NOVA SCOTIA COURT OF APPEAL
Citation: *Raymond v. White*, 2017 NSCA 47

Date: 20170511
Docket: CA 460593
Registry: Halifax

Between:

Paulette Raymond

Appellant

v.

Tamara White and Philip Harris

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	May 11, 2017, in Halifax, Nova Scotia in Chambers
Written Decision:	June 1, 2017
Held:	Motion to dismiss granted
Counsel:	Paulette Raymond, appellant in person Franceen Romney, for respondent Ms. White Philip Harris, not appearing

Decision:

Introduction

[1] On May 11, 2017, I heard a motion brought by the respondent Tamara White seeking to dismiss an appeal due to the appellant's failure to perfect. After hearing from the parties present, I advised the motion was granted, with reasons to follow. These are my reasons.

Background

[2] Tamara White is the mother of a young daughter. She has been involved in court proceedings with the child's father, Philip Harris. From the materials before me, it would appear that after some appearances before the Supreme Court (Family Division) the parents entered into a consent order setting out their respective parenting time.

[3] Paulette Raymond is the child's paternal grandmother. She brought her own application in the Supreme Court seeking contact with the child in addition to the time the child is with her father. A pre-hearing conference was held on February 2, 2017, with Justice Leslie J. Dellapinna. At the conclusion of that conference, dates for the hearing of Ms. Raymond's application were set for two days in September 2017. A written conference memorandum was issued by the presiding judge.

[4] On February 17, 2017, Ms. Raymond filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) identifying the Order or decision being appealed as the Pre-hearing Conference Memorandum. I will return to the grounds of appeal in due course.

[5] In accordance with usual procedure, Ms. Raymond as the appellant, filed a Notice of Motion for Date and Directions with Certificate of Readiness. The Certificate of Readiness, dated February 27, 2017, asserts:

- the order under appeal is the Pre-hearing Conference Memorandum;
- the transcript of the February 2, 2017, conference was ordered on February 16, 2017;
- the transcript would be available in four weeks; and
- the Appeal Book could be filed by April 17, 2017.

[6] The motion for date and directions was heard on March 8, 2017. Relying on Ms. Raymond's representations as to her readiness, the appeal hearing was set down for June 12, 2017. Ms. Raymond was directed to have the Appeal Book filed by April 17, 2017. She was directed to file her Factum and Book of Authorities by April 28, 2017. Ms. Raymond did not file the Appeal Book, Factum or Book of Authorities as directed by this Court.

[7] Ms. White filed the motion seeking to have the appeal dismissed on May 1, 2017. As noted earlier, the motion was heard on May 11, 2017, in Chambers. Mr. Harris did not attend the hearing. However, I am satisfied that he was aware of the matter, and knew his mother would be in attendance.

Law

[8] In seeking dismissal of the appeal, Ms. White relies upon *Civil Procedure Rule* 90.43. It provides:

> Appellant failing to perfect appeal
>
> 90.43 (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:
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> (a) the form and service of the notice of appeal;
>
> (b) applying for a date and directions in conformity with Rule 90.25;
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> (c) filing the certificate of readiness in conformity with Rule 90.26;
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> (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] There is no doubt that Ms. Raymond has failed to perfect her appeal as contemplated by Rule 90.43(1)(e). As noted above, I have discretion to provide further directions for perfection, or dismiss the appeal.

[10] In considering what outcome is appropriate, I have been guided by the approach set out by Saunders J.A. in *Islam v. Sevgur*, 2011 NSCA 114. Although addressing a Registrar's motion to dismiss for failure to perfect, the principles are equally applicable to a dismissal motion brought by a respondent. Saunders J.A. 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:
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> (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
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> (ii) whether the grounds of appeal raise legitimate, arguable issues.
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> (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.
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> (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.

Discussion

[11] Ms. Raymond responded to the motion for dismissal with a flurry of materials, all filed outside of the timeframe contemplated by the *Civil Procedure Rules*. This included what appeared to be a motion to consolidate this appeal with some other unidentified proceeding, a motion for fresh evidence, and a request for an order requiring Ms. White to pay for the transcripts of earlier court proceedings between herself and Mr. Harris.

[12] Ms. Raymond impressed upon this Court that her failure to file materials as directed, including the Appeal Book, Factum and Book of Authorities, must be excused given her status as a self-represented litigant. She says she must be accommodated. I interpret her argument in this regard, consistent with her actions, as advancing the proposition that her self-represented status means the *Civil Procedure Rules* do not apply to her (unless she chooses) and filing dates need only be met if convenient with her personal circumstances.

