Date: 20020830
Docket: CA 184081

NOVA SCOTIA COURT OF APPEAL

[Cite as: *L. L. P. v. Nova Scotia (Community Services)*, 2002 NSCA 107]

BETWEEN:

L. L. P. and R. F. A. P.

Applicants/Appellants

- and -

MINISTER OF COMMUNITY SERVICES

Respondent/Applicant

DECISION

Counsel: Peter D. Crowther for the applicants/appellants
Peter C. McVey for the respondent/applicant

Application Heard: August 30, 2002

Decision Delivered: August 30, 2002

**BEFORE THE HONOURABLE JUSTICE LINDA LEE OLAND
IN CHAMBERS**

<u>Publishers of this case please take note</u> 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.

<u>Oland, J.A. (In Chambers) (Orally):</u>

[1] Each of L. P. and R. P. and the Minister has brought an application in chambers. According to documents they filed, Ms. P. and Mr. P. seek an order extending the time for filing a notice of appeal pursuant to *Civil Procedure Rule* 62.34. The Minister applies for an order quashing or dismissing any appeal under *Rule* 62.11(d) and *Rule* 62.18.

[2] Ms. P. and Mr. P. are the parents of four children, currently twelve, ten, eight and five years of age. In early May, 2001, the children were removed from their parents' home by social workers of the Department of Community Services. They were found, by consent, in need of protective services pursuant to s. 22(2)(h) of the *Children and Family Services Act* (the "*Act*") on July 25, 2001.

[3] On July 4, 2002, Williams, J. of the Nova Scotia Supreme Court (Family Division) decided that the four children should be placed in the permanent care and custody of the Department of Community Services and declined to make an order for access by the parents. Four orders for permanent care and custody pursuant to that decision, one order for each of the children, issued on July 11, 2002.

[4] The parents were separately represented at the hearing leading to the permanent care orders. However, they were unrepresented when, on August 6, 2002, they filed with the court a notice of application to extend the time for filing a notice of appeal, a "Notice for Extension of Time for our Appeal," and an "Affidavit Notice of Appeal" signed and sworn by both parents.

[5] The parents appeared in chambers on August 15, 2002, without counsel. They stated that they had received a Legal Aid certificate three days earlier and while they had been contacting lawyers, they had not yet retained one. The Minister had learned that the parents had filed documents with this court through a media report, and had not been formally served with notice. Neither had the Minister received an affidavit which the parents filed just before chambers. I adjourned the matter for a week to allow the parents time to retain counsel. During that adjournment, the Minister filed his application to quash the appeal.

[6] The parents were represented by counsel in chambers on August 22, 2002. However, their lawyer stated that he had recently been retained for the two

applications and had not had an opportunity to confer with his clients. Over the objections of counsel for the Minister, I adjourned the hearing of both applications to August 30, 2002. Just before chambers, the parents filed a further affidavit.

[7] The orders placing the children in the permanent care and custody of the Agency were made pursuant to s. 42 of the *Act*. Section 49(1) provides that such an order may be appealed to this court by filing a notice of appeal with the Registrar "within thirty days of the order".

[8] Each of the permanent care orders is dated July 11, 2002. The parents filed their application to extend the time for filing a notice of appeal and their "Affidavit Notice of Appeal" on August 6, 2002, that is, <u>within the 30 day appeal period</u>. According to their affidavit evidence, they first attended at the Law Courts on August 2, 2002 "to file for an appeal." They were given forms to fill out and to return no later than 4:30 p.m. the following Tuesday, August 6th. The parents deposed that there was some discussion regarding time lines and that the clerk told them that they may have to file to extend the time to file their appeal and should address that issue in their documents. The parents returned and filed their documents on August 6th.

[9] It is apparent that had the parents known to file or had been assisted to file a notice of appeal in Form 62.03A as required by *Rule* 62.03A(1) during either of their attendances at the Law Courts, that notice would have been filed in time.

[10] The handwritten "Affidavit Notice of Appeal" the parents filed on August 6, 2002 is reproduced verbatim below:

Affidavit
<u>notice of appeal</u>

> I L. L. P. and R. F. A. P. want to appeal the Decision made by community services to have my children removed from our care and custody and place in the permanent care and custody of the Departmant of community services.

