Date: 19980209 Docket: C.A. 144100

NOVA SCOTIA COURT OF APPEAL
Cite as J.C. v. Children's Aid Society of Inverness-Richmond, 1998 NSCA 4

BETWEEN:

J.C. and S.C.	)	Appellants in person
	)	
Appellants	)	
	)	
- and -	)	
	)	Lorne J. MacDowell
	)	for the Respondent
THE CHILDREN'S AID SOCIETY OF INVERNESS-RICHMOND	)	
	)	
	)	
Respondent	)	Application Heard:
	)	February 4, 1998
	)	
	)	
	)	Decision Delivered:
	)	February 9, 1998
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BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

I. Introduction

This is an application by the Children's Aid Society of Inverness-Richmond ("CAS") to quash and/or dismiss this appeal. On consent of the parties, I heard this matter by telephone on February 4, 1998 and reserved my decision.

The application is based on **Civil Procedure Rules 62.11(d), 62.02(2), 62.17(3)** and **62.18**. The text of these **Rules** is as follows:

> **62.11** In addition to any other powers conferred by Rule 62 or otherwise, a Judge may at any time and on such terms as he deems just, on the application of the Registrar or of any party to an appeal, order that
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> . . . . .
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> (d) a notice of appeal be quashed because of failure by the appellant to comply with Rule 62 in respect thereof, provided that seven (7) days' notice has been given to the appellant.
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> **62.02** (1) An appeal, other than a tribunal appeal, shall be brought by filing a notice of appeal with the Registrar
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> (a) in the case of an appeal from an interlocutory order or an order as to costs only, within ten (10) days, and
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> (b) in the case of an appeal from a judgment under the **Divorce Act**, within thirty (30) days, and
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> (c) in the case of an appeal from any other judgment, within thirty (30) days,
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> from the date of the order for judgment appealed from or, if no order has been made from the date of the decision.

> **62.02** (2) A notice of appeal, other than in a tribunal appeal, shall be served within the time prescribed by rule 62.02(1) and as prescribed by rule 10.12 on any party in the proceedings in the court appealed from who may be directly affected by the appeal.
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> **62.17** (3) If Rule 62 has not been complied with in the preparation or the prosecution of an appeal, a Judge on the application of a party or of the Registrar may direct perfection of the appeal, or may set the appeal down for hearing or, on seven (7) days' notice to the parties, may dismiss the appeal.
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> **62.18** (1) Any party to an appeal may apply in accordance with rule 62.30 to the Court at any time before or at the hearing of the appeal for an order quashing the notice of appeal or dismissing the appeal on the ground that no appeal lies to the Court or that the appeal is frivolous, vexatious or without merit or that the appellant has unduly delayed preparation and perfection of the appeal.

I note that applications under Rule 62.18 are to be made to the Court, not to an individual judge and therefore I have no jurisdiction to consider that aspect of the CAS application.

II. Facts

By a decision given in December of 1996, the Family Court granted the CAS application for permanent care of three children ("the children") of Mr. and Mrs. C. ("the parents"). This decision did not permit access by the parents because the Court decided that "...the only viable option for these children is adoption." The parents were represented by a lawyer at that time and the

decision was not appealed.

This decision came after a long series of proceedings in the Family Court beginning with an initial appearance in July of 1995.

I set out **ss. 47(1)** and **(2)** and **s. 70(3)** of the Children and Family Services Act ("the Act"):

> **47 (1)** Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
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> **(2)** Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
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> > (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
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> > (b) the child is at least twelve years of age and wishes to maintain contact with that person;
> >
> > (c) the child has been or will be placed with a person who does not wish to adopt the child; or
> >
> > (d) some other special circumstances justifies making an order for access.
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> **70 (3)** No child in permanent care and custody and in respect of whom there is an order for access pursuant to subsection (2) of Section 47 may be placed for adoption

> unless and until the order for access is terminated pursuant to Section 48.

In May, 1997, the parents made an application for access to the children. The most relevant provisions of the **Act** are as follows:

> **48(3)** A party to a proceeding may apply to terminate an order for permanent care and custody or to vary access under such an order, in accordance with this Section, including the child where the child is sixteen years of age or more at the time of application for termination or variation of access.
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> **48(7)** On the hearing of an application to vary access under an order for permanent care and custody, the court may, in the child's best interests, confirm, vary or terminate the access.

The parents' access application was adjourned a number of times, mainly as a result of the parents' ultimately unsuccessful attempts to retain a lawyer through Nova Scotia Legal Aid. Both the Family Court judge and counsel for the CAS attempted to assist in obtaining legal aid approval to represent the parents but all attempts failed.

The access application finally was set for hearing on October 23, 1997. The parents, nor anyone on their behalf appeared in Court at the date and time set. After waiting for 35 minutes, the Court dismissed the application. The formal order is dated October 27, 1997.

It is from this order dismissing the access application that the parents now appeal to this Court. As I understand it, the parents' position is that they attended at what they thought was the right Court but found a sign saying that the provincial court had moved so that they attempted to attend court but did not find the right place.

The parents filed a Notice of Appeal with the Registrar of this Court on November 26, 1997. This Notice of Appeal was not served on the CAS or its legal counsel. The Appeal Book has not been filed. The parents have filed an affidavit explaining the failure to serve the Notice of Appeal. It indicates that they had wished to have the filing fees waived, but did not have a completed waiver form. The result, according to their affidavit, was considerable delay in having the Notice of Appeal returned to them so that they could serve it on the CAS.

