COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

45-22-CA

C.S.

INTENDED APPELLANT

- and -

D.S.

INTENDED RESPONDENT

C.S.

APPELANTE ÉVENTUELLE

- et -

D.S.

INTIMÉ ÉVENTUEL

Motion heard by teleconference:
The Honourable Justice Baird

Date of hearing:
May 18, 2022

Date of decision:
May 25, 2022

Counsel at hearing:

For the Intended Appellant:
Stéphanie M. Cormier

For the Intended Respondent:
Daniel R. Jardine

Motion entendue par téléconférence :
l'honorable juge Baird

Date de l'audience :
le 18 mai 2022

Date de la décision :
le 25 mai 2022

Avocats à l'audience :

Pour l'appelante éventuelle :
Stéphanie M. Cormier

Pour l'intimé éventuel :
Daniel R. Jardine

DECISION

I. Preliminary Issue

[1] At the outset of this motion hearing, I was asked to rule on the admissibility of affidavit evidence filed by both parties which contained alleged out-of-court statements made by the children, and/or a parent, following the issuance of the motion judge's decision in this case.

[2] In my view, that evidence is inadmissible, and it has not been considered. Therefore, para. 8, line 3 of the affidavit filed by D.S. is struck, as is line 2 of para. 32 of the affidavit filed by C.S. (see Karakatsanis J. in *Barendregt v. Grebliunas*, 2022 SCC 22, [2021] S.C.J. No. 101 (QL), at paras. 4-10, 31-34, 116, 152, 154 and 189).

II. Introduction

[3] C.S. seeks leave to appeal the decision of a motion judge made pursuant to the provisions of the *Family Law Act*, S.N.B. 2020, c. 23 (the "*Act*"), which varied an *ad hoc* shared parenting arrangement with respect to the three children of their marriage, aged eleven, seven and two years respectively.

[4] C.S. raises the following errors:

1. The reasons were insufficient;

2. There was no best interests of the child analysis under s. 50 of the *Act*;

3. Because the resulting order was made based on conflicting affidavit evidence, there should have been a hearing with *viva voce* evidence;

4. The judge erred in mixed fact and law when he determined there had been a material change that would permit him to vary the *status quo*; and

5. The judge erred in law when he ordered the parties to share expenses for the children on a *pro rata* basis.

[5] Appellate review of an interim parenting order is rare. In *J.C.P. v. A.D.P.*, [2018] N.B.J. No. 54 (QL) (C.A.), Richard J.A., as he then was, wrote the following:

> 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. [para. 4]
>
> 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). [paras. 9-10]

[6] As Richard J.A. observed in *J.C.P.*, appellate intervention occurs when a motion judge on appeal is convinced the interim order falls outside the wide range of reasonable solutions in the short term.

[7] The above being said, however, some parents may wait upwards to eighteen months or more for trial dates in New Brunswick. This creates a situation where interim parenting orders take on the appearance of final orders, which are then varied on the basis

of material change. Hearing these motions on the basis of conflicting affidavit evidence alone, becomes a matter of contention.

[8] In this case, C.S. seeks:

1. Leave to appeal under Rule 62.03(1)(a) of the *Rules*;

2. A stay of execution of the interim order pending the disposition of the appeal (Rule 62.26(2) and (3)); and

3. Costs.

[9] In considering the motion for leave to appeal, I am persuaded:

1. The issue of how motion judges treat conflicting affidavits where interim parenting orders are being sought is not without conflict (see; *Fougère v. Fougère* (1987), 77 N.B.R. (2d) 381, [1987] N.B.J. No. 26 (C.A.) (QL); *D.E.M. v. D.M.C.* (1988), 92 N.B.R. (2d) 13, [1988] N.B.J. No. 721 (Q.B.) (QL); *D.G. v. H.F.*, 2006 NBCA 36, 297 N.B.R. (2d) 329; *N.E.R. v. J.D.M.*, 2011 NBCA 57, 377 N.B.R. (2d) 147, at para. 16; *Henheffer v. Barry*, 2016 NBQB 29, [2016] N.B.J. No. 100 (QL));

2. I have doubts about the correctness of the order. Here, I highlight the lack of a best interests of the child analysis (see *J.H. v. T.H.*, 2017 NBCA 7, [2017] N.B.J. No. 16 (QL), at para. 36; *T.M.D. v. J.P.G.*, 2018 NBCA 15, [2018] N.B.J. No. 44 (QL), at paras. 26-32; *L.S. v. M.S.*, 2019 NBCA 64, [2019] N.B.J. No. 235 (QL); *N.A.T. v. S.A.T.*, 2019 NBCA 87, [2019] N.B.J. No. 368 (QL); *J.J.S. v. E.M.S.*, 2021 NBCA 23, [2021] N.B.J. No. 131 (QL)); and

3. The proposed appeal involves matters of sufficient importance to the administration of justice. How should interim custody and access hearings be conducted when there is conflicting affidavit evidence? Are judges required

to conduct a best interests of the child analysis under s. 50 of the *Act* when making interim orders for parenting? Should mathematical calculations under the *Guidelines* be delegated to counsel in circumstances where there has been a failure to comply with financial disclosure obligations under the *Federal Child Support Guidelines*, SOR/97-175?

[10] I am persuaded that leave to appeal should be granted. With respect to a stay of execution, under Rule 62.26(2), there is a three prong test which must be satisfied (see *Collette v. B & C Mazeroll Construction Inc.*, [2017] N.B.J. No. 266 (QL) (C.A.), at para. 7; *Potash Corp. of Saskatchewan Inc. v. HB Construction Co.*, [2021] N.B.J. No. 356, at para. 4). Applying the criteria, I am satisfied:

a) the intended appeal poses a serious challenge to the motion judge's decision;

b) the effect of the order creates a marked departure from the *status quo* in existence for six months with the attendant risk of creating an alternative *status quo* by the time the case is finally heard; and

c) the balance of convenience favours a stay at this time.

[11] Under Rule 62.03(5), a judge granting leave to appeal may:

a) impose such terms as may be just; and

b) give directions to expedite the hearing of the appeal.

[12] In consultation with the Chief Justice of New Brunswick, the appeal shall be perfected no later than August 15, 2022, and it will be heard in September 2022. Given the time constraints, this decision will issue in the English language first, subject to translation, under s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

III. Disposition

[13] The motion for leave to appeal is granted. The interim order is stayed pending the hearing of the appeal. The appeal shall be perfected no later than August 15, 2022, and it will be heard in September 2022, as per the directions of the Chief Justice of New Brunswick. Costs are ordered in the amount of $1,000.