

NO. AC 27052 : SUPREME COURT
NICHOLAS PERRICONE :
VS. :
MADELEINE PERRICONE : APRIL 12, 2006

**PETITION TO SUPREME COURT FOR CERTIFICATION
FOR REVIEW FROM APPELLATE COURT**

Pursuant to Conn. Gen. Stat. §51-197f and P.B. §§84-1 *et seq.*, the Defendant in the above-captioned matter respectfully petitions the Supreme Court for certification to appeal from the judgment (of dismissal) of the Appellate Court in this case.

1. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- Whether the Appellate Court erred in granting the Plaintiff's Motion to Dismiss the instant appeal;
- Whether the Appellate Court erred in dismissing the Defendant's Motion for Extension of Time to File Late Appeal Nunc Pro Tunc (dated November 2, 2005), and the Defendant's Request for Leave to Amend Motion for Extension of Time to File Late Appeal Nunc Pro Tunc;
- Whether the Appellate Court erred in denying the Defendant's Motion for Permission to File a Late Appeal (dated November 17, 2005).

2. STATEMENT OF BASES FOR CERTIFICATION

- A questions of great public importance is involved in this matter simply because the Appellate Court dismissed an appeal focused on the best interests of a minor child because the appeal was a week late, notwithstanding there was no prejudice to the Plaintiff;
- The Appellate Court failed to judiciously apply P.B. §60-1 in that the dismissal of the instant appeal worked an unnecessary injustice on the minor child by depriving her of a review of a sole custody order and on the Defendant by depriving her of review of sacred constitutional rights involving family and religious freedom;
- The Defendant has no other practical means of redress concerning the dismissal of the appeal, notwithstanding the uncontroverted evidence that the Defendant intended all along to appeal any unfavorable decision on the sole custody issue and the admission by Defendant's trial counsel in her Motion for Permission to File a Late Appeal that the late filing was due solely to counsel's inadvertence resulting from serious personal and medical issues.

3. SUMMARY OF THE CASE

The underlying appeal in this matter arose from the trial court's (postjudgment) order of August 10, 2005, awarding sole custody of the parties' minor child, Caitlin, to the Plaintiff. On August 24, 2005, the Defendant filed a

motion for extension of time (20 days) to file appeal, which motion was granted the same day. On August 30, 2005, the Defendant filed a motion for reconsideration of the sole custody order. That motion was denied by the trial court on October 4, 2005. The appeal was filed by trial counsel, Lori Welch-Rubin, on October 31, 2005. On November 2, 2005, the undersigned, having been retained to take over the appeal, filed a Motion for Extension of Time to File Late Appeal Nunc Pro Tunc. The Plaintiff objected to that motion by opposition dated November 7, 2005. The Plaintiff in turn filed a Motion to Dismiss dated November 9, 2005. The Defendant filed a Request for Leave to Amend Motion to File Late Appeal Nunc Pro Tunc on November 14, 2005. The Defendant filed a Statement in Opposition to the Motion to Dismiss dated November 17, 2005. The Defendant filed a (second) Motion for Permission to File Late Appeal dated November 17, 2005.¹

By Order dated February 8, 2006 (DiPentima, J., recused), the Appellate Court granted the Plaintiff's motion to dismiss. By (separate) Order dated February 8, 2006 (DiPentima, J., recused), the Appellate Court dismissed the Defendant's motion for extension of time to file appeal nunc pro tunc (dated November 2, 2005). By (separate) Order dated February 8, 2006 (DiPentima, J., recused), the Appellate Court denied the Defendant's motion to file late appeal (dated November 17, 2005).

The Defendant filed a Motion for Reconsideration En Banc dated February 21, 2006. By Order dated March 22, 2006 (Bishop, DiPentima and Gruendel, Js., recused), the Appellate Court denied that motion.

¹ The second motion to file late appeal was filed by trial counsel, and contained an affidavit in support of said motion claiming a basis for good cause to permit the late filing of the appeal. No statement in opposition to this second motion was filed.

