**NOVA SCOTIA COURT OF APPEAL**
**Citation:** C.O. v. Nova Scotia (Community Services),
2010 NSCA 83

**Date:** 20101022
**Docket:** CA 337524
**Registry:** Halifax

**Between:** C.O. and D.F.

Applicants

and

Minister of Community Services (Formerly Family and Children Services of Yarmouth County)

Respondent

**Restriction on publication:** **s. 94(1) of the *Children and Family Services Act***

**Revised Decision:** The docket number of the original decision has been corrected according to the erratum dated October 26, 2010. The text of the erratum is appended to this decision.

**Judge:** The Honourable Justice Fichaud

**Motion Heard:** October 21, 2010, in Chambers

**Held:** Motion to extend time to file Notice of Appeal is dismissed, without costs.

**Counsel:** Angela A. Walker, for the applicants
Philip Gruchy, for the respondent

**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] This is an application for an extension of the time to file a notice of appeal in a child disposition matter, under the *Children and Family Services Act* S.N.S. 1990, c. 5 ("*CFSA*") The proceeding involves two children, born in November 2006 and February 2008. Their birth parents are K.T.-D. and J.O. The birth parents would not be parties to the prospective appeal.

[2] In February 2009, Family and Children's Services of Yarmouth County, whose functions are now performed by the Minister of Community Services, ("Agency"), began a protection application for the children under the *CFSA*. On February 4, 2009, the Family Court issued an interim order for protection, providing for Agency supervision. In March 2009, the Agency took the children into care under s. 39(5) of the *CFSA*, applied for a variation of the interim order under s. 39(9), and placed them in a registered foster home. In June 2009 the Family Court found that the children were in need of protective services, because of substantial risk of physical harm. The court ordered that the children remain in the Agency's interim care, and they remained in the same foster home.

[3] The applicant C.O. has a family-like relationship with K. T.-D., the children's mother. C.O. and her partner D.F. reside in Alberta.

[4] In the disposition proceedings, C.O. and D.F. asked that the children be placed with them. The Agency's Plan of Care in October 2009 recommended that the children be placed with C.O. and D.F., subject to conditions and Agency supervision. On October 27, 2009, after a disposition hearing, the court placed the children with C.O. and D.F., subject to the Agency's supervision. This supervision order incorporated conditions, including that the Agency could reapprehend the children if there was non-compliance with the terms of the supervision order.

[5] In December 2009, after an incident of domestic violence between C.O. and D.F., the Agency re-apprehended the children, and on December 22, 2009 the children returned to their foster home where they had resided from March to October 2009. There followed an application, under s. 46 of the *CFSA*, to review the earlier disposition order for the children. During that review proceeding, C.O. and D.F. were represented by counsel.

[6] On June 23, 2010 Chief Judge Comeau of the Family Court issued a written decision, followed by an order on June 24, 2010. The Order granted permanent care and custody of the children to the Agency for the purpose of adoption, without

access to the parents or C.O. and D.F. Chief Judge Comeau had also presided over the earlier proceedings that I have discussed.

[7] On July 9, 2010, C.O. had her final access visit with the children.

[8] The children remain today with the foster parents who have cared for them since March, 2009 (except for October to December 2009, when they were with C.O. and D.F.). Those foster parents have asked to be considered as adoptive parents for the two children.

[9] The Agency has taken steps toward adoption. The foster parents have completed the application process. The Agency has completed the children's Social History - the detailed summary of the children's life and circumstances. A home assessment is pending. There have been discussions with the children's mother, K.T.-D., respecting the possibility of an open adoption that would allow her contact with the children. The foster parents appear willing to adopt with such an open arrangement.

[10] The children are now 3 years 11 months and 2 years 8 months. Their care has been litigated for over 20 months.

[11] Section 49(1) of the *CFSA* permits an appeal to the Court of Appeal "within thirty days of the order". Section 49(4) says the "appeal shall be heard by the Court of Appeal within ninety days of the filing of the notice of appeal, or such longer period of time, not to exceed sixty days, as the Court deems appropriate".

[12] The appeal period expired by July 25, 2010. No notice of appeal was filed by anyone. On October 6, 2010, C.O. and D.F. applied for an order extending their time for filing a notice of appeal. I heard that application in chambers on October 21, 2010. This is my decision.

[13] The applicants cite the well known principles for extension stated by Justice Saunders in *Jollymore v. Jollymore Estate*, 2001 NSCA 116, ¶ 22:

> [22] In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:
>
> > (1) the applicant had a bona fide intention to appeal when the right to appeal existed;

> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[14] In *CFSA* cases the *Jollymore* principles are adjusted to conform with the statute's objectives. *In Nova Scotia (Minister of Community Services) v. S.E.L.*, 2002 NSCA 62, Justice Cromwell said:

> [10] In many civil cases, extensions of time are often granted quite readily especially where the delay is short and the party seeking the extension is not represented by counsel. However, extensions of time for appealing under the **Act** call for the consideration of at least two special factors.
>
> [11] The first is that, as in all proceedings under the **Act**, the best interests of the child or children are paramount. It is not a matter of doing justice simply between the appellants and the respondent, but of serving the best interests of the child who is the subject of the proceedings. Secondly, the **Act** makes it clear that time limits are important so that the child's sense of time is respected. Nowhere in the **Act** is this more clear than with respect to appeals. The **Act** has an extraordinary and virtually unique requirement that appeals must be heard by the Court of Appeal in 90 days, with the possibility of a 60 day extension, from the date of the filing of the notice of appeal. The time limit for hearing the appeal runs from the filing of the notice of appeal; it follows that any extension of the time for filing the notice of appeal in effect extends the time for hearing the appeal. In other words, extending the time for filing the notice of appeal accomplishes indirectly what the **Act** does not specifically provide for -- an extension of the time within which the appeal must be heard.

