

NO. AC 27052

APPELLATE COURT

NICHOLAS PERRICONE

VS.

MADELEINE PERRICONE

FEBRUARY 21, 2006

MOTION FOR RECONSIDERATION EN BANC

Pursuant to Practice Book §71-5, the defendant in the above-captioned matter respectfully moves the court to reconsider *en banc*¹ its orders dated February 8, 2006, granting the plaintiff's Motion to Dismiss, denying the defendant's Motion for Permission to File Late Appeal, and dismissing the defendant's (initial) Motion to File Late Appeal Nunc Pro Tunc and defendant's Request for Leave to Amend Motion to File Late Appeal Nunc Pro Tunc. In support thereof, the defendant states as follows:

1. BRIEF HISTORY

This appeal flows from the trial court's (postjudgment) order of August 10, 2005, awarding sole custody of the parties' minor child 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

¹ The defendant assumes the court will consider the instant motion *en banc* in any event pursuant to P.B. §66-2(d), which required *en banc* consideration of the underlying motions given their dispositive nature.

the court on October 4, 2005.² This appeal was filed by trial counsel on October 31, 2005. On November 2, 2005, the undersigned, having been retained to take over the appeal of this matter, 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 filed a Motion to Dismiss dated November 9, 2006. The defendant filed a Request for Leave to Amend Motion to File Late Appeal Nunc Pro Tunc on November 14, 2006. The defendant filed a Statement in Opposition to the Motion to Dismiss dated November 17, 2006. The defendant filed a (second) Motion for Permission to File Late Appeal dated November 17, 2006.³

2. SPECIFIC FACTS

As is specifically set forth in the defendant's affidavit dated November 14, 2005, 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. For reasons stated in the affidavit filed by plaintiff'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 states clearly the intention of the defendant to appeal the trial court's decision, and counsel in that affidavit takes

² Notice of this order was not received by the defendant herself until October 25, 2005. Upon information and belief, her trial counsel received the order October 26, 2005.

³ 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. The defendant did not receive a statement in opposition to this second motion.

full responsibility for the tardy filing of the appeal. See Affidavit of Lori Welch-Rubin dated November 17, 2005. Furthermore, counsel in that affidavit 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 in her affidavit 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 (of which this court can take judicial notice).⁴

3. LEGAL BASIS

P.B. §60-2(6) provides that this court may permit a late appeal “for good cause shown.” P.B. §60-2(6). “Good cause” has routinely been defined by the Connecticut courts as “a substantial reason amounting in law to a legal excuse for failing to perform an action required by law [and] [l]egally sufficient ground or reason.” See *Schoolhouse Corp. v. Wood*, 43 Conn. App. 586, 591 (1997) (citations omitted). 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.

⁴ There was actually a third appeal involving Attorney Welch-Rubin pending during the relevant time period (*Scott v. Somers*, AC 26115), in which counsel was permitted to file a brief late. (It is not known to the defendant whether there was objection to any of the requests for late filings referenced by counsel in her affidavit).

In *Nicoll v. State*, 38 Conn. App. 333 (1995), the court held that to permit untimely appeals conveys an unfair benefit to the appellant “to the detriment of others with appeals pending who...have a right to have their appeals determined expeditiously.” *Id. at 336*. It seems to the defendant that the only detriment to “timely” appeals (appellants) by the acceptance of a late appeal is one additional case on the court’s docket which arguably slows the disposition of the docket as a whole in light of the finite judicial resources available to adjudicate pending appeals. However, the filing of a timely appeal has the same effect (by adding to the court’s docket). In reality, it is the dismissal of a late appeal and the resultant “freeing up” of the docket by one case (arguably benefiting all other appellants with appeals pending) that is the tangible “benefit” in terms of judicial resources and timely disposition that would seem to be behind the court’s reasoning in *Nicoll*. That is to say, there is in fact no direct relationship between the concept of an “unfair benefit” being bestowed upon a late filer and the “detriment” to other appellants with pending appeals who, had the late case been timely filed, would have been impacted nonetheless. Put simply, the dismissal of late appeals just makes everything else move faster by shrinking the docket. Yet, in a case such as this, the relatively miniscule (and certainly immeasurable) delay to other appeals should in fairness and equity yield to the right to appeal bona fide legal issues concerning custody of a minor child that are at the heart of this case.

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.

Last, and perhaps most important of all, is the fact that this case is about a child. It involves the child’s parents, but ultimately it is about the best interests of an 8-year old named Caitlin Perricone. The abrupt and mysterious leap from joint to sole custody ordered 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 effect it will likely have permanently on the life of the minor child. The Preliminary Statement of Issues sets forth a plethora of legitimate issues that merit consideration by this court under the totality of the circumstances.

WHEREFORE, for all the foregoing reasons, the defendant respectfully requests the court reconsider its orders of February 8, 2006 as aforesaid and to reinstate the instant appeal to the docket.

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