

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Michel A. Monnin  
Madam Justice Barbara M. Hamilton  
Madam Justice Holly C. Beard

***BETWEEN:***

<b><i>JAMIE ELIZABETH CONDE</i></b>	)	<b><i>A. P. Conde</i></b>
	)	<i>on his own behalf</i>
	)	
	)	<b><i>D. R. Fraser and</i></b>
<i>(Petitioner) Respondent</i>	)	<b><i>R. B. Wolfe</i></b>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard and</i>
<b><i>ABOUBACAR PAPA CONDE</i></b>	)	<i>Decision pronounced:</i>
	)	<b><i>December 4, 2018</i></b>
	)	
<i>(Respondent) Appellant</i>	)	<i>Written reasons:</i>
	)	<b><i>December 13, 2018</i></b>

**HAMILTON JA** (for the Court):

[1] The respondent (father) appealed an interim order of custody and care and control pronounced September 22, 2017 (the interim order). He filed a motion for fresh evidence on November 19, 2018. The petitioner (mother) has counsel while, for financial reasons, the father is currently representing himself.

[2] After the hearing of the appeal, we dismissed the fresh evidence motion and the appeal with brief reasons to follow. These are those reasons.

[3] The parties are the parents of a five-year-old daughter. They are unable to agree on matters with respect to custody and care and control of

their daughter. As a result, they have had several case conferences and been before the Court of Queen's Bench for contested motions.

[4] A five-day trial is set for February 4-8, 2019.

[5] A case conference judge ordered a Family Conciliation Assessment Report in January 2017, which issued on September 14, 2017 (the report).

[6] Some of the issues between the parties related to the mother's concerns arising from the father's diagnosis that he suffers from depression, as well as his plan to move to New York for a period of time to be close to family and continue his education. He was requesting that, while in New York, he have his daughter with him for month-long periods of time. The father was born in Guinea. Although he speaks English, his first language is French.

[7] On September 22, 2017, a motion judge heard submissions from counsel for both parties on motions filed by both parties. The father's counsel advised that the father was not moving to New York.

[8] The motion judge granted the mother's motion and dismissed the father's motion. He pronounced a detailed order dealing with the custody and care and control of the daughter. In his reasons, the motion judge stated that he noted that the author of the report was not cross-examined and that he found the report "of considerable assistance".

[9] The motion judge ordered specified periods of shared care and control subject to the father complying with two conditions: the first requires him to take the daughter to certain daycares; the second is that he participate

in an assessment by his psychiatrist or a qualified healthcare provider to assess his ability to parent the daughter. Under the shared care and control regime, the parties are to consult with each other and the mother has final decision-making authority.

[10] Until those two conditions are met, the motion judge ordered that the mother shall have primary care and control of the daughter with specified periods of care and control to the father.

[11] The motion judge also ordered that the father pay costs to the mother in the amount of \$6,316.

[12] The father's stated grounds of appeal are vague. He argues that the assessor discriminated against him and that he was denied the opportunity to appear before a bilingual judge, which he raised for the first time in this Court. He also argues that the terms of the interim order are unjust, particularly because the motion judge was misled by the evidence before him and about an earlier decision of another motion judge.

[13] The father's motion for fresh evidence had no merit and was dismissed. The information that he wished to present to the Court is information that could have been provided already or is new information that is not relevant to the appeal of the interim order.

[14] As for the appeal of the interim order, from our reading of the motion judge's reasons, in the context of the submissions made by counsel at that hearing, it is evident that the motion judge understood the issues between the parties and that he had to make an interim order in the best interests of the daughter because the parties could not agree on matters of custody and care

and control. In that regard, he placed significant weight on the report of the assessor, as he was entitled to do.

[15] This Court has stated often that appeals of interim orders are to be discouraged and that the best place for review is at the trial of the matter. An appeal is not a re-hearing. The father's appeal raises issues that deal with discretionary decisions by the motion judge that are to be reviewed by this Court on a deferential standard of review, such that this Court cannot intervene unless the motion judge made an error in the legal principles that he applied, misapprehended the facts or arrived at an unjust decision (see *Cottyn v Anderson*, 2014 MBCA 48 at para 7).

[16] The father has not identified an error in principle or a misapprehension of the evidence by the motion judge. The interim order is not unjust. At the appeal hearing, the father advised that, under the interim order, he has primary care and control of his daughter 50 per cent of the time. While there are clearly outstanding issues to be resolved, they are best determined by the trial judge, after hearing all of the evidence, at the trial set for one week in February 2019.

[17] As for the father's assertions that he was denied the ability to participate in French in prior court proceedings, the record indicates that, in the end, he chose to participate in English, either through counsel or on his own, just as he chose to do on this appeal.

[18] For these reasons, we dismissed the father's fresh evidence motion and his appeal.

[19] We awarded costs against the father in favour of the mother. Those costs are fixed at \$1,000, inclusive of disbursements. This costs award takes into account the mother's success on this appeal and it includes the "costs in the cause" ordered by the chambers judge on May 10, 2018, when dismissing a motion by the father to strike portions of the mother's factum and supplementary appeal book, and the "costs in the cause in favour of the [father]" ordered by the chambers judge on July 26, 2018, when dismissing the mother's motion to declare the father a vexatious litigant or, alternatively, for security for costs.

Hamilton JA

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Monnin JA

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Beard JA

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