

COURT OF APPEAL OF
NEW BRUNSWICK



COUR D'APPEL DU
NOUVEAU-BRUNSWICK

9-21-CA

B E T W E E N :

E N T R E :

R.A.M.

R.A.M.

INTENDED APPELLANT

APPELANTE ÉVENTUELLE

- and -

- et -

J.C.M.

J.C.M.

INTENDED RESPONDENT

INTIMÉ ÉVENTUEL

Motion heard by teleconference:
The Honourable Justice LeBlond

Motion entendue par téléconférence :
l'honorable juge LeBlond

Dates of hearing:
February 24 and 26, 2021

Dates de l'audience :
les 24 et 26 février 2021

Date of decision:
February 26, 2021

Date de la décision :
le 26 février 2021

Counsel at hearing:

Avocats à l'audience :

For the Intended Appellant:
Jennifer Lee Donovan

Pour l'appelante éventuelle :
Jennifer Lee Donovan

For the Intended Respondent:
Ferne M. Ashford

Pour l'intimé éventuel :
Ferne M. Ashford

DECISION
(Orally)

[1] The Intended Appellant, R.A.M., moves for:

1. an extension of time to file a Notice of Motion for leave to appeal the decision of a judge of the Court of Queen’s Bench, Family Division, dated January 22, 2021 (the “Decision”), pursuant to Rules 3.02(2) and 62.03(1) of the *Rules of Court*;
2. if the extension of time is granted, leave to appeal the Decision pursuant to Rule 62.03(1)(a);
3. if leave to appeal is granted, a stay of execution of the Decision pursuant to Rule 62.26(2) and (3) pending disposition of the appeal.

[2] The grounds argued in support of the requested relief are numerous, but all relate to R.A.M.’s motion for interim relief which was heard on February 3, 2020, almost one year prior to the release of the Decision. They include alleged errors committed by the motion judge as a result of the incorrect application of the law in:

1. awarding exclusive possession of the marital home to the husband, the Intended Respondent, J.C.M.;
2. making no order or an ambiguous order/suggestion relating to spousal support for R.A.M.;
3. granting joint custody to R.A.M. and J.C.M. of their two children; and
4. failing to properly conduct a “best interests of the child” analysis.

[3] After hearing counsel for the parties, I am satisfied R.A.M. has an arguable case, one of the requirements which must be met in order to grant an extension of time to seek leave to appeal (*Naderi v. Strong*, 2005 NBCA 10, 280 N.B.R. (2d) 379) as well as the leave to appeal itself.

[4] As a result, the motion for the extension of time is granted. The motion for leave to appeal is also granted. In accordance with Rule 62.03(5)(b), I consulted with Richard C.J.N.B. and with his approval, the hearing of the appeal will be expedited. There is no evidence to transcribe as all of the evidence before the motion judge consisted of affidavits. Moreover, the motion judge's Decision is transcribed. The expedited hearing of the appeal will be set by the Chief Justice and communicated to the parties by the Registrar.

[5] The motion for the stay of execution is predicated on meeting the three requirements of the test established by the Supreme Court of Canada in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL), wherein:

1. the appellant must have a meaningful issue to be considered on appeal;
2. the appellant will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favours granting a stay.

[6] I have already indicated I am satisfied the first criterion is met.

[7] In family law cases where child custody and the best interests of children are paramount, the second criterion is somewhat different than would be the case for other civil cases: *A.B. v. C.D.* (2004), 283 N.B.R. (2d) 138, [2004] N.B.J. No. 443 (QL) (C.A.) per Richard J.A., as he then was. The inquiry must focus on whether the children will suffer irreparable harm from the denial of a stay. To the extent, the Decision results

in a marked departure from the status quo in terms of the living arrangements which the children in this case have always known to this point, I am persuaded the risk of such harm to them, until disposition of the appeal, is significant. There need not be proof of such harm and maintaining the status quo, at least until disposition of the appeal, is in their best interests.

[8] That said, the third criterion of balance of convenience clearly favours granting the stay.

[9] The motion for the stay of execution is granted up to the date the parties confirm withdrawal of the appeal or the date of the hearing of the appeal, at which time the panel will deal with its continuation or termination. The stay is granted subject to the following terms:

1. R.A.M. is ordered not to attend the marital property with Shane Bridger of Oromocto, New Brunswick, or to permit his attendance there in any way until further order of the Court.
2. Any and all recording or surveillance devices located at or inside the marital property shall be disconnected and are not to be used until further order of the Court.
3. R.A.M. and J.C.M. shall have joint custody of both children until further order of the Court. Pending disposition of the appeal, the custodial terms set out in para. 51 of the Decision shall remain in place with the first week of custodial responsibilities going to J.C.M. While custodial responsibilities are exercised by one spouse, the other is not to interfere in any way unless requested by the spouse then exercising custodial responsibilities.
4. Until the hearing of the appeal, I will remain seized to deal with any contempt of court motion arising from a breach or violation of this decision.

[10] I make this decision strictly out of my concern for the best interests of the children and the parties are urged to keep that in mind pending the hearing of the appeal. This decision is made in accordance with the jurisdiction granted to me under s. 11 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, Rule 62.26(3)(c), and the common law.

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