C.A. No. 102337

NOVA SCOTIA COURT OF APPEAL

Cite as: D.G. v. Family and Children Services of Kings County, 1994 NSCA 103

BETWEEN:

D. G. Applicant/Appellant	Peter Katsihtis for the Applicant/Appellant
- and -	Donald B. MacMillan for the Respondent, Family and Children's Services
FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY and T. H. Respondents	Stephen Mattson for the Respondent, T . H .
	Application Heard: June 6, 1994
	Decision Delivered: June 6, 1994

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

BEFORE THE HONOURABLE JUSTICE ELIZABETH A. ROSCOE, IN CHAMBERS

ROSCOE, J.A.: (orally, in Chambers)

The Court is in a very difficult position as a result of a combination of factors, one being the **Children and Family Services Act** s. 49 which sets out the appeal provisions of this **Act** and provides that if a person wishes to appeal an order of the Family Court made pursuant to this **Act** that they must do so by filing a notice of appeal within thirty days of the order.

In this case, Ms. G. filed a notice of appeal by fax on March 7, 1994 and then a hard copy on March 10, 1994, which was on the last day to comply with this rule. Section 49(4) provides that where a notice of appeal is filed pursuant to this section, the Minister is responsible for the timely preparation of the transcript and the appeal shall be heard by the Appeal Division of the Supreme Court (now the Nova Scotia Court of Appeal) within ninety days of the filing of the notice of appeal. That ninety days expires this Thursday, June 9, three days from today. The section also provides, in s-s. 5, that when on an appeal pursuant to this section the Appeal Division may, in its discretion, receive further evidence relating to events after the appealed order.

Ms. G. sent a fax to this Court on May 19, 1994, saying "I have an appeal before the courts, **G. v. Kentville Child and Family Services**. The date I am requesting to go before Chambers is June 2, 1994. I await your response."

When this file was brought to my attention on June 1, 1994, one day before Chambers, this file came forward with all the other Chambers files and I was concerned about whether or not notice had been given to the solicitor for Family and Children's Services and directed that notice be given to Mr. MacMillan by court staff. Mr. MacMillan received very short notice but did attend on June 2. At that time the matter was adjourned to today's date so that Ms. G. could have counsel to put her argument before the Court as to how this matter should proceed at this time. Since last Thursday, Mr. MacMillan has arranged for the preparation of the transcript of two decisions of Judge Legere and has filed them with the Court. I have read those decisions. The first is dated September 14, 1993, at which time Judge Legere made an order for the temporary care and custody of the two children of Ms. G.. At the hearing on February 8, 1994, Judge Legere made an order for permanent care and custody of the two children. It is from that order that Ms. G. seeks to appeal.

On Thursday, June 2, I advised Ms. G. that since her notice of appeal had indicated she wished to file new evidence, it was necessary that she come to court this morning with an affidavit containing an outline at least of the new evidence that she would seek to present at the appeal. She has filed an affidavit this morning which contains complaints concerning her lawyer at the time, last year and in February of this year, who was Mr. Harry How, Q.C. She also complains that Family and Children's Services did not do anything to assist her or not do everything that they should have done to assist her in her parenting and with dealing with the abusive relationship that she was in with Mr. H.. This affidavit does not contain anything in the nature of evidence relating to events since the appealed order other than paragraph 7 which says she is now receiving counselling from Theresa Clark to help her deal with the abuse she suffered and she would like to introduce fresh evidence "that the way I conducted myself during the past year was partly because I was an abused woman".

The fact that Ms. G. was in an abusive relationship is not something that is just coming to the attention of the people who have been involved in this case. It appears from the first decision of Judge Legere that that certainly was a difficulty and that was something that was directed to be dealt with as much as possible by whatever ways were available after that hearing and there are terms and conditions from A to Q in the order of October 14, 1993, designed to assist Ms. G. with all of her difficulties including, I find, the difficulty that she was in an abusive relationship.

The difficulty that the Court has today is that it is impossible to have the appeal heard within the ninety days. I accept Mr. MacMillan's definition of the word "heard" as used in that section and that is that there should be a hearing on the merits of the case. I also agree that "heard" does not include the word "determined" so I would take it that s. 49(4) means that the appeal should be heard on the merits within the ninety days but it is not necessary for the Court to render a decision within the ninety days. In some cases, this Court has allowed the commencement of the hearing to take place within the ninety days and then adjourned the matter for completion of the hearing.

In this case, however, I would find that it is impossible to even commence the hearing of the appeal within the ninety days because that ninety days is up two days from now and there has been no transcript prepared and no appeal book filed. Rule 62.14 provides that the appellant shall within sixty days of the filing of the notice of appeal file with the Registrar five copies of the appeal book and deliver to each respondent, or his solicitor, a copy of the appeal book. Rule 62.14(3) provides what should be contained in an appeal book. The appeal book must contain all of the documents that were used in the lower court plus a transcript of the evidence that was presented in the lower court. There has been nothing done except for what was done by Mr. MacMillan since last Thursday to assist in the preparation of this appeal book.

As indicated before, the **Children and Family Services Act** requires that the Minister is responsible for the timely preparation of the transcript. I would take it as implied in this section that the appellant must begin that process by at least notifying the Minister that a transcript is required and, of course, as I indicated a minute ago, the appeal book must contain a lot more that just the transcript. It must contain, for example, copies of affidavits, written admissions, discovery evidence, photocopies of documentary exhibits, the pleadings, the decisions, the orders, and in this case there were several experts who presented reports and those reports were before Judge Legere. It is impossible to comply with s. 49 in this instance because of the delay between the filing of the notice of appeal and the brief note sent by Ms. G. that she was going to appear in Chambers on June 2, presumably to set the matter down for the hearing of the appeal.

As I mentioned during the argument, I believe that the combined effect of s. 50 of the **Judicature Act** and Rule 62.31(7)(e) provide, in limited cases, for extensions of the time for the hearing of appeals but as I also indicated there is a test that has to be met and the test consists of three parts: 1) that there was a continuing intention to appeal; 2) that there is an arguable ground of appeal; and 3) that there is a reasonable excuse for the delay in advancing the appeal.

In this case the notice of appeal itself is evidence of the intention to appeal and I would find that that part of the test is met. However, with respect to there being an arguable ground I find I am not able to indicate that that part of the test has been met. The notice of appeal contained two grounds of appeal, one being that "during the proceedings in the Family Court I requested that Judge Moira Legere step down as I felt she had previously heard the case on other matters. She would not step down"; and secondly, "I am seeking a new trial in order to present new evidence". I am satisfied based on the affidavit that has been filed by Mr. MacMillan that there is no merit to the first ground of appeal because Mr. How who was representing Ms. G. at the relevant period of time consented to Judge Legere continuing with the case. With respect to the second ground of appeal, there is scant evidence of any new evidence and I think that in relation to this part of the test that it is important to keep in mind that there are other provisions contained in the **Children and Family Services Act** for new evidence to be presented if, in fact, there is new evidence that would assist in the review of this matter and I refer to the right of the person to apply to terminate an order for permanent care and custody. It is well known that the test under that section of the **Act** is that there has been a change in the circumstances and that it would be in the best interest of the children involved for there to be a termination.

With respect to the other part of the test, that is that there is a reasonable excuse for the delay, I am not satisfied that any reasonable excuse has been presented in this case.

I would find that since it is impossible for this Court to hear the appeal in accordance with the **Act** and that grounds have not been presented to convince me that I should extend the time for the hearing of the appeal, that the notice of appeal in this case should be struck because the appeal has not been perfected in accordance with the rules.

J.A.