COURT OF APPEAL OF NEW BRUNSWICK		COUR D’APPEL DU NOUVEAU-BRUNSWICK

54-20-CA

W.G. and D.G.	W.G. et D.G.
INTENDED APPELLANTS	APPELANTS ÉVENTUELS
- and -	- et -
K.A.W.	K.A.W.
INTENDED RESPONDENT	INTIMÉE ÉVENTUELLE
- and -	- et -
V.B.	V.B.
INTENDED RESPONDENT	INTIMÉ ÉVENTUEL
- and -	- et -
THE MINISTER OF SOCIAL DEVELOPMENT	LA MINISTRE DU DÉVELOPPEMENT SOCIAL
INTENDED RESPONDENT	INTIMÉE ÉVENTUELLE
Motion heard by teleconference: The Honourable Justice Baird	Motion entendue par téléconférence : l’honorable juge Baird
Date of hearing: August 11, 2020	Date de l’audience : le 11 août 2020
Date of decision: August 12, 2020	Date de la décision : le 12 août 2020
Counsel at hearing:	Avocats à l’audience :
For the intended appellants: Chelsea L. Seale	Pour les appelants éventuels : Chelsea L. Seale
For the intended respondent K.A.W.: Misty Amber Matthews-Emery	Pour l’intimée éventuelle K.A.W. : Misty Amber Matthews-Emery
V.B., on his own behalf	V.B., en son propre nom
For the intended respondent the Minister of Social Development: Nancy Jane Martel	Pour l’appelante éventuelle la ministre du Développement social : Nancy Jane Martel

DECISION

I. Introduction

[1] This is a motion for leave to appeal an interlocutory decision of a Court of Queen's Bench judge. In the alternative, the intended appellants request an extension of time in which to file a Notice of Appeal should I find the interim order was final.

[2] I am satisfied that all parties to the proceedings were served with the motion. The intended respondent, V.B., did not reply to the motion, nor did he appear. At the outset, I have determined the interim order is interlocutory, as described by the Court in *Murray v. Royal Bank of Canada* (2011), 384 N.B.R. (2d) 288, [2011] N.B.J. No. 509 (C.A.) (QL):

> I must first address whether the decision on each motion is interlocutory or final. The test which continues to be applied in determining whether an order is final or interlocutory was set out by Stratton C.J.N.B. in *Bourque v. New Brunswick, Leger and Leger* (1982), 41 N.B.R. (2d) 129, [1982] N.B.J. No. 247 (C.A.) (QL), recently cited in *Zildjian v. Sabian Ltd. et al.* (2009), 342 N.B.R. (2d) 143, [2009] N.B.J. No. 15 (C.A.) (QL), wherein he said:
>
>> In my opinion, the question whether an order or decision is interlocutory or final should be determined by looking at the order or decision itself, and its character is not affected by the nature of the order or decision which could have been made had a different result been reached. If the nature of the order or decision as made finally disposes of, or substantially decides the rights of the parties, it ought to be treated as a final order or decision. If it does not, and the merits of the case remain to be determined, it is an interlocutory order or decision. [para. 13]
>
> [para. 3]

See also *Toronto Dominion Bank v. Andal Holdings (Moncton) Ltd.*, [2017] N.B.J. No. 212, at paras. 11-13.

[3] Having determined the order in the court below was interlocutory, leave to appeal is therefore required.

[4] The standard of review for interlocutory decisions was summarized in *Buctouche First Nation v. New Brunswick*, (2014), 426 N.B.R. (2d) 304, [2014] N.B.J. No. 266 (QL) as follows:

> Whether we are dealing with a motion for leave to appeal or an appeal, we always begin the analysis with the applicable standard of review of each question raised: *Roy v. Doucet*, 2005 NBCA 84, 288 N.B.R. (2d) 12, at para. 13 and *Godin v. Star-Key Enterprises and Carquest Canada*, 2006 NBCA 91, 305 N.B.R. (2d) 180, at para. 7. The standard of review of a discretionary judicial decision is the most deferential standard: Local 772, at para. 4. That standard is described in *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery*, 2006 NBCA 75, 302 N.B.R. (2d) 161, at para. 4 and Local 772, at para. 41. A discretionary judicial decision may only be interfered with if it is founded on an error of law, an error in the application of the governing principles or a palpable and overriding error in the assessment of the evidence. [para. 10]

[5] Intended appellants have a steep hill to climb when they seek leave to appeal interlocutory decisions to which a high degree of deference is accorded (see *Burtt v. Boyle* (2001), 382 N.B.R. (2d) 206, [2011] N.B.J. No. 471 (QL)). In this case, the intended appellants are the foster parents to a young child, born October 8, 2018, who was placed in care by the Minister of Social Development on July 16, 2019. The hearing of the Minister's guardianship application is scheduled to commence on August 24, 2020.