4. ARGUMENT

As was specifically set forth in the Defendant's affidavit dated November 14, 2005, filed in support of her request for leave to amend motion to file late appeal, she at all times intended to file a timely appeal of any adverse final judgment of the court concerning the postjudgment custody issue. See Affidavit of Madeleine Perricone dated November 14, 2005. Furthermore, she made that fact clearly known to trial counsel. See Affidavit of Lori Welch-Rubin dated 11/17/05. For reasons stated in the affidavit filed by Defendant's trial counsel in support of her Motion for Permission to File Late Appeal dated November 17, 2005, the appeal was filed 27 days after the order denying the Defendant's motion for reconsideration. That affidavit not only states clearly the intention of the Defendant to appeal the trial court's decision, but counsel in that affidavit takes full responsibility for the tardy filing of the appeal. *Id.* Furthermore, counsel sets forth a litany of personal reasons, both medical and family-related, as to why the decision by the trial court on the underlying motion for reconsideration was not discovered until October 26, 2005, five (5) days after the 20-day appeal period had expired. *Id.* In addition, trial counsel sets forth specific facts concerning two (2) other appeals pending during the relevant time frame of October 1 to October 26, 2005, wherein the court granted various motions and requests based upon counsel's medical condition.

The issue before the Appellate Court did not involve a matter of the court's subject matter jurisdiction because the 20-day time limit provided by Practice Book § 63-1 (a) is not subject matter jurisdictional. *Kelley v. Bonney*, 221 Conn. 549, 559

(1992); *Connelly v. Doe*, 213 Conn. 66, 69 n.5 (1989); C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 4.8, pp. 144-45. “In the absence of jurisdictional barriers, appellate tribunals must exercise their discretion to determine whether a late appeal should be permitted to be heard. *Kelley*, 221 Conn. at 559; also see *State v. Stead*, 186 Conn. 222, 227-29 (1982). “Such discretion . . . imports something more than leeway in decision making and should be exercised in conformity with the spirit of the law and should not impede or defeat the ends of substantial justice...” (Citations omitted; internal quotation marks omitted.) *Burton v. Browd*, 258 Conn. 566, 570 (2001). In addition, the design of the rules of appellate procedure being to facilitate business and advance justice are to be interpreted liberally in any case where it is manifest that a strict adherence to them will work surprise or injustice. See Practice Book § 60-1.

Practice Book § 60-2 (6) provides that the court may order that a party for good cause shown may file a late appeal. Practice Book §60-2(6). This provision places the burden on the party seeking permission to file a late appeal to establish good cause for its failure to file a timely appeal. Nevertheless, the court may exercise its discretion to consider late appeals, even when a party timely files a motion to dismiss an untimely appeal. *Id.*; *Kelley*, 221 Conn. at 559 n.4. The Appellate Court explicitly has articulated its rationale for this policy and its awareness of when it is appropriate. When a motion to dismiss that raises untimeliness is, itself, timely filed pursuant to P.B. § 66-8, it is ordinarily the court’s practice to dismiss the appeal if it is in fact late, if no reason readily appears on the record to warrant an exception to our general rule. *Alliance*

Partners, Inc. v. Voltarc Technologies, Inc., 263 Conn. 204, 213 (2003). Though the court ordinarily dismisses late appeals that are the subject of timely motions to dismiss, it does so knowing also that its discretion can be tempered by Practice Book §60-2 (6), which provides for the filing of late appeals for good cause shown." *Nicoll*, 38 Conn. App. at 335-36. In addition, the court also eschews "a mechanistic interpretation of our appellate rules in recognition of the fact that an unyielding policy requiring strict adherence the fact that an unyielding policy requiring strict adherence to an appellate time limitation no matter how severe or unfair the consequences does not serve the interests of justice." *Banks v. Thomas*, 241 Conn. 569, 586 (1997). The defendant asserts that the circumstances under which her trial counsel was attempting to keep up with her practice of law under extraordinary conditions (as set forth specifically in her affidavit), the lack of prejudice to the plaintiff, and the fact that the case revolves around the best interests of a minor child together constitute good cause. Although the Defendant did have a pro se appearance on file, she was relying on her counsel fully to protect her legal rights. In fact, the Defendant had no knowledge that her counsel was unavailable and preoccupied due to the crises enumerated in the motion to file late appeal dated November 17, 2005. See Affidavit of Lori Welch-Rubin dated November 17, 2005.

