NOVA SCOTIA COURT OF APPEAL
Citation: *J.B.P. v. L.J.S.*, 2007 NSCA 34

Date: 20070328
Docket: CA 276228
Registry: Halifax

Between:

L.J.S.

Applicant/Appellant

v.

J.B.P.

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Application Heard:	March 21, 2007, in Halifax, Nova Scotia, In Telephone Chambers
Held:	Application for leave to extend time for filing notice of appeal granted.
Counsel:	Lorieann Whittaker, for the applicant/appellant Raymond Jacquard, for the respondent

Decision:

[1] On August 8, 2006 Chief Judge Comeau of the Family Court released his decision regarding child support for the children of the parties, and spousal support for the applicant. His decision was not appealed within the 30 days set out in *Civil Procedure Rule* 62.02. Some seven months after the decision, the applicant applies for an order extending the time to file her notice of appeal.

[2] Some background on the application that came to Court of Appeal Chambers would be helpful. In the spring of 2006, the parties had agreed that for the purpose of the Child Support Guidelines, the father's income was $30,000 and the table amount for the children was $447 per month, retroactive to June 1, 2005. In his decision, Chief Judge Comeau imputed his income at $40,000 and the table amount for the children at $579. He ordered two lump sum payments totalling $4,500, to cover the period from separation in early summer 2005 to the end of February 2007, in full satisfaction of the applicant's claim for spousal support.

[3] Not until January 16, 2007 did the applicant apply for an order to extend the time to file her notice of appeal, with the application to be heard on February 15, 2007. The notice was served on the respondent personally, rather than his lawyer.

His lawyer having learned of the application only on his return from an extended absence just prior, the hearing did not proceed on the February date. The applicant subsequently applied be heard on March 21, 2007 and the hearing proceeded then.

[4] Before turning to this particular application, I will set out the test for an order extending the time to appeal. It was concisely stated by Bateman, J.A. in *Bellefontaine v. Schneiderman*, 2006 NSCA 96:

> 3. A three part test is generally applied by this court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (*Jollymore Estate v. Jollymore* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at ¶ 22):
>
> > (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
> >
> > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
> >
> > (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.
>
> 4. Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (*Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers).

[5] The materials filed in support of this application to extend consisted of the applicant's affidavit, a copy of the decision, and the proposed notice of appeal. After deposing that after she and the respondent separated in May 2005, she and her sons were left with absolutely no money, that she immediately sought legal advice at Legal Aid, that her first lawyer obtained the order paying her $447 per month, and that commencing in September 2005, she was subsequent represented by Marci Lin Melvin, Q.C., the applicant stated that the trial concluded in August 2006, and the decision was rendered on August 8, 2006. Her affidavit continued:

> 8. THAT between three and five days later I did receive a telephone call from Marci Lin Melvin, Q.C., wherein she left a message on my machine indicating that we won the case, and to have a great rest of the summer. She did tell me that I would get $579.00 per month in child support based on the imputed income of $49,000.00 and two lump sum, one time payments of spousal support.
>
> 9. THAT at the time that I received the telephone call, I already had an appointment scheduled approximately two weeks later, with my lawyer. I decided to wait until my appointment to speak to her about the decision, and the fact that I was not pleased with it. The procedure in their office takes about four weeks to see someone, so my scheduled appointment would be quicker.
>
> 10. THAT less than one day prior to my appointment, I was advised by her secretary that she was canceling all her appointments that day, that she would be away and I was told to re-book my appointment with her.
>
> 11. THAT approximately three to five days later, I did call Ms. Melvin, Q.C., to re-book my appointment and was told that I no longer had a lawyer because my

matter was completed. I was told I had to re-apply for legal aid and be assigned a new lawyer. I did so, and was assigned Tim Landry in October 2006.

12. THAT all of the issues in my case were never resolved. I had an additional court appearance in October 2006, and access was still outstanding. Those matters still have to be set for a hearing.

13. THAT I did meet with Mr. Tim Landry approximately three times, after the October 2006 court appearance. At that time, he did inform me that there was a time limit for an appeal. I advised him then that I was appalled that no one had informed me of that fact. Prior to speaking with him, I had no idea that I was required to file my appeal within a certain time period. At that point, Mr. Landry advised me that he would inquire as to the possibility of my getting an outside lawyer to deal with my appeal of the decision from August 2006.

14. That it was not until November 21st, 2006 that I was able to meet with my new lawyer, Lorieann Whittaker of Pink, Star, Murphy, Barro, in Yarmouth, Nova Scotia.

15. THAT since that time, I am advised that Ms. Whittaker has been attempting to get together my documents to have an extension granted so that I may appeal the August 2006 judgment.

