

NOVA SCOTIA COURT OF APPEAL
Citation: *An Jager v. Jager*, 2019 NSCA 9

Date: 20190131
Docket: CA 472720
Registry: Halifax

Between:

Julie Deborah An Jager

Appellant

v.

Wiebo Kevin Jager

Respondent

Judge: Bourgeois, J.A.

Motion Heard: January 31, 2019, in Halifax, Nova Scotia in Chambers

Written Decision: February 12, 2019

Held: Registrar's motion to dismiss appeal granted

Counsel: Julie Deborah An Jager, appellant in person
Jennifer K. Reid, for the respondent

Decision:

[1] On January 31, 2019, I heard a Registrar's motion to dismiss Julie Deborah An Jager's appeal. At the conclusion of the hearing, I advised the motion was granted with reasons to follow. These are my reasons.

Background

[2] Ms. An Jager brought an appeal seeking to challenge an order entitled "Final Order Parenting and Support" issued by Justice R. Lester Jesudason on December 19, 2017. The order relates to the care of the parties' two children and followed a number of days of trial extended over several months. Justice Jesudason did not produce a written decision, but he gave lengthy oral reasons on November 24, 2017.

[3] Although a detailed order, it suffices for now to highlight the trial judge's order placed the two children in Mr. Jager's primary care. He was given "final decision-making authority in all matters respecting the children". It was further ordered that Ms. An Jager would have supervised access to the children. The order contemplated the supervision could terminate with the consent of the parties. Further, should Ms. An Jager successfully participate in a psychiatric assessment or treatment that addressed whether she suffers from any condition that impacts on her ability to appropriately parent the children, such would be considered a material change of circumstances permitting her to bring an application to vary the parenting arrangement.

[4] The procedural history of the appeal is not straightforward. On January 29, 2018, Ms. An Jager signed a Notice of Appeal, which was accepted for filing the same day. It was some time later that it was determined the Notice of Appeal was filed out of time and should not have been accepted by court administration. This was after Ms. An Jager had filed a motion for date and direction with an accompanying Certificate of Readiness. She was advised she would need to file a motion to extend the time for filing her appeal.

[5] Ms. An Jager brought a motion to extend the time for filing an appeal dated June 21, 2018, seeking to re-file the Notice of Appeal that had been erroneously accepted in January. On July 10, 2018, Mr. Jager brought a motion to have Ms. An Jager's appeal dismissed. The grounds set out in his motion were as follows:

1. The Appellant was out of time to file the appeal in accordance with *Civil Procedure Rule* 90.13 and the *Divorce Act* of Canada.
2. That the Appellant has failed to perfect the appeal as per *Civil Procedure Rule* 90.43 by:
 - (a) failing to apply for a date and directions in compliance with *Civil Procedure Rule* 90.25 as the motion was not set to be heard within 80 days from the filing of the Notice of Appeal.
 - (b) filing a Certificate of Readiness that does not comply with *Civil Procedure Rule* 90.26.
 - (c) failing to order the transcript in compliance with *Civil Procedure Rule* 90.29.
3. That the Notice of Appeal fails to disclose a ground of Appeal as per *Civil Procedure Rule* 90.40.
4. That the Appellant has failed to comply with the *Rules*, as contemplated in *Civil Procedure Rule* 90.40.

[6] Both Ms. An Jager's motion to extend and Mr. Jager's motion to dismiss were heard by me on July 19, 2018. I granted Ms. An Jager's request to file her appeal (see *An Jager v. Jager*, 2018 NSCA 66). This ruling effectively restarted all the timelines for Ms. An Jager to advance her appeal.

[7] As is required by the Rules, Ms. An Jager was required to file a motion for date and directions. She did so on November 1, 2018, with an accompanying Certificate of Readiness. It appears that the certificate filed was the same one she had originally filed in May. Dated May 24, 2018, Ms. An Jager certified that she had received audio recordings of the proceedings and had ordered them to be transcribed. She further indicated that she felt the transcription could be complete by August 1, 2018 "but fundraising for \$15,000+ may delay to Dec. 1".

[8] The motion for date and directions was heard on November 8, 2018. Justice Farrar directed that Ms. An Jager file the appeal book by December 3, 2018 and her factum by January 4, 2019. He further directed Mr. Jager to file his factum by February 8, 2019. The appeal hearing was scheduled for April 9, 2019.