[6] The foster parents have filed an application in which they seek custody of the child. The mother contests the guardianship application but states that if a guardianship order issues, she would want the child to remain in the custody of the foster parents. The father has not participated in the proceedings. The Minister wishes to proceed with the guardianship application, with a view to placing the child for adoption.

[7] At the hearing before the Court of Queen's Bench judge on June 20, 2020, the foster parents requested an order under Rule 6 of the *Rules of Court* that would have consolidated their custody application with the guardianship application, or, in the alternative, they requested that their application be heard immediately following the guardianship application, on the basis they are interested parties as contemplated in s. 129(2) of the *Family Services Act*, S.N.B. 1980, c. F-2.2 (see *Minister of Social Development v. T.A.P., A.H., F.M. and D.W.*, 2015 NBCA 39, [2015] N.B.J. No. 150 (QL)).

[8] The intended appellants submitted further that there is no prejudice to the natural parents should their application be heard, either at the same time, or immediately following the hearing of the application for guardianship, relying on the Court's decision in *J.S. and J.N. v. Minister of Social Development (now Minister of Families and Children)*, 2018 NBCA 26. They distinguish the concerns raised by the Court in *J.S. and J.N.*

[9] The relief requested was denied by the motion judge in a carefully-crafted decision in which she echoed the public policy concerns expressed by courts both in this province and elsewhere, that foster parents should remain neutral in child protection proceedings (see *Minister of Family and Community Services v. S.P. and K.B.*, January 9, 2008 (unreported), by M. Robichaud J.; and *Minister of Family and Community Services v. S.S. and T.M.*, 2008 NBQB 34, [2008] N.B.J. No. 17 (QL), per Rideout J.; and *Minister of Family and Community Services v. S.P. and K.B.,* (2008), 329 N.B.R. (2d) 340, [2008] N.B.J. No. 263 (Q.B.) (QL).

II. Analysis

[10] Rule 62.03(4) sets forth the criteria to be applied when considering whether or not leave will be granted. They are:

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

b) whether there is a doubt concerning the correctness of the order or decision in question; and

c) whether the proposed appeal involves matters of sufficient importance.

[11] Under Rule 62.03(4) it is clear that the decision whether to grant leave, or not, is discretionary. The wording of the Rule is such that it has removed the obligation to satisfy any of the three pre-conditions, and what were once preconditions are now "considerations to be weighed in the exercise of the discretionary power to grant leave to appeal" (see *AMEC Americas Limited v. HB Construction Co.* (2015), 438 N.B.R. (2d) 137, [2015] N.B.J. No. 169 (QL), per Richard J.A., as he then was).

[12] Even if it is concluded that one of the three pre-conditions have been met, there is still a residual discretion to deny leave (see *Buctouche First Nation v. New Brunswick*, at para. 22). Having reviewed the record and the submissions, I conclude that leave to appeal should not be granted in this case. We are two weeks away from the beginning of a guardianship application involving the status of a young child. It is in her best interests that the Minister's application proceed. To postpone or stay the proceedings in the court below, pending the outcome of an appeal, would create unnecessary delay and I observe the intended appellants did not request an expedited hearing.

[13] Further, although there were two decisions cited by the intended appellants, one from Nunavut, and one from Saskatchewan, where foster parents were permitted to participate in child protection proceedings as interested parties, these decisions are not binding on this Court, they were lower court decisions, and they are distinguishable.

[14] Finally, I do not doubt the correctness of the decision in the court below in this case, nor am I satisfied the third criterion of Rule 62.03(4) has been satisfied in this case.

III. <u>Disposition</u>

[15] There was no request made for costs, so leave to appeal is dismissed without costs. Given the fact the Minister's application is scheduled to be heard over several days starting on August 24, 2020, and the parties have requested a decision on the motion as soon as possible, I am exercising my authority under the *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 24(2) and the decision will be released in the English language first with the French translation to follow.