

COURT OF APPEAL FOR ONTARIO

CITATION: D.C. v. T.B., 2021 ONCA 562

DATE: 20210804

DOCKET: M52687

van Rensburg J.A. (Motions Judge)

BETWEEN

D.C.

Moving Party

and

T.B.

Responding Party

Michael J. Stangarone and Aria MacEachern, for the moving party

Christina Doris and Jessica Luscombe, for the responding party

Heard and released orally: August 3, 2021 by videoconference

ENDORSEMENT

[1] The moving party seeks an extension of time to appeal the final order of Conlan J. with respect to parenting of the parties' daughter, R., who is almost 12 years old. She also seeks to stay the final order pending appeal. The motion is opposed by the responding party, who is R.'s father.

[2] I will deal with each aspect of the motion in turn.

The Extension of Time to Appeal

[3] The mother was three days late in serving her notice of appeal. She sought consent from the father to the late filing of the notice of appeal, which was refused. Courts can extend time under r. 3.02 of the *Rules of Civil Procedure*. In general, the following factors are relevant to a motion to extend time to appeal: (1) whether the appellant formed an intention to appeal within the relevant period (in this case 30 days after the final order); (2) the length of, and explanation for, the delay; (3) prejudice to the respondent; (4) the merits of the appeal; and (5) ultimately, whether it is in the interests of justice to order the extension of time. In cases involving children, the justice of the case is reflected in the best interests of the children: *Denomme v. McArthur*, 2013 ONCA 694, at para. 10.

[4] The mother states in her affidavit that she formed the intention to appeal within the requisite time. She explains that the delay resulted from a combination of the traumatic effect of the final order and the time that was required to retain appellate counsel. The motion was brought promptly.

[5] The father opposes the motion for an extension of time, asserting that the mother waited until she received his costs submissions before deciding to appeal. He asserts that he is prejudiced, in part because the mother has failed to pay her share of the costs of the Family Bridges program. He asserts that the merits of the appeal are weak.

[6] I am satisfied that an extension of time is in the interests of justice.

[7] The mother had a right to appeal the final order of the trial judge and the right to seek leave to appeal the award of costs. The final order reverses custody of R. and prevents the mother from having any contact with R. for a period of time, and the mother is subject to an award of substantial indemnity costs. The mother was only three days late in serving her notice of appeal. Even if she decided to appeal only after she received the father's costs submissions, she formed the intention to appeal within 30 days of the final order. The final order has been implemented to the extent that R. is residing with her father, and they are participating in the After Care program. R.'s contact with her mother is suspended. Other than the mother's non-payment of her share of the Family Bridges program required under para. 20 of the final order (it is a financial provision that would be stayed on appeal), the mother has complied with the final order. The therapists have indicated that her involvement in the After Care program is suspended during her appeal.

[8] I am not prepared to say that there is no potential merit to this appeal. In view of the very short delay, the strength of the proposed appeal is not a compelling factor in this case. The mother has a right to appeal the final order and a three-day delay should not prevent her from doing so.

Stay Pending Appeal

[9] Custody and access orders remain in effect pending an appeal to this court unless the court has ordered otherwise. In determining whether to stay an order involving the parenting of a child, the courts must consider: (1) whether, on a preliminary assessment, the appeal raises a serious question (recognizing that this is a low threshold); whether the child will suffer irreparable harm if a stay is refused; and (3) the balance of convenience: namely whether there would be greater harm from the granting or refusal of a stay pending a decision on the merits of the appeal. The overriding consideration, again, is the best interests of the child. In other words, the court must be satisfied that it is in the child's best interests to grant a stay: *K.K. v. M.M.*, 2021 ONCA 407, at para. 17 and *Lefebvre v. Lefebvre*, 167 O.A.C. 85 (C.A.), at para. 6.

[10] The standard for appellate review of a custody or parenting decision is exacting: *Bors v. Bors*, 2021 ONCA 513, at paras. 18-20. The function of this court is not to retry the case on appeal. Intervention is warranted only if there is a material error, a serious misapprehension of the evidence, or an error of law. The mother contends that there are a number of errors in the trial judge's decision, and accordingly that the appeal raises a serious issue. Among other arguments, she asserts that the trial judge erred in the scope and application of the expert evidence of the joint participant expert, Dr. Fidler.

[11] The mother's argument about irreparable harm essentially focuses on her temporary separation from the child and its effect on both her and the child.

[12] The father argues that the mother's appeal lacks merit, but even if there were some arguable merit to the appeal, that a stay is not in the best interests of R., who is continuing to benefit from the current therapeutic program and the opportunity (which will continue throughout the summer) to rebuild a relationship with her father and his family. The father also points to the disruption and additional costs that would be incurred in stopping and restarting the therapeutic program, if a stay were granted and the mother were to lose her appeal.

[13] In this case, as in *K.K. V. M.M.*, "staying [the final order] would not preserve the *status quo*, but would disassemble the structure the trial judge put in place and replace it with the very circumstances [he] found not to be in [the child's] best interests; it would run the risk of undoing the very benefits that the trial judge fashioned the Order to achieve": at para. 28.

[14] I am not persuaded that a stay of the final order pending appeal is in the best interests of R. The reasons of the trial judge are comprehensive and reveal no obvious error. The grounds of appeal may be arguable, but they are weak. What the mother is seeking is a return to the *status quo* before the final order was made. She seeks to have R. return to live with her, ending the current living arrangements and the suspension of her contact with R. She seeks to stop the process which

started on the day the final order was made. The letter from the therapists (prepared at the father's request) notes that R. is adjusting to the transition and that the family is receiving appropriate support in the process. No doubt R. misses her mother. However, she is benefiting from the restoration of her relationship with her father. There is no question about the level of care she is receiving. Since there is no evidence of significant harm or risk of harm to R. as a result of the order, and evidence of benefit to R. in continuing to have the order in effect, to stay the order under appeal would be highly disruptive to R. under appeal and would not be in her best interests.

[15] Finally, before ending these reasons, I note that the mother was complying with the final order by doing what was required to participate in the After Care program until the therapists indicated that they would not continue while an appeal is pending. Her counsel advises that she continues to be prepared to participate in therapy. Pursuant to para. 19 of the final order the parties are returning to the trial judge on September 15, 2021. The parties are agreeable to expediting the appeal. All of this is helpful and no doubt in R.'s best interests.

[16] For these reasons, the motion to extend time to appeal is granted, and the stay pending appeal is refused. The appeal shall be perfected on or before August 20, 2021 and the hearing of the appeal shall be expedited. On consent of the parties, an order is made to use initials in place of the names of the parties and the

child in these reasons and the order of this court. As agreed between the parties, and to reflect the divided success, there will be no costs of this motion.

“K. van Rensburg J.A.”