The defendant concedes that the Connecticut courts have adopted a policy that gives precedence to those appeals that are timely filed. See *Blue Cross/Blue Shield of Connecticut, Inc. v. Gurski*, 47 Conn. App. 478, 481 (1998); see also *Nicoll v. State*, 38 Conn. App. 333, 335 (1995). At the same time, however, our rules vest

broad authority in the appellate courts for the management of their dockets. The supervision and control of proceedings on appeal are with the court having appellate jurisdiction from the time the appeal is filed. The court may on its own motion or upon motion of any party order that a party for good cause shown may file a late appeal unless the court lacks jurisdiction to allow the late filing. See P.B. 60-2(6); *Alliance Partners*, 263 Conn. at 214. Furthermore, P.B. § 60-3 provides, in addition, that “in the interest of expediting decision, or for other good cause shown, the court in which the appeal is pending may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its own motion and may order proceedings in accordance with its direction.” Practice Book §60-3. The Plaintiff makes reference in his motion to dismiss to our Supreme Court’s affirmation of such dismissals. However, he also acknowledges in discussing both *Alliance Partners* and *Nicoll* that in each case, the court made specific reference to exceptions to the general rule of timeliness—for good cause shown and for unusual circumstances.

In the instant case, good cause abounds for the filing of a late appeal. First, the appeal, if late, is at most one (1) week tardy. The plaintiff fails in his motion even to make a vain attempt to assert prejudice concerning this time period in the context of this case. However, the Defendant makes it abundantly clear in her affidavit (as if it were not self-evident in any event given the history of this case) that she fully intended to appeal any unfavorable decision by the trial court concerning the custody of her daughter. While the Defendant had a pro se appearance in the court file, she did not receive notice of the court’s decision denying the motion for

reconsideration until October 25, 2005, Day 21 of the appeal period running from the October 4, 2005 denial of the motion for reconsideration. Furthermore, this is not a case of hard, quantifiable damages suffered by either party. This is a case about a plaintiff father and a little girl who were operating under a **stipulated** joint custody order, and a defendant mother who found herself the unwitting subject of a modification motion filed by the plaintiff on the heels of their stipulation, citing, incredibly, acts and behavior of the Defendant apparently theretofore unknown to the Plaintiff yet detrimental to their minor child.

In reviewing the propriety of denying a late appeal, the court has said that it will consider whether the exercise of such discretion constitutes a manifest abuse, surprise or injustice. See *Burton v. Browd*, 258 Conn. 572 (2001); *Ramos v. Commissioner of Corrections*, 248 Conn. 52 (1999). Moreover, this court has eschewed a “mechanistic” interpretation of our appellate rules in recognition of the fact an unyielding policy concerning timeliness does not always serve the interests of justice. *Banks v. Thomas*, 241 Conn. 569, 586 (1997). Here, as for prejudice by virtue of the late filing, the plaintiff has not claimed any. The closest he comes is on Page 6 of his Statement in Opposition dated November 6, 2005, in which he avers that the “continued delay...leaves the life of the child...in limbo.” Statement in Opposition to Motion for Extension of Time to File Appeal Nunc Pro Tunc at p.6. While that may be technically true, having won sole custody it would seem that “limbo” inures to the Plaintiff’s benefit in that the status quo is clearly favorable to him, not the Defendant. In the eyes of the Defendant, it is the **dismissal of her appeal** that is prejudicial—not just to her, but to her daughter.

It is also vital for this court to note that the underlying appeal in this matter implicates the Defendant's constitutional rights--as a parent, and as an individual afforded freedom of religion. The trial court paid particular attention in its memorandum of decision to the religious issues between the parties vis-à-vis the minor child, concluding, for example, that the Defendant's actions in certain regard were "not illustrative of a person invested in the spirit or practice of joint custody" (notwithstanding the substance of the Joint Parenting Plan to the contrary) (see Memorandum of Decision dated August 10, 2005, reproduced in attached appendix)

Last, and perhaps most important of all, remains the fact that this case is about a **child**. It indeed involves her parents, but ultimately it is about the best interests of an 8-year old named Caitlin Perricone. The abrupt (and, frankly, mysterious) leap from joint to sole custody conjured up by the trial court on a motion filed by the Plaintiff merely weeks after a stipulated joint custody order deserves review by this court if for no other reason than the permanent effect it will have on the life of a child.

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