COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

1-18-CA

B E T W E E N:

J.C.P.

APPELLANT

- and -

A.D.P.

RESPONDENT

E N T R E :

J.C.P.

APPELANT

-et-

A.D.P.

INTIMÉE

Motion heard by:
The Honourable Justice Richard

Date of hearing:
January 25 and February 21, 2018

Date of decision:
February 22, 2018

Counsel at hearing:

For the appellant:
Michael R. Young

For the respondent:
Amanda Dawn McCordic

Motion entendue par :
l'honorable juge Richard

Date de l'audience :
les 25 janvier et 21 février 2018

Date de la décision :
le 22 février 2018

Avocats à l'audience :

Pour l'appelant :
Michael R. Young

Pour l'intimée :
Amanda Dawn McCordic

DECISION

[1] J.C.P. seeks leave to appeal an interim decision of a judge of the Court of Queen's Bench, Family Division, rendered on January 2, 2018. With that decision, the judge issued an order concerning the interim custody of, and access to, the two children of J.C.P.'s marriage with A.D.P.

[2] When applying for leave to appeal, the moving party must file a Record on Motion in accordance with Rule 37 of the *Rules of Court*. According to Rule 62.03(3), the Record must contain:

(a) an index;

(b) a copy of the notice of motion;

(c) a copy of the order or decision sought to be appealed;

(d) a copy of the pleadings, if any; and

(e) a copy of any affidavits or other evidence relevant to the appeal.

[3] When this matter initially came up for hearing, I had not been provided with a copy of the decision sought to be appealed, which had been rendered orally and had not yet been reduced to writing. In addition, the Record on Motion did not include a copy of the pleadings, or the affidavits that were before the judge of the Court of Queen's Bench.

[4] Instead, the Record on Motion contained the Notice of Motion for Leave to Appeal and each party's own affidavit, in which each sought to recast the case in their respective favour. At the initial hearing, the parties were informed this was inappropriate. While new evidence may sometimes be necessary in a motion for leave to appeal, the role of the judge in determining such a motion is not to retry the case. In deciding whether to grant leave to appeal, a judge of the Court of Appeal may consider the factors set out in Rule 62.03(4). They are as follows:

(a) whether there is a conflicting decision by another judge or court upon a question involved in the proposed appeal;

(b) whether he or she doubts the correctness of the order or decision in question; or

(c) whether he or she considers that the proposed appeal involves matters of sufficient importance.

[5] These factors are applicable when deciding a motion for leave to appeal an interim custody and access order. However, regarding motions for leave to appeal an interim custody and access order, our jurisprudence instructs judges that these types of orders will only be reversed on appeal if it is shown the order is clearly wrong and falls outside the wide ambit of reasonable temporary solutions pending trial.

[6] With the Record on Motion as originally filed, consideration of those factors proved impossible. The hearing was therefore adjourned to allow counsel to prepare and file a proper Record.

[7] When the hearing resumed, all the required documents were included in the amended Record on Motion.

[8] J.C.P. and A.D.P. were married in 2000, had two children currently aged 13 and 11, separated in June 2013 and are now in the throes of a divorce. After separation, they signed a domestic contract, a portion of which provided for the shared custody of the children. This arrangement continued until September 2017 when the children ran away from their mother’s home and took up residence with their father. Persistent attempts by the mother to communicate with her children were unsuccessful. As a result, court proceedings were initiated with each party seeking interim custody of the children pending the final outcome of the divorce proceedings.

[9] The purpose of an interim order was described in *Legault v. Rattray*, [2003] N.B.J. No. 442 (QL):

> The purpose of an interim order is to cover a short period of time between the making of the order and trial. By necessity, the order is made on limited evidence: usually by affidavit. It is designed to "provide a reasonably acceptable solution to a difficult problem until trial", to use the words of Zuber J.A. in *Sypher v. Sypher*, [1986] O.J. No. 536, online: QL (OJ) (Ont. C.A.), adopted by Rice J.A. of this Court in *Wentzell v. Wentzell*, [1999] N.B.J. No. 25, online: QL (NBJ), which case was in turn relied upon by Robertson J.A. in *Piercy v. Foreman*, [2003] N.B.J. No. 76, online: QL (NBJ). In the *Sypher* case, Zuber J.A. reasoned that "an appellate court should not interfere with an interim order unless it is demonstrated that the interim order is clearly wrong and exceeds the wide ambit of reasonable solutions that are available on a summary interim proceeding." I agree.
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> [para. 4]

[10] This statement was adopted in *D.A. v. J.R.*, 2012 NBCA 38, 387 N.B.R. (2d) 203 and in *J.H. v. T.H.*, 2014, NBCA 52, 422 N.B.R. (2d) 388. In the latter of these cases, the Court, per Larlee J.A., noted "it is generally unusual for a single judge of this Court to grant leave to appeal from an interim custody and access order" (para. 12).

[11] I have not been persuaded to deviate from the restraint normally exercised in motions for leave to appeal an interim order of this type. Notwithstanding the able arguments of counsel for J.C.P., and despite an evidentiary ruling the correctness of which I doubt, I remain unconvinced the interim order falls outside the wide ambit of reasonable solutions. The evidentiary ruling in question concerns the motion judge's decision not to consider collateral affidavits the parties had filed in support of their respective positions. In his decision, the motion judge states as follows:

> [J.C.P.] submitted a number of affidavits in support of his position and as character references. I can't rely upon these documents at this point in the litigation. [N.B.], for example, is [J.C.P.]'s partner. Her affidavit provides a substantial amount of information about her time with

> [J.C.P.] and the children and also with [A.D.P.] and her family. But I cannot consider [N.B.]'s interpretation of the facts for this interim hearing precisely because she is [J.C.P.]'s partner and hence not an objective third person. More particularly her assertions must be subjected to cross-examination before they can be assessed as evidence. All the other deponents were friends or [confidants] of the petitioner. There was no opportunity to verify any of the assertions or allegations set out therein. Before the evidence they set out could be considered as reflecting the truth, the deponents would have to be subjected to cross-examination.
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> [Emphasis added.]

[12] The judge made a similar ruling regarding a number of affidavits filed in support of the mother's position, saying he refused to consider those affidavits until the deponents could testify and be subjected to cross-examination.

[13] It appears the motion judge was ruling the affidavits inadmissible. I certainly doubt the correctness of that ruling. The question of admissibility is governed by the rules of evidence and the *Rules of Court* and counsel did not raise any objection or point to any rule that would have precluded the admissibility of these affidavits.

[14] While the motion judge might have said he would attach little weight to the affidavits, his use of the words "can" and "refuse" suggests he made admissibility rulings. Even more troubling is the fact the judge later, in making unfavourable credibility findings, states J.C.P. had "provided no corroboration for" certain statements contained in his affidavit. In reality, J.C.P. had provided some corroboration. The corroborating evidence is found in the affidavits the judge refused to consider.

[15] I find the judge's approach to the use of collateral affidavits troubling. In another context, his refusal to consider the affidavits might have persuaded me to grant leave to appeal; however, upon reviewing the record, including the affidavits the judge refused to consider, I remain convinced the judge's interim order falls within the wide ambit of reasonable solutions.

[16] For these reasons, the motion for leave to appeal is dismissed. I order J.C.P. to pay costs in the amount of $750. Because this decision may impact the timing of proceedings in the Court of Queen's Bench, I invoke s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, and order its release in the English language with the French version to follow in due course.