

NOVA SCOTIA COURT OF APPEAL
Citation: Mason v. Mason, 2007 NSCA 43

Date: 20070416
Docket: CA 273801
Registry: Halifax

Between:

Shawna Mason

Appellant

v.

Shawn Mason

Respondent

Judge: The Honourable Justice Linda Lee Oland

Application Heard: April 5, 2007, in Halifax, Nova Scotia, In Chambers

Held: Registrar's motion to dismiss appeal dismissed.

Counsel: Mark T. Knox, for the appellant
Deborah I. Conrad, for the respondent

Decision:

[1] In November 2006, the appellant, Ms. Shawna Mason, filed a notice of appeal appealing orders that the child of her marriage to the respondent, Mr. Shawn Mason, must remain in this province as opposed to being allowed to return to British Columbia with her, dividing the matrimonial property equally, setting the amount of spousal support, and limiting its duration to three years. When her appeal was not perfected within six months in accordance with *CPR* 62.17, the Registrar brought a motion for an order dismissing the appeal for non-compliance with the *Rules*. The appellant sought an extension of time to file the appeal book. The respondent supported the Registrar's motion to dismiss.

[2] The motion was heard on April 5, 2007. In the course of submissions from counsel in Chambers, a matter came to light which, if resolved between the parties, might allow the appellant to perfect her appeal soon. It required further communication between the parties. Any decision on the Registrar's motion was delayed, pending advice from counsel as to its necessity. I have now received correspondence seeking a decision.

[3] For the reasons which follow, I would dismiss the Registrar's motion and extend the time permitted to file the appeal book.

[4] The appellant filed an affidavit in response to the motion, and was cross-examined on her depositions. Her evidence was that according to her counsel, the cost of the transcript required for the appeal would cost some \$3,500. She testified that she had lost her employment in January 2007, that she was presently working four hours a week in an accounts receivable position, and that she had just started a second job where she had worked one hour at \$25 per hour. The hours she could expect at the new place were as yet unknown.

[5] In addition, the trial decision almost a year earlier had ordered that the matrimonial home be sold. The judge noted that both parties felt that it would sell quickly. This did not happen. The appellant related that significant difficulties were found during a property inspection for a prospective purchaser, and work had had to be done to deal with those matters. According to her testimony, while the respondent and family had helped with improvements for sale purposes, she had spent \$1,000 to \$2,000 for certain repairs. The period that the house has remained unsold is longer than anticipated and the carrying costs, which were her

responsibility, are substantial. The appellant maintained that until she had the equity from the sale of the house, she could not purchase the trial transcript and perfect her appeal.

[6] In supporting dismissal of the appeal, the respondent indicated that he does not believe that the appellant has a *bona fide* intention to appeal, nor a reasonable excuse for the delay in perfecting within the requisite time. He pointed out that in 2006, she had had a taxable income of \$62,000 (\$50,000 employment plus \$1,000 per month spousal support), and submitted that the appellant should have put away money for the transcript following the June 2006 decision under appeal. In his view, she had not presented any compelling or exceptional circumstances which would warrant an extension of time.

[7] Even using the criteria suggested by the respondent, I am persuaded that the circumstances here are such that I should decide in favour of the appellant. That she always intended to appeal is supported in part by letters her counsel wrote to the Registrar on November 8, 2006 and February 2, 2007. The correspondence indicate his awareness of the *Rules* pertaining to appeals, explained his client's inability to obtain a transcript, and sought advice on how to safeguard his client's right to appeal. Those letters were copied to counsel for the respondent. The correspondence demonstrates a consciousness of the need to perfect within the time allowed, before the Registrar brought the motion to dismiss. Moreover, I detected nothing in the appellant's evidence in her affidavit or under cross-examination which would suggest that she is less than sincere in pursuing her appeal in relation to the child moving with her back to British Columbia and the amount and duration of spousal support. These are clearly matters of importance to the appellant's future plans.

[8] While the appellant acknowledged her 2006 income, I was presented with very scant information as to her expenses or obligations. The trial decision mentioned her line of credit of \$12,000 on separation, against which the respondent is to pay \$6000 by cash or spousal rollover of his share of RRSPs. The respondent's extensive cross-examination of the appellant did not uncover any extravagances or large cash purchases. The appellant testified that she could not take the risk of borrowing further against her line of credit, for fear of not be able to pay her ongoing obligations. There being so little evidence, I am not in any position to determine what the appellant's ability to save might have been, in the

latter part of 2006, nor what her spending priorities should have been had she have been able to do so.

[9] Certainly, the appellant's present situation - no full-time, and only minimal part-time work; no equity from the house; the monthly housing costs; ordinary living expenses; and the like - does not permit any accumulation of funds for the purposes of a transcript and appeal. Nothing I heard would indicate that the appellant is seeking to appeal for improper purposes. She has established good reason for her failure to perfect and her appeal should not be truncated at this point.

[10] I would dismiss the Registrar's motion to dismiss, and extend the time for the appellant to perfect her appeal by filing her appeal book on or before October 15, 2007. There will be no award of costs. The Registrar is, of course, free to bring another motion to dismiss should that become appropriate.

Oland, J.A.