<u>Reason's for appeal</u>

> Our case was heard in front of justice R. james Williams his Decision was with community services Decision we belive it was not a Fare Decision more could have been done to help us and our children reither then taken them away From us

> for good our children have a lot of health problems witch we beleave can be control if I L. P. would be a stay at home mom witch I plan to do so if our children are returned home. We also beleave that we could go to some kind of perenting classes to become stronger parnts to learn more on children with speacil needs. We were not given that right to do so. The only thing that we got was a family skills worker and that was both time. We feel that there is more community services can do with Family's then to take there children away from there home and family.

[11] The parents did not comply with *Rule* 62.03A. This document is not in Form 62.03A (*Rule* 62.03A(1)) and was not served as required by *Rule* 62.03A(2). It does not include a notice of intention to apply to set down the appeal for a hearing and to give directions (*Rule* 62.03A(3)), and no application was made to apply to a judge in chambers no later than 10 days following the filing of this document (*Rule* 62.03A(4)).

[12] However, the "Affidavit Notice Of Appeal" does set out sufficient information from which the judgment and court being appealed from, the parents' grounds of appeal, and the relief sought could be gleaned. It includes, to a substantial degree, the information generally required in a notice of appeal according to *Rule* 62.04. Furthermore, it was filed within 30 days of the date of the order appealed from.

[13] It is apparent from the documents they drafted, and from their demeanor at their initial appearance in chambers, that the parents are neither well-educated nor knowledgeable in the law. They were self-represented when they came to the Law Courts to appeal the permanent care orders and they followed the advice they were given to the best of their ability. While the "Affidavit Notice of Appeal" was sworn and was submitted with a notice of application to extend the time for filing a notice of appeal, I am of the view from the evidence before me that in this particular case the parents intended to file a notice of appeal and that this document contains sufficient particulars to constitute a notice of appeal.

[14] The Minister brought his application to quash or dismiss the appeal pursuant to *Rule* 62.11 and *Rule* 62.18(1). As he acknowledged in chambers, any application to quash or dismiss under the latter *Rule* on the grounds that the appeal is frivolous, vexatious, or without merit or that the appellant has unduly delayed preparation and perfection of the appeal must be made before a panel of this court.

Consequently the Minister relies on *Rule* 62.11 which authorizes a judge in chambers to quash an appeal because of failure to comply with *Rule* 62. As I noted in ¶ 11 above, the "Affidavit Notice of Appeal" does not comply with *Rule* 62.03A.

[15] The Minister submits that without a Form 62.03A notice of appeal clearly setting out the grounds of appeal and the relief sought, the Agency cannot properly assess whether an appeal is likely to succeed and is hampered in making any realistic plans for the children's futures. Mr. P.'s delivery on August 14, 2002 of the parents' August 6th documentation to the Dartmouth office and a caseworker's discovery of them in her in-box did not meet the service requirements of *Rule* 62.03(2). Without proper and timely service, the Minister argues, the Agency is delayed in making decisions for these children, some of whom have special needs. He points out that in *Nova Scotia (Minister of Community Services) v. S.E.L.*, [2002] N.S.J. No. 232, Cromwell, J.A. at ¶ 10 and 11 stated that applications for extensions of time for appealing under the *Act* call for the consideration of at least two special factors, namely that the best interests of the child or children are paramount and that time limits are important so that the child's sense of time is respected. In that case, the parents had missed the appeal period by nine days and their application for an extension of time was dismissed. The Minister urges that Ms. P. and Mr. P. failed to perfect the filing of their appeal in a timely manner and that while they were self-represented in preparing and filing documents pertaining to an appeal, they had been represented at trial and were not entirely inexperienced.

[16] The particular facts of each case dealing with the placement of a child or children in the permanent care and custody of the Minister are important considerations. The parents in *S.E.L.* had a more extensive and different history with the Minister of Community Services. Moreover, it appears that while those parents intended to appeal and attempted to seek legal counsel, they took no further steps whereas here Ms. P. and Mr. P. attended twice at the Law Courts within the prescribed period with the object of appealing the permanent care orders. Any delay that may adversely affect the children or any of them is a concern. However, I would observe that the Minister knew the parents intended to appeal and that the initial appearance in chambers was but a few days after the expiration of the appeal period. Moreover, the children have been in the care of the Agency since last spring, and pending the hearing of any appeal, the parents are not seeking that their children's current placements be disturbed or that they have access to their children.

