Date: 19990331
Docket: C.A. No. 154123

NOVA SCOTIA COURT OF APPEAL
Cite as R.L.S. v. C.N.W., 1999 NSCA 19

BETWEEN:

R.L.S.	)	Myra L. Batalion
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	D. Timothy Gabriel
	)	for the Respondent
C.N.W. and J.S.W.	)	
	)	
Respondents	)	Application Heard:
	)	March 25, 1999
	)	
	)	
	)	Judgment Delivered:
	)	March 31, 1999

BEFORE THE HONOURABLE JUSTICE NANCY BATEMAN, IN CHAMBERS

<u>BATEMAN, J.A.:</u> **(In Chambers)**

[1] The appellant, R.L.S., has appealed an order of Justice M. Heather Robertson of the Supreme Court dispensing with his consent to the adoption of his daughter by the child's mother, C.N.W. and her husband, J.S.W. This is an application for security for costs of the appeal.

Civil Procedure Rule 62.13 provides:

> (1) A Judge on an application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.
>
> (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

[2] This rule was considered by Macdonald, J.A., in **Frost v. Herman**, (1976), 18 N.S.R. (2d) 167 (N.S.C.A.). He said at p.168:

> In my view, however, the discretion given a judge under the present *Rule 62.13* to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for so doing.

[3] The respondents say that security should be ordered because the appeal is frivolous, the respondents are of limited means, the appellant resides out of province and has no assets within the jurisdiction and has not honored his court ordered financial obligations in the past. They say that if they are successful on the appeal and costs are awarded in their favour, they have no chance of collecting the amount ordered.

[4] It is the appellant's submission that he is of limited means and thus unable to respond to an order for security. Such an order he says, would therefore effectively terminate his appeal. His counsel further submits that an order for security is inappropriate

where it is unlikely that costs will be awarded to either party on the appeal. In this regard counsel has cited a number of adoption cases where no costs were ordered.

[5] There is no evidence before me about the appellant's financial circumstances. The information before the Court is limited to the representations of counsel. His lawyer advises that the appeal is being pursued on a Legal Aid certificate, which information she asks that I receive as confirmation of his impecuniousity. In addition, it is her understanding that he is not working and is in receipt of a disability pension.

[6] The child in question is nine years old. The affidavit of C.N.W., filed in support of this application, states that the appellant moved to British Columbia in 1993 and provided no financial support for the child until mid-1996 when she began to receive court ordered maintenance through the efforts of the Nova Scotia and British Columbia maintenance enforcement agencies.

[7] The history of the court's authority to order security is set out in **L. E. Powell and Co. Ltd. v. Canadian National Railway Co. (No. 2)**, (1975) 11 N.S.R. (2d) 532 (N.S.S.C.A.D.) where MacKeigan, C.J.N.S. wrote at p.533:

> 5 Prior to 1966 under *Rules* of the Supreme Court of Nova Scotia the power to order security for costs on appeal was very limited. Until 1966 our rules contained no provision such as 0.58, r.15 of the English Rules which provides by clause (2):
>
> > The Court of Appeal may in special circumstances order that such security shall be given for the costs of the appeal as the court may direct.
>
> . . .
>
> 6 The Nova Scotia cases before 1966 almost always refused to order security for costs on appeal, and, in particular, where the only ground was the poverty of the appellant. In *Fleckney v. Desbrisay*, [1927] 1 D.L.R. 537 (N.S.C.A.), Harris, C.J., at pp. 537–540 said:

> The spirit of our *Judicature Act* and *Rules*, 1919 (N.S.), c.32, seems to be to give to every litigant, rich and poor alike, the right to have one appeal in every case in which he has, or claims to have, a cause of action in his own right, or if he is a defendant in every case in which he has, or claims to have, a defence to the action being prosecuted against him.

See also: *Grant v. Baker*, 60 N.S.R. 237.

7 By *Rule 62.30*, supra, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p.38:

> The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.

Approved in *Pritchard v. Pattison* (1900), 19 Ont. P.R. 277 (C.A.).

. . .

9 We need not determine whether security for appeal costs should be ordered herein merely on the ground of the poverty or insolvency of the appellant. In England and other jurisdictions with similar rules, appeal costs will usually be secured on that ground, but sometimes not where the decision appealed from appears probably wrong or where the appellant is acting in forma pauperis or, in England, is represented by Legal Aid. Special cases, e.g., divorce, liberty or the subject, etc., may also not require such security despite poverty or insolvency.
See: Annual Practice, 1952, pp. 1279–1282 *Cook v. Orr*, [1924] 2 W.W.R. 1131.

[8] I am not able to conclude on the limited information before me that as a result of the appellant's financial circumstances security for costs should or should not be ordered. The fact, however, that he resides out of the jurisdiction, has no assets within the jurisdiction and has previously failed to voluntarily honor court ordered maintenance obligations, in my view, constitute special circumstances warranting an order for security.

[9] The amount of the security is to be a sum less than the costs that may probably be taxed. (see **Frost v. Herman**, supra) I cannot say that costs would not be awarded to the respondent, if successful on the appeal. While in the past, courts have often not awarded

costs in adoption matters, there is no rule barring an order for costs. In the circumstances I order security for costs in the amount of $1000 payable by July 19, 1999. In the event that the security is not posted the respondent may apply to the court, on notice to the appellant, to dismiss the appeal, pursuant to **Civil Procedure Rule 62.13(2)**. For further clarity, whether the appeal will continue in the absence of security will be a matter for the Chambers judge on that application.

Costs of this application shall be costs in the appeal.

Bateman, J.A.