[13] One does not need to look far to find clear and compelling statements regarding the need to recognize the unique challenges faced by self-represented litigants. Flexibility and patience are often required when self-represented litigants find themselves before the Court. This does not, however, mandate a separate set of rules or complete restructuring of the conduct of proceedings because a litigant is self-represented. In *Assaf v. Assaf*, 2014 NSCA 87, I noted:

> [6] The Court is fully cognizant that pursuing an appeal is a daunting task for many litigants, especially those who are self-represented. It is not uncommon for the Court to show latitude with respect to the timeframe for perfecting the appeal, giving litigants the opportunity, with some instruction and cajoling along the way, to get their materials in order. However, that latitude must have limits.
>
> [7] By filing a Notice of Appeal, an appellant, self-represented or not, brings upon themselves the obligation to advance the appeal in an expeditious manner, and to abide by the requirements set out in the *Civil Procedure Rules*. The latitude afforded must be balanced against other important considerations, most notably the fairness to other parties and respect for the efficient and timely administration of justice.

[14] I am not satisfied Ms. Raymond has provided a reasonable explanation for her failure to perfect her appeal. It is clear she understands what is required to advance her appeal and has familiarity with the *Rules*. She says she has been too busy with other matters, legal and personal. Without more, such is not a reasonable excuse, self-represented or otherwise.

[15] However, the primary reason giving rise to the dismissal is that the grounds of appeal are entirely lacking in merit. There are simply no legitimate or arguable issues arising from the Pre-hearing Conference Memorandum.

[16] I have carefully reviewed the Memorandum. Although substantive matters may be determined in the course of such pre-hearing meetings, this does not appear to be such a case. There is nothing in the "order" under appeal that indicates Justice Dellapinna made any substantive decision. He merely attended to procedural matters.

[17] The following passages are informative:

> 2. A Conference was held on Thursday, February 2, 2017 with respect to Ms. Raymond's application. There was a decision earlier in the week by The Honourable Justice Chiasson of this Court dealing with the parenting arrangements between Ms. White and Mr. Harris. I have not seen the order but I have been told that the result of that order is to give Mr. Harris parenting time of approximately 42% of the time. Ms. Raymond is seeking her own time with Layla over and above the time she spends with Mr. Harris. She has filed numerous affidavits. I expressed my concern to Ms. Raymond that much of the contents of all her affidavits is inadmissible because rather than focusing on the facts she has presented argument and opinion. Ms. Raymond's attention is brought to Rule 39 of the *Nova Scotia Civil Procedure Rules* with respect to affidavits. Rule 39.02 provides that a party may only file an affidavit that contains evidence admissible under the rules of evidence, the *Civil Procedure Rules* or legislation. Rule 39.04 gives a judge the authority to strike an affidavit containing information that is not admissible or evidence that is not appropriate to the affidavit. A judge may strike a part of an affidavit or if the affidavit is so flawed may strike the entire affidavit. Her attention is also drawn to the decision of *Waverley v. Nova Scotia*, [1993] NSJ 151 which spells out what is and is not to be in an affidavit. An affidavit is to be confined to facts. It should not contain speculation or inadmissible material. It should not contain argument. I have strongly urged Ms. Raymond, and for that matter Mr. Harris, to seek legal advice before proceeding any further.
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> …
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> 5. The direct evidence at that trial will be limited to the affidavits of the parties and their Parenting Statements and the affidavits of any other witnesses they intend to call. All witnesses who provide affidavits must be available on the date of trial for cross-examination purposes or the Court has the discretion to not consider their affidavit.

6. The following filing deadlines will apply. It will be at the discretion of the judge to disregard any affidavit that is filed late.

7. The parties are reminded that the focus of this case should be on the best interests of Layla.

8. The filing deadlines are as follows:

   (a) Any additional affidavit Ms. Raymond intends to file shall be filed no later than **seven weeks prior to the hearing**. Given that she has already filed numerous affidavits I urge her not to file any more than one other affidavit and that affidavit should contain facts and not argument, conjecture or opinion, etc.

   (b) Mr. Harris' affidavit, given that he supports the position of Ms. Raymond, shall be filed no later than **five weeks prior to the hearing**.

   (c) Ms. White's affidavit in response shall be filed no later than **two weeks prior to the trial**.