[17] The parents attempted to appeal within the appeal period in accordance with the requirements of the court and their failure to do so was not of their making. I would exercise my discretion pursuant to *Rule* 62.04(4) and *Rule* 15 and would grant them leave to amend the "Affidavit Notice of Appeal" to properly set out the grounds of appeal in that document (adding only "such other grounds as may appear") and to otherwise comply with Form 62.03A, and to serve the amended document in accordance with *Rule* 62.03A, within seven days of the date of this decision. I would also order that the time to apply to set down the hearing in accordance with *Rule* 62.03A(4) be extended accordingly.

[18] The Minister was not served in accordance with *Rule* 62.03A(2) with the documents the parents filed on August 6 and 15, 2002. However, his counsel had obtained or received copies by the latter date, two weeks before making submissions on behalf of the Minister in chambers. Pursuant to Rule 62.11(b), I would order that formal service of the unamended "Affidavit Notice of Appeal" on the Minister and on the court officer of the court appealed from be waived.

[19] I would add that had I not determined that the parents had filed a notice of appeal within the appeal period and granted them leave to amend, I would have granted their application for an extension of time to file a notice of appeal.

[20] Cases including *Maritime Co-operative Services Ltd. v. Maritime Processing Co.* (1979), 32 N.S.R. (2d) 71 (N.S.S.C.A.D.) have set out a three-part test for such applications. The test is not to be applied inflexibly. Rather, the court must ask on such an application whether justice requires the application to be granted: *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2^d) 173 at ¶14.

[21] The Minister acknowledges that the parents meet the first part of the test, namely that they had a *bona fide* intention to appeal when the right to appeal existed. This was established not only by the parents' affidavit but by that of Kandi Swinehammer, a social worker employed by the Department of Community Services and the assigned caseworker for the children, which was filed in support of the Minister's application to quash the appeal. She deposed that during conversations on July 10, 11, 30 and August 5, 2002 L. P. informed her either that she or she and Mr. P. intended to appeal.

[22] The second part of the test requires an intended appellant to satisfy the court that he or she had a reasonable excuse for the delay in not filing an appeal within

the prescribed time. Mr. P. deposed that trial counsel advised him about the appeal period. There are some discrepancies in the affidavit evidence as to when Ms. P. determined she would not be using trial counsel but would be seeking new legal counsel for the appeal and what efforts were made in that regard. Where however the parents continually asserted their intention to appeal, travelled to the Law Courts twice before the expiration of the appeal period, and filed documents in time, it cannot be said that they procrastinated and did not have a reasonable excuse for the delay.

[23]   The Minister urges that there is no arguable ground of appeal. Such a ground has been defined as a realistic ground, which if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal: *Coughlan v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at p. 174-175. In their submissions on this point, counsel for the Minister and the parents referred to the decision of Justice Williams and *inter alia* raised s. 42(2) and 42(4) of the *Act*. I am mindful that as Justice Cromwell stated in *S.E.L.* at ¶ 15, it is not appropriate at a preliminary stage of a proposed appeal to "attempt a searching examination" of the merits of an appeal. It is difficult to assess the possible merits of whatever grounds of appeal are contained in the "Affidavit Notice of Appeal."

[24]   Having in mind the test articulated in *Tibbetts* supra it would not be necessary to decide whether there is an arguable ground. The circumstances here are such that in my view this would be a case where the interests of justice would have required that leave to extend time be given. The case is an important one which involves the lives of four children and termination of the parental rights of parents who had a continuing intention to appeal and who acted to effect their appeal.

[25]   In this proceeding, the documents the parents filed initially appeared to be for an application to extend the time for filing a notice of appeal. In the particular circumstances before me, their application evolved to one to amend a notice of appeal. I have determined that the "Affidavit Notice of Appeal" constitutes a notice of appeal. I would grant the parents leave to amend and to serve and an extension to set down the appeal for hearing, as set out in ¶ 17 above. I would also order that service of the unamended "Affidavit Notice of Appeal" be waived. I would dismiss the application to quash or dismiss the appeal. There will be no award of costs.

Oland, J.A.