

Staying Parenting Orders Pending Appeal: Best Interests and Practical Considerations

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A first step taken in some appeals is a request to stay a parenting Order until the appeal is determined. This is because parenting Orders “remain in effect pending an appeal...unless the court has ordered otherwise” [see *D.C. v. T.B.*, 2021 ONCA 562, para. 9 [<https://canlii.ca/t/jhcfn>]].

When making or responding to this request, it is important to be aware of (a) the governing legal test; and (b) practical considerations.

Governing Legal Test

Starting with the governing legal test, the Court of Appeal recently stressed that the stay test revolves around the best interests of the child: “The overriding consideration...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”: *D.C. v. T.B.*, 2021 ONCA 562, para. 9 [<https://canlii.ca/t/jhcfn>].

The child’s best interests are infused into multi-factor stay test (at the irreparable harm and balance of convenience stages): *D.C. v. T.B.*, 2021 ONCA 562, para. 9 [<https://canlii.ca/t/jhcfn>]; *N. v. F.*, 2021 ONCA 688, para. 36 [<https://canlii.ca/t/jjfrf>]; *S. v. A.*, 2021 ONCA 744, para. 28 [<https://www.ontariocourts.ca/decisions/2021/2021ONCA0744.htm>]. This test is unique to family law parenting matters, as the test usually focuses on the parties: *N. v. F.*, 2021 ONCA 688, paras. 23, 36 [<https://canlii.ca/t/jjfrf>], however, it has been held to also look at the parties in the balance of convenience analysis in parenting matters, with the best interests of the children being the “paramount consideration”: *Morrow v. Hitchman*, 2021 ONSC 5473, para. 43 [<https://canlii.ca/t/jhh31>].

Practical Considerations

Globally, the Court of Appeal is focusing on the practical consequences to the child(ren) of what would happen if a stay was granted. For example, in *K.K. v. M.M.*, the Court of Appeal noted that ordering a stay “would disassemble the structure the trial judge put in place and replace it

with the very circumstances she found not to be in J.K.'s best interests; it would run the risk of undoing the very benefits that the trial judge fashioned the Order to achieve": *K.K. v. M.M.*, 2021 ONCA 407, para. 28 [<https://canlii.ca/t/jg9fj>].

In another case, *S. v. A.*, the Court observed that "...there is evidence of benefit to the children in continuing to have the trial judge's order intact pending appeal. The trial judge concluded that the very best outcome for the children is to first restore their parenting relationship with the respondent, and then to progress parenting as quickly as possible to a schedule appropriate to their age and stage of development, while minimizing transitions. To stay the order under appeal would be highly disruptive to this goal and would not be in their best interests..." *S. v. A.*, 2021 ONCA 744, para. 28 [<https://www.ontariocourts.ca/decisions/2021/2021ONCA0744.htm>].

In *D.C. v. T.B.*, the Court observed that "...to stay the order under appeal would be highly disruptive to R. under appeal and would not be in her best interests": para. 14 [<https://canlii.ca/t/jhcfj>].

Overall, the practical outcome sheds light on whether a stay is in the best interests of the child. This recent guidance from the Court of Appeal is helpful when deciding to bring a stay motion or how to defend a stay request.

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