, and any other pertinent information concerning the medical issue.

Duration of this Order: This order will remain in force until the pending decision on the interim motion heard on September 3, 2020, is rendered.

Variation: The access provisions of this order can be varied by mutual written consent of the parties. In the event of a material change of circumstances, either party may on motion apply to the Court of Queen's Bench, Family Division, for a variation, in which case that Court will apply the governing legal principles and determine the motion as if this order had been an interim order of the Court of Queen's Bench.

[6] Considering the nature and effect of this decision, we direct, in accordance with s. 24(2) of the *Official Languages Act*, S.N.B 2002, c. O-0.5, that this decision be published in the first instance in English and, thereafter, at the earliest possible time, in French.