The existence of the parents' appeal only came to the attention of the CAS when Mr. O'Neil, who was attempting to assist the parents, wrote to the CAS legal counsel, Mr. MacDowell, in a letter which was received by Mr. MacDowell on December 19, 1997. Prior to receiving that letter, a Notice of Proposed Adoption had been signed and filed with the Minister on November 27. In fact, it was service of this notice on the parents that prompted Mr. O'Neil's letter. It is also significant that Mr. O'Neil's letter indicates that he had requested the parents to contact the CAS or its counsel to notify them that the appeal had been initiated, but apparently the parents did not do so.

The effect of the filing of this Notice of Proposed Adoption is important.

Section 47(3A) of the **Act** provides as follows:

> **47(3A)** Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application for an order granting access may be made during the continuance of the adoption placement until
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> > (a) an application for adoption is made and the application is dismissed, discontinued or unduly delayed; or
> >
> > (b) there is an undue delay in the making of an application for adoption.

This section means that after the filing of the Notice of Proposed Adoption, no access application may be made until the application for adoption is dismissed, discontinued or unduly delayed. I am advised that the adoption process is ongoing with respect to these children and I find that there has been no undue delay in moving it forward. I also accept the CAS submission that had it been aware of the appeal, it would have waited in proceeding with the Notice of Proposed Adoption even though it is not required by the **Act** to do so.

In summary, the Notice of Appeal has not been served on the CAS. It should have been served within thirty (30) days of the order being appealed. Even if Mr. O'Neil's letter received by the CAS on December 19, 1997, is counted as service because it at least provided informal notice of the appeal to the CAS, it was over three weeks late.

III. Analysis

Although there is no application to extend the time for serving the Notice of Appeal and filing the Appeal Book before me, it is appropriate for me to consider whether time should be extended in assessing the CAS application to dismiss the appeal for failure of the parents to serve the Notice of Appeal and failure to proceed with the filing of the necessary documents for the hearing of the appeal.

The general principles are that time should be extended in a case in which the party appealing, in this case the parents, intended to appeal within the time limit, have an arguable ground of appeal and a reasonable excuse for the delay.

Given that the parents do not have a lawyer and they filed a Notice of Appeal within a month of the written order they wished to appeal, I am satisfied that they had the intention to appeal within the time limit. As for arguable grounds of appeal, I am in no position on the evidence before me to judge the merits of their appeal other than to say that their notice of appeal raises grounds which if accepted by the Court of Appeal might result in their appeal being allowed. I therefore conclude that they have set out arguable grounds of appeal. Given the difficulties they encountered getting the original documents back for service and bearing in mind that they are representing themselves, I think the parents have a reasonable excuse for the delay in serving the Notice of Appeal

and in failing to file their appeal book. However, I find it difficult to understand why they did not give some notice of the appeal, even if the original documents were not available, especially in light of Mr. O'Neil's instruction to them to do so.

I also have to consider the strict time limits for hearing appeals under the **Act**. **Section 49(4)** of the **Act** requires the Court of Appeal to hear this appeal within 90 days of the filing of the notice of appeal or such longer period not to exceed sixty days as the Court deems appropriate. Although we are already well into the 90 day period, it would still be possible to have this appeal heard within the time frame required under the **Act** provided all necessary documents were filed promptly.

Accordingly, if these were the only considerations, I would not quash or dismiss this appeal for non-compliance with the **Rules**. However, these are not the only considerations.

In all matters under the **Act**, the best interests of the children is the paramount consideration: see **s. 2(2)**. In this case, the Family Court has ruled after lengthy proceedings, that the best interests of the children will be served by proceeding with adoption. That is what prompted the Court to deny access to the parents at the time the order for permanent care was made. In their submissions to me, the parents claimed that their lawyer at the permanent care

hearing did not properly represent them and that the judge was biased in favour of the CAS. The short answer to these submissions is that the permanent care order, which denied access, was never appealed. It is therefore not now open to me to consider these sorts of arguments, particularly where there is absolutely nothing in the material before me to support them. I must proceed on the basis that the permanent care order was properly made and that at the time it was made, the Court was correct in concluding that the best interests of the children would be served by proceeding with adoption.

Another significant factor is that the Notice of Proposed Adoption means that no order for access may be made at this time. There was no hearing on the merits of the parents' access application which, as mentioned, was dismissed because they were not present in Court on the day set for the hearing. The most favourable outcome that the parents could reasonably expect to achieve on their appeal to this Court is that the order dismissing their access application would be set aside and the matter remitted to the Family Court for determination. However, even if this happened, the Family Court, because of the Notice of Proposed Adoption, is barred from considering the access application. The appeal, therefore, can realistically serve no useful purpose for the parents or the children. All this appeal is likely to achieve is further uncertainty for the children and the proposed adoptive parents and further delay in implementing the plan for the children which has been found to be in their best interests. Of course, if the adoption does not proceed or is unduly delayed, the

dismissal of this appeal will not preclude the parents from applying for access at that time.

In these circumstances, it seems to me that allowing this appeal to go forward will serve no useful purpose for the parents, given that no access order can now be made because of the filing of the Notice of Proposed Adoption. By the same token, the dismissal of this appeal will not preclude the parents from applying for access again in the future if the adoption does not proceed or if it is unduly delayed. On the other hand, the existence of the appeal could interfere with the adoption process and therefore risk further delaying the children in finding the certainty about their future which the evidence before me establishes that they urgently require.

Taking these considerations into account and giving the best interests of the children the paramount consideration that the **Act** requires and that indeed everyone involved with this matter wants to secure, I will grant the CAS application to dismiss this appeal for failure to comply with the **Rules** relating to the service of the Notice of Appeal. The appeal is dismissed.

Cromwell, J.A.

C.A. No. 144100

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Appellants

- and -

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Respondent

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