[9] On November 28, 2018, Deputy Registrar C. Mollon forwarded correspondence to the parties confirming the dates set by Justice Farrar. In bold, that letter advised:

To extend a filing date: the permission of the Registrar must be obtained and all parties must consent to the extension. To request a new hearing date: a motion must be made to the Chambers Judge. **FAILURE TO MEET ABOVE-NOTED FILING DATES MAY RESULT IN THIS APPEAL BEING DISMISSED BY THE PRESIDING JUSTICE.**

[10] Ms. An Jager did not file the Appeal Book as directed on December 3, 2018. On that day, she left a voice message for Deputy Registrar Morse. On December 4, 2018, Registrar McInnes replied to Ms. An Jager by email. That response, reproduced in its entirety, stated:

Dear Ms. An Jager,

I have your voice mail to Mr. Morse of December 3, 2018. He forwarded the message to me as I have returned from my leave and resumed my post as Registrar of the Court of Appeal.

I understand from your voice mail that you are seeking an extension of time to file your appeal book. The Registrar has the authority to grant filing extensions in appeals if the following conditions are met: (1) the request is made in writing, copied to counsel for the other party, (2) the other party consents to the extension requested, and (3) the extension requested still allows all documents to be filed with the Court at least 30 days before the scheduled appeal hearing date. It is not clear to me that you have sought consent from Ms. Reid, who is counsel for the respondent, with respect to your extension. In addition, you have not provided a specific date for the extension sought.

If you are unable to obtain consent from the respondent to your request for a filing extension, you will have to make a motion to a judge in chambers to obtain your extension. I attach to this email an instruction sheet and precedent forms you may use to make such a motion, should you wish to do so.

In your voice mail you also asked me to confirm, by email, whether Justice Bourgeois' Order from chambers issued in July 2018 which stated that "the motion is granted, without costs" means that you do not have to pay for the costs of the transcript. I have your file before me, and see the Order that you are referring to. It is dated July 23, 2018. This Order is with respect to your motion to extend time to file your appeal. Justice Bourgeois granted the motion with costs. This means that you were given permission to file your appeal past the deadline to do so, and that you were not ordered by the court to pay costs to the respondent in relation to that motion. This Order has no further relevance to the remainder of the appeal, including the fees parties may incur in preparing for the appeal or costs that the court may award one party pay to another in a future order, should it exercise its discretion to do so.

In summary, I remind you that it is your obligation to obtain a copy of the transcript that is to be included in your appeal book. Here is a link to your Civil Procedure Rules, in particular Rules 90.29 and 90.30, which speak to obtaining a transcript and the appeal book: (link omitted from quote). (Emphasis added)

[11] The above email was also sent to Mr. Jager's counsel. On the same day, Ms. Reid responded by email indicating that she had not been contacted by Ms. An Jager seeking an extension to file the appeal book, and that her client was not in agreement to an extension being granted.

[12] Despite the Registrar having advised Ms. An Jager of the process for seeking an extension to file the appeal book, including providing precedents for bringing a motion, no motion was brought.

[13] On December 31, 2018, the Registrar sent another lengthy email to Ms. An Jager. It provided:

Good morning Ms. An Jager,

I have received your voicemails and the envelope you left for pick up in the wire basket at the courthouse. In future, I would ask that you please file documents in the appropriate fashion – that is, by leaving them with the court officers at the court administration office, or sending by mail/courier/fax. Please do not leave documents in the wire basket for the registrar. The wire basket is for outgoing documents only.

In addition, I note you addressed a copy of these documents to both Justice Farrar and Justice Bourgeois. Please do not address correspondence directly to a judge, unless you are addressing a brief for a judge who is scheduled to hear the matter you are writing about. It is not appropriate to send documents to a specific judge in the manner in which you have done, and I refer you to Civil Procedure Rule 87 [link omitted in quote] for guidance on this. All documents you wish to have filed with the Court must be filed through the Registrar's office.

Further, I would ask that you do not leave me voicemails of such length in the future. I am happy to listen to a brief message and reply to a question left on a voice mail. However, it is not appropriate to leave submissions or lengthy comments on my voice mail. Nor will I be forwarding your voicemails to counsel for the respondent, as you indicated I had permission to do. It is not my role to act as intermediary and deliver messages between parties. I would ask that you kindly refrain from doing so in future and limit your messages to questions that may be replied to by me. Lengthy comments or submissions should be reserved for your brief or written arguments.