In *R.K. v. Family and Children's Services of Cumberland County*, 2006 NSCA 19, after quoting this passage from *S.E.L.*, I said:

> [5] The two principles cited in *S.E.L.* flow from the *CFSA* and are complementary. The *CFSA* s. 2(2) states:
>
> > In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.
>
> The "proceedings" in s. 2(2) include this extension application. The *CFSA*'s preamble states:

> > Children have a sense of time that is different from that of adults and services provided pursuant to this *Act* and proceedings taken pursuant to it must respect the child's sense of time.
>
> A delay that impacts the parent only minimally may exhaust a full formative term for an infant. So s. 49 of the *CFSA* strictly limits the time for appeal. Respect for the child's sense of time sustains the child's best interest.
>
> [6] In other civil proceedings the named litigants may be the only parties whose interests are relevant to an extension application. In a disposition proceeding under the *CFSA*, the child's interests trump the interests of the parents and Agency. So I should first consider the children's interests in the extension application before folding in the components of the standard *Jollymore* test. This essentially is what was done in *S.E.L.*, at ¶ 12-28.

[15] The material filed by C.O. and D.F. for this application says almost nothing about the children's interests.

[16] The children are under 4 years of age. As the *CFSA* recites, their sense of time differs from that of adults. That is why the *CFSA* presumes that the appeal be *heard* within ninety days of the notice of appeal, meaning at most 120 days from the order under appeal (though the Court of Appeal has discretion to extend for another 60 days). Here, that 120 days would expire next Monday.

[17] The trial transcript is not prepared. The applicants' brief for this application says that their grounds of appeal "will likely be extended once the transcripts are reviewed". This would require a chambers application to amend the notice of appeal. The applicants' written submission treats the parties with pertinent interests as just the applicants and the Minister. But in a *CFSA* appeal, the children's interests dominate, and the children's abridged sense of time is incongruent with the leisurely pace, involving adjournments, extensions and lawyer's timetables, that sometimes governs adult litigation. This reality faces a *CFSA* prospective appellant on an extension application.

[18] Judge Comeau, who heard the evidence, found that the incident of domestic violence in the applicants' home "resulted in a door casing being damaged" that C.O. "called 911 to have him [D.F.] removed" and "[T]he children were in the home at the time". Judge Comeau concluded:

> > [47] In fact there is a "substantial risk" (a real chance of danger that is apparent on the evidence) that returning the children to them would put them at risk and in

> the middle of some future domestic dispute. This would be contrary to their best interest. It was a trial placement that did not work.

[19] The applicants offer not even nominal evidence to counter this finding, or satisfy me that the requested extension, or any placement with C.O. and D.F. resulting from this prospective appeal, would be in the children's best interests. They say nothing to gainsay the Agency's submission, backed by affidavit evidence, that the children's best interests would be an adoption by their current foster parents, in the only stable family unit they have ever known.

[20] When the litigation started, one child was an infant and the other a toddler. Now the younger is a toddler and the elder an active boy. Twenty months may be an eye blink to a commercial litigant, but cradle to playground is a stage of life to a child. Even the four months since the decision to be appealed is formatively significant. The *CFSA* commands that I examine the children's best interests through the lens of their sense of time. A courtroom is a sorry nursery, and no aspect of the evidence suggests that longer litigation could elevate these children's interests.

[21] In my view the application does not meet the threshold test of the children's best interests under the principles in *S.E.L.*, ¶ 10-11 and *R.K.*, ¶ 5-6.

[22] Neither am I persuaded, on the evidence before me, that the applicants have satisfied the second and third *Jollymore* factors. C.O.'s affidavit does not explain why her trial lawyer could not have advised her about the time limit to appeal. C.O. says she learned of the time limit to appeal two days after its expiry - i.e. July 27. Yet, between July 27 and the filing of this extension application, there elapsed more than double the 30 day appeal period. On a *CFSA* matter, with the statutory time constraints in the children's interests, this isn't good enough. There is no reasonable excuse for the delay. As I have discussed, on the evidence before me, there is no strong case for an appealable error.

[23] I would dismiss the application to extend time to file the notice of appeal, without costs.

Fichaud, J.A.

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**Revised judgment:** The docket number of the original judgment has been corrected according to this erratum dated **October 26, 2010.**

**Restriction on publication:** **s. 94(1) of the *Children and Family Services Act***

**Judge:** The Honourable Justice Fichaud

**Motion Heard:** October 21, 2010, in Chambers

**Held:** Motion to extend time to file Notice of Appeal is dismissed, without costs.

**Counsel:** Angela A. Walker, for the applicants
Philip Gruchy, for the respondent

Erratum:

[24] On the first page of the original judgment, replace the docket number with CA 337524.