

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Green v. Green*, 2021 NSCA 90

**Date:** 20211222

**Docket:** CA 507407

**Registry:** Halifax

**Between:**

Jamie Todd Green

Appellant

v.

Tara Leah Green

Respondent

**Judge:** Bourgeois J.A.

**Motion Heard:** December 22, 2021, in Halifax, Nova Scotia in Chambers

**Written Decision:** January 13, 2022

**Held:** Motion dismissed

**Counsel:** Jamie Todd Green on his on behalf  
Charlotte Edwards, for the respondent  
Caroline McInnes, Registrar

## Decision:

[1] On December 22, 2021, I heard a motion brought by the Registrar to dismiss an appeal brought by Jamie Todd Green. The motion was opposed by Mr. Green. The respondent, Tara Leah Green, was in support of the dismissal.

[2] After having heard from the parties, and having considered the evidence filed, I advised the parties the motion was dismissed, and that Mr. Green was to have his motion for date and directions filed no later than January 14, 2022. I promised written reasons to follow. These are my reasons.

## Background

[3] The parties have been involved in what appears to be a contentious marital breakdown. On June 9, 2021, they appeared before Justice Diane Rowe for a divorce hearing including the determination of corollary issues pertaining to parenting, child support and division of property. An oral decision was rendered the same day.

[4] On July 5, 2021, Mr. Green filed a Notice of Appeal in which he challenged the oral decision. As will be discussed later, the written order arising from the June 9 hearing was not issued until November 1, 2021.

[5] On July 16, 2021, the Registrar sent her customary letter to Mr. Green advising of his responsibility to move the appeal forward pursuant to the *Nova Scotia Civil Procedure Rules*. She advised:

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 July 05, 2021. That means that you must have your motion filed and heard no later than October 28, 2021.** If the motion is not done within this time, I am required as Registrar to make a motion pursuant to **Civil Procedure Rule 90.43(4)**, on five (5) days' notice, to have the appeal dismissed for non-compliance with the Rules.

(Emphasis in original)

[6] Mr. Green was further advised by the Registrar that before applying to get a hearing date he had to 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;
- Get a copy of the trial judge's written decision, 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 her review;
- Order the audio CD of the court proceedings;
- Get the CD transcribed; and
- Start gathering documents for preparation of the Appeal Book.

[7] Mr. Green did not file a motion for date and directions by the October 28, 2021 deadline. As such, the Registrar brought a motion to dismiss the appeal on November 5, 2021.

### **The Law**

[8] The Registrar's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). 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.

[9] 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, *Rule 90.43(4)* provides a chambers judge with the discretion to provide further directions to move a stalled appeal toward conclusion, or grant dismissal.

[10] 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.

(Emphasis added)

[11] 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**

[12] It became apparent from reviewing the affidavits filed by both parties that matters continued to unfold in the court below well after Mr. Green filed his Notice of Appeal on July 5, 2021. These subsequent events are relevant as to whether Mr. Green has a reasonable excuse for not bringing his motion for date and directions within the required 80-day period. Further, how matters unfolded may, according to Mr. Green, be relevant to the merits of the appeal. That, of course, will be left to a full panel of this Court.

[13] As noted earlier, the judge rendered an oral decision on June 9, 2021. The Corollary Relief Judgment was not issued until November 1, 2021. It would appear there was ongoing discussions between the parties and the court in the interim. Although I recognize I may not have been provided a complete record of the exchanges, I note the following:

- On June 22, 2021, Ms. Green's counsel wrote to the judge providing submissions on costs arising from the hearing and "secondly modifying the retroactive child support provisions that [she] has ordered on June 9, 2021." From the written submissions, it appears as if Ms. Green was asking the judge to change aspects of her June 9, 2021 decision:

Ms. Green is seeking permission from the Court and Mr. Green to not involve [\*] in the proceeding. She has no issue paying the full table amount in favour of [\*]'s student loan. She is seeking, that given [\*] has completed school, that instead of starting an RESP for [\*], that the amount be directly applied to his student loans. She is proposing that she will pay that amount once funds are released from the sale of the matrimonial home.

For retroactive child support payable by Mr. Green, Ms. Green is proposing to the Court and Mr. Green to divide the retroactive amount owing into equal monthly payments over 3 years. Please confirm this is acceptable and the Order can be drafted to reflect this.

- Mr. Green provided submissions on costs to the judge on June 22, 2021;
- On August 31, 2021, the judge's assistant wrote to the parties and requested they provide comments in relation to their respective cost submissions by September 14, 2021;
- On September 13, 2021, Ms. Green, through her counsel, sent correspondence to the judge addressing the issue of costs, and again seeking to modify aspects of the decision rendered on June 9:

For retroactive child support payable by Mr. Green, Ms. Green proposed to the Court and Mr. Green to divide the retroactive amount owing into equal monthly payments over 4 years. She is seeking they be added to an existing RESP for the children that is in her name, where the children are beneficiaries. I incorrectly informed the Court on June 9, 2021 that an RESP was not in existence. Ms. Green has since corrected me.

I have not received a response from the Court or Mr. Green. I am enclosing a Draft Order for comment by the Honourable Justice Rowe and Mr. Green. I have highlighted portions that are solely proposed at this stage. It is my sincere hope to be able to have an Order issued as soon as possible. Ms. Green would like to make a motion to the Court of Appeal in relation to Mr. Green's Appeal and if the Order cannot be provided, a timeline for issuance that can be provided to the Court of Appeal would be most appreciated;

- On September 29, 2021, the judge wrote to the parties and, in particular, addressed Ms. Green's attempts to introduce new terms into the order arising from the June 9 hearing. She also recused herself from further involvement in the matter. The judge wrote:

I have reviewed the recent correspondences from the parties, received since the date of the hearing on June 9, 2021.