With respect to the documents you have left for filing, I note that I have marked this as correspondence and will place it in the court file. However,

no action will be taken on these documents, nor will they be treated as evidence for the appeal. The Court of Appeal is not a retrial or a court in which you may file evidence for the appeal as of right. If you have evidence you wish to file for the appeal, there is a process you must follow to request permission to do so. You may refer to our court's website for an information package and precedent forms to do so. It is item #3 under "Material for both civil and criminal matters" [link omitted in quote]. I have also attached the electronic copies of these documents for you to this email.

Lastly, I note that the Court has not yet received the appeal book for filing, nor has a request for an extension been filed. I note that the deadline for your factum is upcoming as well – it is due to be filed January 4, 2019. Should you miss this deadline as well, I as Registrar may make an administrative motion to dismiss your appeal for noncompliance with the Rules. If it is necessary to make this motion, you will receive five clear days' notice of the motion, as required by Civil Procedure Rule 90.43(4). (Emphasis added)

[14] I would note at this juncture, I have reviewed the material referenced in the above email and placed in the Court file as "correspondence". I am satisfied that material could not be interpreted as an attempt by Ms. An Jager to bring a motion seeking to extend the filing date for the appeal book. It contained no such request, nor any other articulated request. It appears to be a copy of email exchanges between herself and Mr. Jager and his counsel, with a number of handwritten notes added in the margins. There is no accompanying explanation of the purpose of this document or affidavit.

[15] On January 9, 2019, the Registrar filed a motion to dismiss the appeal pursuant to Rule 90.43(3), to be heard January 24, 2019. Both Ms. An Jager and Mr. Jager appeared in Chambers on that date. Mr. Jager advised he was in support of the Registrar's motion.

[16] Ms. An Jager advised she objected to the motion. However, she had not, as required by the Rules, filed a response contesting the motion. In particular, Ms. An Jager had not filed an affidavit or brief setting out why the motion should be dismissed and the appeal permitted to continue. Based on her preliminary comments, it was clear Ms. An Jager wanted to challenge the motion. Given the lack of material before me, I explained to Ms. An Jager that I would consider adjourning the motion to permit her to file evidence and submissions responding to the Registrar's motion.

[17] The motion was adjourned to January 31, 2018. Ms. An Jager did file an affidavit in advance of the hearing, the contents of which I will address below. Further, I heard and considered her oral submissions.

The Law

[18] Rule 90.43 provides:

(1) In this Rule 90.43 a “perfected appeal” means one in which the appellant has complied with the Rules as to each of the following:

- (a) the form and service of the notice of appeal;
- (b) applying for a date and directions in conformity with Rule 90.25;
- (c) filing the certificate of readiness in conformity with Rule 90.26;
- (d) the ordering of copies of the transcript of evidence, in compliance with rule 90.29;
- (e) filing and delivery of the appeal book and of the appellant’s factum.

(2) A respondent in an appeal not perfected by an appellant may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the respondent, to dismiss the appeal.

(3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

(4) A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[19] Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. When a motion to dismiss is brought, 90.43(4) provides a chambers judge with the discretion to provide further directions to move a stalled appeal towards conclusion, or grant dismissal.

[20] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge’s discretion to dismiss for failure to perfect the appeal. He wrote:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of

her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the **Rules**.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

[21] As noted by Justice Saunders, the above factors do not constitute a finite list. Further, the unique circumstances of each appeal will make certain factors more or less relevant to the exercise of a chambers judge's discretion.

Analysis

[22] On the material before me, Ms. An Jager has clearly failed to perfect her appeal. She has not filed an appeal book, nor her factum. In her oral submissions, she confirmed, contrary to the assertion contained in her Certificate of Readiness, that she has yet to order the trial transcript. I am further satisfied Ms. An Jager received ample notice of the Registrar's motion to dismiss.

[23] Ms. An Jager carried the burden to satisfy me, on a balance of probabilities, that the motion ought to be dismissed. Considering the factors below, she has failed to do so.

Is there good reason for Ms. An Jager's default sufficient to excuse the failure to perfect?

[24] Ms. An Jager says that she does not have the funds to pay for transcription. The extent of her evidence in this regard was contained in her affidavit affirmed January 25, 2019. She asserted:

Possessing audio transcripts proving numerous, grave errors of otherwise-excellent Judge Jesudason, but lacking the ~\$15000 to transcribe 30+ court sessions, some serious errors are evident within the orders themselves – small sampling attached.

