NOVA SCOTIA COURT OF APPEAL
Citation: *Jacklin v. Daigle*, 2021 NSCA 31

Date: 20210323
Docket: CA 501266
Registry: Halifax

Between:

Rachael Arron Jacklin

Appellant

v.

Kyle Joseph Daigle

Respondent

Judges:	Van den Eynden, Hamilton and Scanlan JJ.A.
Appeal Heard:	March 23, 2021, in Halifax, Nova Scotia
Written Release	March 23, 2021
Held:	Appeal allowed, with costs, per reasons for judgment of the Court.
Counsel:	Lisanne M. Jacklin, for the appellant Kyle Joseph Daigle, self-represented, not appearing

By the Court (orally):

[1] Ms. Stockdale's (formerly Jacklin) appeal raises an issue of procedural fairness, the resolution of which determines the appeal, so it is unnecessary to deal with other issues raised by her.

[2] Mr. Daigle applied to vary child support and reduce arrears under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160. At a June 26, 2020 pre-trial conference with Justice Elizabeth Jollimore, when both parties were represented by counsel, their counsel agreed the application would be dealt with on a document only record, without cross-examination, pursuant to Notice #6 issued by the Nova Scotia Supreme Court (Family Division) on April 20, 2020 during the Covid pandemic. Deadlines were set for each party to file materials and written submissions.

[3] Mr. Daigle had previously filed his statement of income with income tax information from 2010 to 2018, except 2012, and some paystubs relating to 2019, but he failed to file a copy of his 2019 tax return as directed by the judge. Ms. Stockdale filed her materials on time. Neither party filed written submissions with the court by September 10, 2020, the filing date set by the judge for both parties to file their submissions.

[4] Among other documents Ms. Stockdale seeks to have admitted as fresh evidence, is a copy of a letter dated September 10, 2020 from her then counsel to the court. In that letter, copied to Mr. Daigle's then counsel, Ms. Stockdale's counsel indicated that (1) the written submissions on behalf of her client were ready to be filed, (2) Mr. Daigle's counsel had indicated to her that morning she planned to seek an extension of time to file her written submissions on behalf of Mr. Daigle and (3) she felt Mr. Daigle would have an unfair advantage if she filed her submissions on time and he was granted the extension he sought. She requested a teleconference to get directions from the court.

[5] We admit this letter as fresh evidence. It is relevant, credible, could affect the result of the appeal and it is in admissible form.

[6] It is not clear from the record why the judge failed to respond to Ms. Stockdale's counsel's request for a teleconference. The court file indicates the letter was received by the court on September 10. The judge's reasons indicate she thought she had received Ms. Stockdale's submission:

> 8. Ms. Stockdale filed her submissions by the mid-September deadline.

[7] In any event, the only thing Ms. Stockdale's counsel received from the judge following her September 10, 2020 letter was a copy of the judge's Endorsement (2020 NSSC 248) and Order, both dated September 17, 2020. It reduced the amount of child support payable by Mr. Daigle from $1,458 to $946 per month, starting May 1, 2018.

[8] The only issue that needs to be determined is whether the judge erred by not giving Ms. Stockdale's counsel an opportunity to make submissions prior to rendering her reasons and Order in light of her September 10 letter.

[9] In *Whalen v Whalen*, 2018 NSCA 37, Justice Farrar recently stated:

> [41] Donald J.M. Brown, Q.C. in his text, *Civil Appeals* (Toronto: Thomson Reuters, 2017), vol. 1 (loose-leaf, updated 2018, Release 1) ch. 1 comments on the issues of fairness in the trial process:
>
> > *Non-Compliance with Basic Participatory Requirements*
> >
> > 1:1211 *Per Se Fairness Errors*
> >
> > Where the basic requirements of the adjudicative process have not been complied with, appellate intervention will be necessary. For example, where there has been a straightforward error such as attributing the burden of proof to the wrong party, excluding evidence that is both relevant and material, refusing to permit cross-examination, **deciding a matter without allowing a party to make submissions**, or undertaking an evidence-gathering exercise ex parte, the usual result will be for the appellate court to set aside the decision and require the adjudicative process to be started anew. [Emphasis added in Whalen]
>
> [42] Mr. Brown continues (vol. 2) in his text concluding that an error in the process of a trial or in the decision-making process will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice:
>
> > 6:2120 *The Requirement of a Substantial Wrong or Miscarriage of Justice.*
> >
> > … However, unless the error is harmless or the result inevitable, an error in the process of the trial or in decision-making will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice.

[10] The judge's failure to respond to the September 10 letter deprived Ms. Stockdale's counsel of the opportunity to make submissions on behalf of her client, to put her position and theory of the case to the judge prior to the decision and

Order being rendered. This resulted in a significant procedural error amounting to a miscarriage of justice.

[11] We allow the appeal, with costs on the appeal payable forthwith by Mr. Daigle in the amount of $1,500, including disbursements, and order a new trial. Pending the completion of the new trial Justice Elizabeth Jollimore's September 17, 2020 Order is rescinded and Justice R. Lester Jesudason's August 7, 2018 Order is reinstated. We ask that consideration be given to scheduling the retrial as quickly as possible given the unfortunate circumstances to date.

Van den Eynden J.A.

Hamilton J.A.

Scanlan J.A.