I particularly note that the most recent correspondence from Ms. Edwards, received by the Court dated September 13<sup>th</sup>, 2021, encloses a version of draft Order to the Court. This reiterates and clarifies an earlier request to the Court to alter or reconsider aspects of the oral decision in this matter concerning an RESP contribution, and contains a section for the parties to countersign it as a "consent order". This correspondence was provided to Mr. Green by the Court, to ensure his receipt.

...

A Court may consider submissions of parties after an oral decision is made, prior to issuing an Order, in the event that additional information is provided to the Court that indicates an error, mistake in fact or a

substantial change of circumstance in the interim, post hearing (*Donner v. Donner*, 2021 NSCA 30). Ms. Edwards indicates that, in the course of the hearing on June 9<sup>th</sup>, 2021, she had made an error concerning the existence of an RESP. She is seeking the Court Order that, in light of this error, Mr. Green make payments for retroactive child support into this existing RESP, which has both children as named beneficiaries but is in her client's name only.

Ms. Edwards has also requested in the draft Order that her client pay an amount for payment of outstanding retroactive support for [\*] directly to his student loan, upon release of funds from the sale of the matrimonial home, rather than making contribution to a new RESP, as was decided, or, presumably, into the existing RESP that was confirmed.

There is no reference to the Order concerning [\*]'s contribution to expenses as a mature child of the marriage, based on his own earning, as was outlined in the decision. The draft Order also refers to [\*] no longer being a child of the marriage, although it also refers to "children" in other clauses.

Taken as a whole, the submissions by correspondence from Ms. Edwards indicate an attempt to negotiate a form of settlement with Mr. Green on several points.

The issue of an existing RESP was not before me at the hearing and apparently has more nuance than an adjustment, as contemplated in *Donner v. Donner*.

The Court's oral decision is reflective of the evidence that was presented that day by the parties. Issuing an Order in the manner proposed by Ms. Edwards is not in keeping with the oral decision. The Draft Order does not capture the elements of the decision made.

- On October 8, 2021, Ms. Green's counsel forwarded a further draft order to the court for consideration; and
- On November 12, 2021, Mr. Green received by regular mail an issued Corollary Relief Judgment dated November 1, 2021.

[14] I turn now to consider the factors relevant to the motion before me.

*Reason for the default*

[15] Mr. Green says he did not file his motion for date and directions because he had not received an order from the judge. He understood from the letter he received from the Registrar that he needed to have the order in hand prior to asking

for appeal dates to be set. As noted earlier, he did not receive an order until November 12, 2021, well after the Registrar brought her motion to dismiss.

[16] In all other respects, Mr. Green says he complied with the Registrar's directions. He served Ms. Green with the Notice of Appeal, he ordered the audio recording of the hearing and he has obtained a transcript.

[17] Given the delay in obtaining the Corollary Relief Judgment, I am satisfied Mr. Green has provided a reasonable explanation for his failure to bring a motion for date and directions.

*The grounds of appeal*

[18] The next factor is whether the grounds of appeal raise an arguable issue. This is a low threshold.

[19] In his Notice of Appeal, Mr. Green sets out six grounds of appeal. I will not canvass them in detail. He asserts the judge ignored evidence relating to his payment of matrimonial debts in her overall asset division. Further, he asserts the judge erred by failing to consider the terms of a prior separation agreement. Both of these are arguable issues that, upon a full hearing by this Court, could lead to success on appeal.

*Is the appeal taken in good faith?*

[20] Ms. Green asserts Mr. Green is acting in bad faith and is only seeking to ensure she sees no benefit from the division of matrimonial assets ordered by the judge. Mr. Green says he has legitimate concerns with the judge's decision and is entitled to appeal. He argues this should not be viewed as bad faith.

[21] Although Ms. Green attached messages she received from Mr. Green several years ago in support of her assertion he is acting in bad faith, these were sent well before the hearing in June 2021. I am not satisfied this evidence establishes Mr. Green is not presently acting in good faith in advancing his appeal.

*Willingness and ability to comply*

[22] I am satisfied Mr. Green has the willingness and ability to comply with further direction of the Court. I note that other than proceeding to bring a motion for date and directions, Mr. Green has complied in a timely fashion with the other



procedural requirements to advance the appeal. Specifically, he served the Notice of Appeal, he ordered audio recordings promptly and he has obtained the transcript of the hearing.

[23] He advised, and I accept, that he will bring his motion for date and directions on or before January 14, 2022, in order to move the appeal forward.

*Prejudice to the parties*

[24] Both parties say they will be prejudiced, depending on the outcome of the motion. Mr. Green will undoubtedly be prejudiced if he is unable to proceed with his appeal. Ms. Green says permitting the appeal to proceed will cause her prejudice because of the financial implications of being unable to finalize matters.

[25] In my view, Ms. Green's earlier attempts to have the judge issue a Corollary Relief Judgment, which contained terms different than what was ordered, lessens the legitimacy of her claim of prejudice. These attempts delayed the issuance of the order, which, in turn, delayed the setting down of the appeal. Although all parties would certainly benefit from finality, in my view the prejudice to Mr. Green should the appeal be dismissed outweighs that of Ms. Green.

*Further impediments*

[26] I am not aware of any impediments that would prevent Mr. Green from resuscitating his appeal and proceeding to have the matter set down for hearing.

[27] Having considered the factors noted above, I am of the view the circumstances are such that Mr. Green should be permitted to advance his appeal.

**Conclusion**

[28] The Registrar's motion is dismissed. I further order that Mr. Green shall file his motion for date and directions on or before January 14, 2022.

Bourgeois J.A.