16. THAT it is my opinion that the Legal Aid Office is entirely responsible for my missing the deadline to file my appeal. Had someone advised me of that fact, I would have filed the necessary documents on my own if it was necessary.

[6] The proposed notice of appeal makes it clear that the applicant wishes to appeal the order pertaining to spousal support only. The grounds allege that the judge erred by not fully considering certain factors listed in s. 4 of the *Maintenance and Custody Act of Nova Scotia*, by not considering the separate property of each

of the parties, by not obtaining full financial disclosure, and by considering her case to be an exceptional one to which lump sum maintenance should apply.

[7] I am persuaded that the applicant has a reasonable excuse for the delay in appealing the August 8, 2006 decision. According to her affidavit, it was not until after a court appearance that October that she learned of a time limit for an appeal. By then, the 30 day period had already expired. It is reasonable to infer from his arranging for an outside counsel, that her Legal Aid lawyer at the time was not able to deal with the appeal. The applicant and her current counsel first met on November 21, 2006 and the application to extend was filed on January 16, 2007. Where her current counsel had not represented her at the trial and the holiday period intervened, the duration between that first meeting and the filing of the application is not entirely unrealistic. While she states that had she known of the deadline to appeal, she would have filed the documents on her own if necessary, the applicant did not do so in the months between learning of the time limit and the January 2007 filing of her application to extend. However, it seems that the appellant was diligent during that period; she was always in the course of obtaining counsel, or awaiting a meeting with counsel. When she learned of the filing

deadline, it had already expired and it was no longer possible to simply file a notice of appeal.

[8] However, whether the applicant has demonstrated a *bona fide* intention to appeal while the right to appeal existed, and whether there are compelling or exceptional circumstances which would warrant an extension of time, are less clear.

[9] The applicant did not describe her reaction on learning of the decision as one of upset, shock or outrage, nor did she depose that she made a firm decision to appeal. Rather, the applicant states only that she was not pleased with the decision.

[10] However, it is readily apparent from the application that, in the applicant's view, spousal support was critical to her financial stability and future. In his decision, the judge accepted that the applicant had assumed the heaviest burden in regard to the joint debts, and noted that until the separation she was a stay at home mother, that she was presently on stress leave from the job she had taken at a call centre in an attempt to become self-sufficient, and that she wants to improve her

education for the benefit of herself and her children. His award of lump sum spousal support of $4,500 concluding February 28, 2007 is very different from the relief sought in her proposed notice, namely spousal support on a monthly basis and of unlimited duration. Again, the applicant was without legal counsel in regard to any appeal for most of the period after the decision. Where she was perhaps uncertain as to grounds for appeal, the most that might be said based on her affidavit is that while the right to appeal existed, she intended to seek legal advice regarding an appeal and, if favourable, to appeal.

[11] None of the applicant's materials claim compelling or exceptional circumstances. She does not depose that, relying on advice given by her lawyer, she has an arguable issue. Nor did I did receive any submission arguing "a strong case for error at trial and real grounds justifying appellate inference." In her proposed notice, the applicant detailed several grounds of appeal which on their face do not appear frivolous. However, I do not have sufficient information before me to discern whether they, or any of them, are arguable issues.

[12] While I am not satisfied that the three-part test has been completely met, I am of the view that an extension of the time to file an appeal should be granted in order to do justice between the parties.

[13] As indicated in *Jollymore*, supra in regard to the three-part test, cases cannot be decided on a grid or a chart. That three-part test cannot be considered the only one for determining whether the time for bringing an appeal should be extended: see *Tibbetts*, supra. The circumstances of each case must be considered, and the ultimate objective must be to do justice between the parties.

[14] The applicant sought legal advice immediately after separation and has conscientiously taken action in pursuing her children's interest and her own. Her inability to obtain and confer with counsel, a circumstance not of her own making, is the substantial reason for the delay in appealing the August 8, 2006 decision. She has demonstrated a reasonable excuse for the delay. Moreover, a dismissal of her application to extend would have serious consequences for the applicant. Were it granted, the prejudice to the respondent would be considerably less. He argues that the decision sought to be appealed having been rendered months ago, he did not expect to have to contend with an appeal or the possibility of additional costs.

However, the passage of time is not of itself determinative for an application to extend. Rather, whether its duration is acceptable requires an examination of the reasons for the delay. Nor is the possibility of a future award of costs against the respondent sufficient to refuse the application to extend.

[15] In the interests of justice, leave is granted to extend the time to file the notice of appeal to April 5, 2007. Neither party having sought costs, none are awarded.

Oland, J.A.