[25] Ms. An Jager has not provided documentation establishing the estimated cost of the transcript, nor as to her inability to finance its preparation. Although she referenced fundraising efforts in her Certificate of Readiness, she provided no indication of the quantum of funds raised to date, nor an indication of when she may be in a position to obtain the transcript.

[26] In her oral submissions, Ms. An Jager submitted that a transcript was not necessary. First, she argues that the obvious errors on the face of the Order would permit this Court to intervene. Second, she suggests that the Court can simply listen to the audiotapes of the proceeding below.

[27] Undoubtedly, the cost of obtaining a transcript is a hurdle for many appellants. However, it is a hurdle that must be overcome in the vast majority of appeals in order for the Court to properly assess the allegations of error being advanced. Ms. An Jager did not bring a motion seeking to waive the requirement to provide a transcript. She has given no compelling reason for doing so. Her grounds of appeal and allegations of error make it clear that a transcript would be necessary. The Rules do not provide for an alternative of simply having the Court listen to the audio from the proceedings under appeal in lieu of a transcript.

Do the grounds of appeal raise arguable issues?

[28] In granting Ms. An Jager's earlier motion to extend the time for filing her appeal, I wrote:

[10] I am satisfied that Ms. An Jager's proposed Notice of Appeal does, amidst the questionable opinions and factual assertions, identify alleged errors made by the trial judge. For example:

- It is clear Ms. An Jager is asserting the trial judge failed to consider the best interests of the children; rather, focusing on the desires of Mr. Jager.
- Ms. An Jager says she was not privy to all attendances and communications between Mr. Jager and the court and was prevented from calling evidence central to the issues in dispute, thus raising concerns of procedural fairness and natural justice.
- Ms. An Jager questions the trial judge's admission and acceptance of expert evidence, thus challenging the proper exercise of his gatekeeping function.
- Ms. An Jager asserts the trial judge ignored relevant evidence.

[29] In my view, it was incumbent on Ms. An Jager in responding to the present motion to dismiss to not only establish that her grounds of appeal contained identifiable alleged errors, but to establish on a balance of probabilities the grounds were arguable. She has not. Although Ms. An Jager had made many assertions of error on the trial judge's part, she has not provided specifics of the errors or how she intends to establish those errors on appeal. In her oral submissions, Ms. An Jager submitted she has ample evidence to back up her allegations of error; however, none was provided.

Does Ms. An Jager have the willingness and ability to comply with future deadlines and requirements to advance her appeal?

[30] I am not satisfied that Ms. An Jager would meet any future filing deadlines should I dismiss the Registrar's motion. She has provided no indication as to when she could perfect her appeal in future. I note that despite receiving direction in the past, she has been unwilling or unable to move her appeal forward or bring the appropriate motions to extend her filing times. It is more likely than not that should I set new filing dates (which would also necessitate rescheduling the appeal hearing), Ms. An Jager would once again not file the required materials.

Will either party suffer prejudice?

[31] It is a given that an appellant will suffer prejudice should a Registrar's motion to dismiss be granted. They will lose the opportunity to advance their appeal. That prejudice is warranted, however, in light of the need to have matters

proceed expeditiously. Ms. An Jager has not established that she would suffer any additional prejudice.

[32] I am satisfied that Mr. Jager will suffer prejudice should I decline to grant the Registrar's motion. The hearing below commenced in October 2016 and extended over several months. The trial judge rendered an oral decision in November 2017. Mr. Jager has had the prospect of an appeal challenging the parenting arrangements ordered for the children lingering since January of 2018. As a litigant and parent, he is entitled to have a realistic prospect of finality. Ms. An Jager's response to this motion has only highlighted that this matter will likely continue for some time should the motion to dismiss not be granted.

[33] I am further of the view that a lingering appeal is not in the best interests of the Jager children. The trial judge rendered a decision 15 months ago relating to their care. Although their mother wants to challenge that decision, she is no closer to having this Court assess the errors she alleges are apparent in the trial judge's order. Continuing uncertainty as to the validity of the current parenting arrangement is not, given the material provided by Ms. An Jager, warranted.

Conclusion

[34] For the reasons above, I am satisfied that Ms. An Jager has not satisfied the onus that arises on a Registrar's motion to dismiss. I grant the motion and dismiss the appeal, without costs.

Bourgeois, J.A.