

NOVA SCOTIA COURT OF APPEAL

**Citation: *K.L.M. v. Nova Scotia (Community Services)*,
2007 NSCA 77**

Date: 20070626

Docket: CA 280831

Registry: Halifax

Between:

K.L.M. & D.M.

Appellants

v.

Minister of Community Services

Respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family
Services Act.

Judge: The Honourable Justice M. Jill Hamilton

Application Heard: June 14, 2007, in Halifax, Nova Scotia, In Chambers

Held: Application dismissed

Counsel: Fergus Ford & Kelly Ryan, Articled Clerk,
for the appellant K.L.M.
D.M. unrepresented appellant, not appearing
Katherine Carrigan, for the respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Decision:

[1] The appellants are the parents of a young son who Justice N. M. Scaravelli of the Nova Scotia Supreme Court ordered be placed in the permanent care and custody of the Minister by order dated April 10, 2007. While unrepresented by counsel the parents filed a notice of appeal with the Court on May 10, 2007 in which they gave notice that they would be seeking dates for the hearing of their appeal in Chambers on May 17, 2007. A copy of the notice of appeal was received by the Minister on May 11, 2007, one day after the **Civil Procedure Rules** require that the notice of appeal be served on her. Neither parent appeared in Chambers on May 17. K.L.M. phoned the Court in advance and indicated they were seeking counsel. The Minister indicated that the transcript of the hearing before Justice Scaravelli could not be made available to the appellants until July 3, 2007. The matter was adjourned to May 24, 2007 when again neither parent appeared. Following Chambers on May 24 the deputy registrar of the Court wrote to the parents stating that they must attend Chambers on May 31, 2007 with or without counsel or their appeal could be dismissed for failure to prosecute as the Minister had indicated her wish to have the appeal dismissed for want of prosecution. The parents did not appear on May 31 and the Minister advised that she would be making an application to dismiss which she subsequently did. By the time the Minister's application was returnable on June 14, 2007, K.L.M. had retained counsel who filed an affidavit setting out the reasons for his client not appearing prior to that date. Neither D.M. nor counsel on his behalf has yet appeared.

[2] The Minister sought a dismissal of the appeal either (1) on the basis the appeal was deemed to be dismissed pursuant to **Rule** 62.03A(4) because the parents did not appear in chambers within 10 days of filing their notice of appeal to have the dates set for the appeal to be heard or (2) under **Rule** 62.17 because they failed to prosecute their appeal in a timely fashion.

[3] **Rule** 62.03A provides:

(1) An appeal pursuant to section 49 of the **Children and Family Services Act**, shall be brought by filing a notice of appeal in Form 62.03A with the Registrar within thirty (30) days of the date of the order appealed from.

(2) A notice of an appeal pursuant to section 49 of the **Children and Family Services Act** shall be served within the time prescribed by rule 62.03A (1) and as prescribed by rule 10.12, on the Minister of Community Services, the court officer of the court appealed from, and on all other parties in the proceeding in the court appealed from.

(3) The notice of appeal in an appeal pursuant to section 49 of the **Children and Family Services Act**, shall include a notice of intention to apply to a Judge to set down the appeal for hearing by the Court and to give directions as to the appeal book and factums to be filed by the parties with the Court for the appeal.

(4) The application shall be made to a Judge in Chambers no later than ten days following the filing of the notice of appeal, **failing which the appeal shall be deemed dismissed unless a Judge otherwise orders.**

[Emphasis added]

[4] **Rule 62.17** provides:

(1) **If an appellant fails to observe rule 62 in preparation or prosecution of the appeal, the respondent may apply to a judge to set down the appeal for hearing or, if seven (7) days' notice has been given, to dismiss the appeal.**

...

(3) If rule 62 has not been complied with in the preparation or the prosecution of an appeal, a Judge on the application of a party or of the registrar may direct perfection of the appeal, or may set the appeal down for hearing or, on seven (7) days' notice to the parties, may dismiss the appeal.

(4) In this rule 62.17 a "perfected appeal" means one wherein the appellant has complied with the rules as to

(a) the form and service of the notice of appeal,

(b) the ordering of copies of the transcript of evidence, in compliance with rule 62.02(4),

(c) filing and delivery of the appeal book (or printed case in the Supreme Court of Canada form) and of the appellant's factum.

[Emphasis added]

[5] I indicated in Chambers that I was not satisfied the appeal was deemed to have been dismissed and that I would not dismiss it. These are my reasons.

[6] With respect to whether the appeal is deemed dismissed, the parents applied for the dates to be set within the 10 day time frame set out in **Rule 62.03A(4)**. Their application for dates was adjourned until the dates were finally set on June 14, 2007, by which time K.L.M. was able to retain counsel. The appeal was not deemed to be dismissed.

[7] With respect to whether the appeal should be dismissed for want of prosecution, the Minister's position was that the parents had not served her as required in **Rule 62.03(2)** and that they had failed to attend Chambers on three successive dates to have the date set for the hearing of the appeal. She argued this was evidence that they had no intention to continue their appeal prior to K.L.M.'s retention of counsel. With respect to D.M., the Minister argued he has not yet shown any intention to continue with his appeal as he has not appeared in person or through counsel to date. She argued these are serious failures given the short time frames provided in the **Children and Family Services Act, S.N.S. 1990, c. 5** generally and for appeals in particular. She argued it is in the child's best interests that the appeal be dismissed at this point as it would lead to an earlier adoption placement which would bring stability for the child. She argued that the grounds of appeal are unsustainable.

[8] The affidavit filed by K.L.M.'s counsel satisfies me that K.L.M. always intended to continue with her appeal, felt inadequate to appear in Chambers without counsel and focussed her energy on retaining counsel. While that attitude wasted the resources of the Minister and the Court, it is not sufficient to warrant dismissing her appeal given the significant consequences to her of such a dismissal. Service of the notice of appeal on the Minister in accordance with the **Rules** is important given the Minister's responsibility to look after the best interests of the child which may include placing him for adoption at the earliest possible time but the one day delay in this case is not sufficient to warrant dismissal. As it happens, none of the actions of K.L.M. has had the practical effect of delaying the date of the hearing of her appeal.

[9] It is not appropriate for me to comment on the merit of the grounds of appeal given the Minister's notice that she will be making an application to quash the appeal on the basis it is frivolous, vexatious or without merit, which will be scheduled to be heard on the same date as the appeal.

[10] With respect to D.M.'s appeal, I am not satisfied there is any prejudice to the Minister in allowing his appeal to continue along with that of his wife despite the fact he has not attended Court to date for the purpose of prosecuting his appeal. It may be that D.M. did not realize he had to retain separate counsel. K.L.M.'s counsel agreed to bring this to his attention. The parents continue to live together. Similar issues will be relevant to both appeals. I see nothing to be gained from dismissing his appeal at this time as opposed to allowing it to continue along with his wife's.

[11] I would dismiss the Minister's application.

Hamilton, J.A.