…

10. At the hearing no further direct evidence will be given verbally unless the judge in his/her discretion allows it. The parties should not assume it will be allowed. Each will be given a reasonable opportunity to cross-examine the opposing witnesses but given that Ms. Raymond and Mr. Harris are adopting the same position their cross-examination of each other will be extremely limited. It will not be an opportunity to solicit further direct evidence in the disguise of cross-examination. (Emphasis in original)

…

[18] The merits of Ms. Raymond's application are clearly yet to be heard. This makes most of her nine detailed grounds of appeal appear, on first blush, quite nonsensical. A few excerpts give a flavour of her assertions of error:

> The judges' procedural failure to conduct a fresh inquiry with respect to the *best interests of the child analysis* on **November 25, 2016** is judicial mistake in law and principle and has led to unjust resolve and the potential for underserving "harm" to the child and her (paternal) significant others.
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> …
>
> The learned judge failed to suspend judgment and weigh the evidence proportionally with respect to the *best interests of the child principle*. The adjudication of the "whole of the circumstances" was not done.
>
> …

> The learned judge failed to *apply best practices* and abandon to *de facto status quo doctrine of the 20th century* when he interpreted the Maintenance and Custody Act. He failed to adopt a broad, inclusive and qualitative perspective on analysis that would serve the child and her family and avoid any underserving emotional hardship.
>
> …
>
> The learned judge failed to appreciate the plight of the Self-represented Litigant and the diverse abilities between a novice SRL and an experienced SRL. The Appellant's professional expertise involving diverse learners and accommodation was not utilized, appreciated or considered by the learned judge.
>
> …
>
> The Appellant has relied on these humanistic and compassionate grounds for this appeal as real world issues facing diverse families when separating parents need to access the Courts across the country. The deconstruction of the paternal family's relationships over the last four months because of the traditional interpretation on the best interests of the child has resulted in many mistakes in law and mixed law and fact.

[19] The only ground of appeal which remotely touches upon the February 2nd Memorandum concerns the conference judge's reference to affidavits. Ms. Raymond claims:

> The learned judge gestured the voluminous evidence the Appellant filed was mostly inadmissible but he failed to identify any of the particulars that would make the evidence inadmissible specifically. The learned judge failed to outline particulars of the evidence as to the inadmissibility of the evidence.
>
> The judge failed to appreciate the substantive anecdotal and qualitative narrative that represented her evidence and that of her son's evidence in support of the best interests of the child analysis that was filed separately on **November 22, 2016**.

[20] The problem with the above criticism is that the conference judge did not make a final ruling on admissibility. He did not strike any of the contents; rather, he left that to the hearing judge. Justice Dellapinna did issue a caution to Ms. Raymond that the affidavit materials as presently filed would likely be found to be inadmissible. He made no binding ruling. He was giving Ms. Raymond notice that her intended evidence may need to be reframed for the purpose of the eventual hearing. She still has the opportunity to act on that input should she wish.

[21] It was only after reviewing the materials filed by Ms. Raymond and hearing her lengthy submissions, did her ultimate goal become apparent. Ms. Raymond is very displeased with how the proceeding between her son and Ms. White unfolded

in the Supreme Court (Family Division). The parties appeared before a number of judges in the fall of 2016. This included a hearing where witnesses, including Ms. Raymond, gave evidence. From the materials before me, it appears as if the matter between Mr. Harris and Ms. White concluded on January 30, 2017, with a consent order of Justice C. Lou Ann Chiasson. That order provided the child was in the joint custody of her parents, with a shared parenting regime.

[22] Ms. Raymond attempted, on her son's behalf, to appeal various decisions made in the proceeding with Ms. White. A Notice of Appeal was rejected on one occasion for being out of time. It is abundantly clear that Ms. Raymond's goal is to have this Court re-visit the order which is now in place between her son and Ms. White. She is also upset that at one point last fall, Mr. Harris' access was suspended. Ms. Raymond raised concerns surrounding the appropriateness of that decision and the professionalism of Ms. White's counsel, both of which she wants this Court to address.

[23] Ms. Raymond is attempting to use the February 2, 2017, Pre-hearing Conference Memorandum as a springboard to appealing what she feels are errors in the now concluded matter between her son and Ms. White. That is not appropriate or permittable under the *Rules*. Her grounds of appeal do not meaningfully relate to anything contained within the February 2, 2017, "order"; rather, they are a means of criticizing the outcome of the proceeding between her son and his former partner.

[24] Ms. Raymond's appeal is meritless. Giving her a further opportunity to perfect is not warranted. It would be unreasonable to put Ms. White through the expense of responding to meaningless criticisms, and a waste of scarce judicial resources.

Conclusion

[25] The respondent's motion to dismiss the appeal is granted. Ms. Raymond shall pay to the respondent Ms. White costs of $500.00, all inclusive.

Bourgeois J.A.