

COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
REGISTRY OF MONTREAL

No: 500-09-018374-082
(505-04-016623-076)

DATE: JANUARY 30, 2008

IN THE PRESENCE OF THE HONOURABLE MARIE-FRANCE BICH J.A.

H... H...
APPELLANT / Defendant
v.

Z... A...
RESPONDENT / Plaintiff

JUDGMENT

[1] The petitioner seeks leave to appeal the interlocutory judgment rendered on December 21, 2007, by the Superior Court, district of Montreal (the Honourable Madam Justice Claudine Roy), ordering various provisional measures pending the action between the parties in separation from bed and board, among which the following, for which leave to appeal is sought:

Custody of the parties' child (who is now ten years old) is granted to the respondent (mother), with access rights to the petitioner (father);

The respondent is authorized to travel outside Canada without the consent of the petitioner;

The respondent is authorized to sell the parties' former family residence and half of the sale price is to be deposited in trust until final judgment.

[2] It is to be noted that the second conclusion has the effect of allowing the respondent and the child to reside in Town A ([country A]), where the former works and where she has purchased real estate. The child, who was at school in Town B until December, 21, 2007, is now enrolled in a French school in Town A, where mother and child returned shortly after the judgment of Madam Justice Roy was rendered.

[3] The petitioner also seeks the suspension of the provisional execution of the custody and rights of access orders, as well as of the order concerning the family residence (the latter being unnecessary, by virtue of articles 497 and 547, *a contrario*, C.C.P.).

[4] At the interim stage, custody was granted to the petitioner, who exercised it from August 21, 2007 to December 21, 2007.

[5] Leave to appeal is governed in the present case by articles 29 and 511 C.C.P. and can be granted only if the interlocutory judgment falls within the categories of judgments described in article 29, and only if the pursuit of justice requires such leave.

[6] As a general rule, judgments ordering provisional measures in family matters¹ are not appealable, since they do not fall within the ambit of the first paragraph of article 29 C.C.P.: they do not decide the issues and are not binding upon the final judgment (sub-paragraph 29a) C.C.P.); they normally do not order the doing of anything which cannot be remedied by the final judgment (sub-paragraph 29b) C.C.P.), nor do they unnecessarily delay the trial (sub-paragraph 29c) C.C.P.). Neither do they fall under the second paragraph of article 29 C.C.P., which is not relevant here.

[7] In exceptional cases, where the impact of the judgment is such that it will, for all practical purposes, have an irremediable effect, leave will be granted, but only if the said judgment is apparently affected by palpable and flagrant errors of fact or law. The standard of intervention in appeal is an exacting one and even more so in the case of judgments ordering provisional measures:

[5] La revue des moyens d'appel ne nous convainc pas que le jugement attaqué soit l'un de ceux donnant prise à une intervention de notre part. En cette matière, le principe de la retenue judiciaire est fermement établi et constamment rappelé par la Cour suprême (arrêts *Van De Perre*, *Young*, *Goertz*).

[6] Seule la présence d'une erreur de droit ou d'une importante erreur de fait peut justifier pareille intervention. Cette règle découle de ce que les ordonnances de garde reposent sur une fine analyse des faits. Jouissant d'un contact direct avec les parties et les témoins, le premier juge est celui qui est le mieux à même de trancher ces questions parfois déchirantes et dont le sort, quel qu'il soit, porte atteinte à la qualité de liens qui figurent parmi les plus fondamentaux.

¹ Except as they arise in the context of divorce proceedings, where they are appealable as of right under s. 21 of the *Divorce Act*.

[7] Cette retenue des tribunaux d'appel s'impose avec encore plus d'acuité lorsque l'ordonnance attaquée en est une provisoire. Saisi du fond, le juge pourra revoir l'ensemble de la situation sans être lié par les déterminations faites au niveau provisoire.²

[References omitted.]

[8] According to the rule set out in article 511 C.C.P., leave will therefore not be granted unless the alleged errors in the judgment are such that the appeal has a reasonable chance of success, considering the applicable standard of intervention in appeal.

[9] In the present case, I conclude that the appeal has no reasonable chance of success, and that leave should therefore not be granted.

[10] Even if the judgment has the effect of removing the child from the presence of his father and of separating them, temporarily, it has not been shown that this will have an irreparable and prejudicial effect on the former, considering that the trial judge, on the merits, is not bound by the judgment on provisional measures, and may deem it appropriate to return the child to the custody of the father. Although the child has been born in Quebec and raised here for most of his life, he has also lived in Town A with his parents and gone to school there (it is in this same school that he is now enrolled). The issue of stability is undoubtedly of great importance, but, in the present circumstances, appealing the judgment and granting the suspension of its provisional execution would also have a potentially detrimental effect on the child's stability.

[11] In his motion for leave to appeal and, as well, during the hearing, the petitioner, through his lawyer, alleged that Madam Justice Roy committed many errors of law and did not properly evaluate the evidence or the credibility of the various witnesses, including the parties. What the petitioner is actually requesting is a complete reassessment of the case, and he is calling for the Court to substitute its opinion to that of the first judge. This is not the role of the Court.

[12] Madam Justice Roy's judgment is carefully reasoned and even though she does not (and indeed is not required to) mention and comment on all of the evidence, she makes a solid review of the essential facts in light of the best interest of the child. Her conclusions appear devoid of the kind of errors that might justify a review by this Court. More precisely, the petitioner has not succeeded in establishing *prima facie* the presence of such errors.

² *Droit de la famille* — 072382, 2007 QCCA 1390, B.E. 2007BE-1055. See also : *Droit de la famille* — 072315, 2007 QCCA 1329, B.E. 2007BE-1014; *Droit de la famille* — 07955, 2007 QCCA 902, J.E. 2007-1334, [2007] R.D.F. 458 (rés.) (C.A.); *F. c. L.*, J.E. 98-1939, [1999] R.L. 3 (C.A.). These are divorce cases (where the appeal is of right) but the principle that they recognize is applicable to cases of separation from bed and board.

[13] This is not to say that the petitioner's arguments are futile or unsustainable, on the contrary. By their nature, however, they should rather be submitted to the judge who will be seized with the merits of the case.

[14] As far as the sale of the former family residence is concerned, the petitioner has not shown the seriousness of the errors alleged in the judgment, which, after careful consideration, concluded that there were exceptional factual circumstances justifying such measure.

[15] Finally, one last observation: this is a case where the parties, in order to avoid the crystallization of the custody situation (since a definitive move of both the respondent and the child to another country³ is envisioned) should proceed as quickly as possible before the Superior Court, preferably before the beginning of the next school year, and should certainly present a motion to be heard by preference.

[16] Leave for appeal not being granted, provisional execution of the judgment cannot be considered nor granted.

[17] FOR THESE REASONS,

[18] The Amended Motion for Permission to Appeal a Provisional Judgment and for Suspension of Provisional Execution is dismissed, without costs.

MARIE-FRANCE BICH J.A.

Me Pamela Anne O'Reilly
For Appellant

Me Sébastien St-Clair
For Respondant

Date of hearing: January 25, 2008

³ A country which is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction.