

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Rice v. Rice*, 2019 NSCA 18

**Date:** 20190311

**Docket:** CA 481305

**Registry:** Halifax

**Between:**

Candace Rice

Appellant

v.

Aaron Rice

Respondent

**Judge:** Cindy A. Bourgeois, J.A.

**Motion Heard:** March 7, 2019, in Halifax, Nova Scotia in Chambers

**Held:** Registrar's motion to dismiss granted

**Counsel:** Candace Rice, appellant, on her own behalf  
Aaron Rice, respondent, on his own behalf

**Decision:**

[1] On March 7, 2019, I heard a motion brought by the Registrar to dismiss an appeal commenced by Candace Rice. After having heard from Ms. Rice, the respondent Aaron Rice, and considering the material before me, I advised the Registrar's motion was granted and the appeal dismissed. I promised written reasons would follow. These are my reasons.

**Background**

[2] The appellant filed a Notice of Appeal on October 12, 2018. She seeks to challenge an order of Justice Lee Anne MacLeod Archer issued September 12, 2018. That order granted relief under the *Divorce Act* and the *Matrimonial Property Act*.

[3] From the grounds of appeal and her submissions I understand that the appellant wants this Court to change the parenting arrangement ordered by the court below in relation to the parties' 11 year old son. By virtue of the order under appeal, the parties are joint custodial parents, but the child's primary residence is with the respondent in Bedford. The appellant resides in Glace Bay. She further asserts the terms of the order requiring her access to be supervised are unreasonable and unworkable given the distance between her place of residence and that of her son.

[4] The appellant also asks this Court to set aside the trial judge's determinations relating to the division of matrimonial assets and a costs award made in the respondent's favour.

[5] Following the filing of the Notice of Appeal, the Registrar sent correspondence to the appellant on October 29, 2018. It included the following:

This letter is a customary letter that I send out as Registrar after an appeal has been started. It sets out the next steps you must take as the appellant in order to have your appeal heard. . .

If you have not already done so, you must deliver a copy of the Notice of Appeal to the respondent(s) or to their lawyer, if they have one.

. . .

Before applying to get a date for your appeal hearing, you must do the following:

- Send a copy of the Notice of Appeal to the court appealed from for the information of the judge who made the decision;
- Get a court certified copy of the trial judge's formal order, if you did not have it at the time you filed your appeal;
- Get a copy of the trial judge's written decision, if you did not have it at the time you filed your appeal OR, if the judge gave an oral decision in court, get a copy of the transcript of the oral decision and send it to the judge for his or her review;
- Order the audio CD of the court proceedings you are appealing;
- Once you get the audio CD of the court proceedings, take it to a certified court reporter/transcriber to get a transcript prepared. Ask the court reporter to provide you with a date estimating when the transcript will be ready. For a list of certified court transcribers, see the 'Nova Scotia Court Transcribers' website:

[http://novascotia.ca/just/Court\\_Services/court\\_transcribers.asp](http://novascotia.ca/just/Court_Services/court_transcribers.asp)

...

- Start gathering the documents that make up the record before the trial judge. As the appellant, it will be your responsibility later on to file what is called the "Appeal Book" which contains the record of the trial you have appealed. While you do not need to have your Appeal Book ready to get a date for your appeal hearing, you will need to tell the judge how long you think you will need to do so . . .

Once you have completed the steps outlined above, you are ready to apply to get a date for your appeal hearing. This is called making a motion for date and directions and is heard by a judge of the Court of Appeal in chambers, either in person in a courtroom on a Thursday at 10:00 a.m. or by telephone at a pre-arranged time on a Wednesday.

...

To make this motion for date and directions, you must file a Notice of Motion for date and directions and a Certificate of Readiness. These forms, along with an instruction sheet explaining this process, may be found on the Courts' website:

[http://courts.ns.ca/Appeal\\_Court/NSCA\\_forms.htm](http://courts.ns.ca/Appeal_Court/NSCA_forms.htm)

...

It is important that you work quickly to take the necessary steps to move your appeal along. Your motion for date and directions (to get a hearing date for your appeal) must be heard no later than eighty (80) days from the date your Notice of Appeal was filed. **In this case, the time period started to run on October 12, 2018. That means that you must have your motion filed and heard no later than February 8, 2019.** If the motion is not done within this time, I am required

as Registrar to make a motion pursuant to **Civil Procedure Rule 90.34(4)**, on five (5) days' notice, to have the appeal dismissed for non-compliance with the Rules.

[Emphasis in original]

[6] The above letter clearly indicated that the appellant was required to bring a motion for date and directions no later than February 8, 2019. She did not do so. On February 14, 2019, the Registrar, as is required by the *Rules*, filed a motion to dismiss the appeal. The motion was sent to both parties by email and regular mail the same day.

[7] On March 1, 2019, the Court received an affidavit from the appellant in which she:

- Acknowledges receipt of the Registrar's letter of October 29th;
- Describes her unsuccessful attempts to obtain legal counsel to assist her with the appeal;
- Asserts that since filing the appeal she has become pregnant and has been experiencing "general health difficulties";
- States that she did not previously understand the importance of the motion for date and directions, but now does;
- Asks to extend the time to file her motion for date and directions.

[8] The appellant also asked if she could attend the motion hearing by telephone. This request was granted. During the course of the hearing, the appellant further advised:

- She is presently attending university, undertaking an honours degree in psychology;
- The hearing giving rise to the order under appeal took place over five (5) days. In addition, there were a number of pre-trial appearances which are relevant to her grounds of appeal;
- She has in her possession CD audiotapes of approximately half of the court appearances and it will take her some time to afford to order the remaining hearing days from the court;
- She has not yet contacted a transcriber to ascertain their availability to prepare a transcript, the cost, or anticipated time for preparation;

- She was unable to provide an estimate as to when an Appeal Book could be filed in this matter.

[9] The respondent attended the hearing and advised that he was in support of the Registrar's motion. He submitted that the court proceedings are stressful and he wishes to have finality. He does not believe the appellant will move the appeal forward in a timely fashion.

## Law

[10] *Civil Procedure Rule* 90.43 provides:

(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.

[Emphasis added]

[11] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders set out the principles to be considered in a Registrar's motion to dismiss. 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.

[38] Civil Procedure Rule 90.43(a) is mandatory. It obliges the Registrar to enforce the Rules and chase delinquent appellants.

[39] In my opinion, the Rules and the Registrar's explicit directions concerning the perfecting of an appeal and the consequences of non-compliance ought to be strictly interpreted and applied so as to give effect to the object of the Rules which is to achieve the just, speedy, and inexpensive determination of every proceeding.

[12] In exercising my discretion, I have adopted the above approach.

### **Analysis**

[13] I am satisfied from the materials before me that the rules for perfecting an appeal have been breached. As such, the burden rests with the appellant to satisfy me that it would not be in the interests of justice to dismiss her appeal for non-compliance. She has failed to do so.

[14] In my view, the evidence adduced by the appellant does not establish a good reason for her failure to move the appeal along. She asserts she did not understand the importance of complying with the deadline for filing a motion for date and directions. She said she could not find legal representation. Neither, in my view, are an adequate excuse for the appellant's default.

[15] The letter from the Registrar clearly and explicitly outlined the steps to be taken, as well as the consequences for failing to do so. It is difficult to conceive that the appellant, a university student, failed to understand the directions provided.

[16] Further, the lack of legal representation does not afford the appellant with an excuse for not moving her appeal forward. Although undertaking an appeal is often a substantial challenge for self-represented litigants, it is a challenge which is often successfully navigated without legal assistance. The resources noted by the Registrar are meant to assist self-represented appellants in undertaking the obligations which accompany the filing of a Notice of Appeal.

[17] I asked the appellant to expand upon the grounds of appeal set out in her Notice of Appeal. On its face, there appears to be grounds which could be arguable. In her submissions, however, much of the appellant's concerns relate to the trial judge's findings of fact or problems which have arisen since the issuance of the order. It very much seems that the appellant is hoping this Court will reconsider the evidence submitted to the trial judge and provide a different outcome.

[18] The appellant says she is now willing to comply with all future deadlines and requirements for advancing her appeal. I do not doubt her willingness. I do, however, have concerns with respect to her ability to comply with the future deadlines this Court will need to set. Despite receiving notice of the motion to dismiss on February 14<sup>th</sup>, the appellant has done little since that time to advance her appeal. She has not retrieved all of the necessary audio recordings, nor has she made attempts to find a transcriptionist.

[19] Given the time that has already passed, any extension granted would still need to respect the object of having this matter proceed in a speedy manner. The appellant has provided inadequate assurance that she will be able to comply.

[20] I have also considered the prejudice which may result should the motion be dismissed, or granted. Undoubtedly the appellant will suffer some prejudice if she is unable to proceed with the appeal. I am satisfied, however, that in the present circumstances, the prejudice to the respondent would be greater if the appeal is permitted to proceed.

[21] As noted above, I am satisfied that the appellant will not be in a position to have the hearing set down for some time. There has been no estimate provided as to when the transcript may be available, and the Appeal Book ready for filing. The respondent, and the child indirectly, will have the prospect of an appeal lingering for quite some time.

## **Disposition**

[22] Having considered the above, I am satisfied that the appeal ought to be dismissed. The Registrar's motion is granted.

Bourgeois, J.A.