NOVA SCOTIA COURT OF APPEAL
Citation: ***Kenny v MacDougall***, 2007 NSCA 126

Date: 20071212
Docket: CA 280038
Registry: Halifax

Between:

Norah Marie Kenny

Appellant

v.

David William MacDougall

Respondent

Judges: Bateman, Cromwell and Fichaud, JJ.A.

Appeal Heard: December 12, 2007, in Halifax, Nova Scotia

Written Judgment: December 13, 2007

Held: Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Bateman and Fichaud, JJ.A. concurring.

Counsel: Ronald Richter, for the appellant
Jean DeWolfe and Nicole Mahoney, for the respondent

Reasons for judgment: (Orally)

[1] We are all of the view that the appeal should be dismissed.

[2] Warner, J. varied the parties' corollary relief judgment by deleting Mr. MacDougall's obligation to "... continue the existing medical/dental plan coverage for [his former spouse, Ms. Kenny] so long as the plan permits ...". Ms. Kenny appeals.

[3] The parties were divorced in 2001. The health coverage obligation, along with many other provisions, had been incorporated into the corollary relief judgment from the Minutes of Settlement to which the parties had agreed. Mr. MacDougall has remarried and Ms. Kenny has a new partner. The case has been argued in the Supreme Court and here on the basis that the policy permits Mr. MacDougall to maintain coverage for his former spouse and we assume, although we have not been asked to decide, that this is the case.

[4] Ms. Kenny submits that the judge wrongly concluded that any variation of the health coverage provision was justified. The parties were and are in agreement about the applicable legal principles. Although the appellant attempted to characterize the issue as one of law, the appellant's submission, in effect, is that the judge erred in his application of the legal principles to the facts.

[5] This is a question of mixed law and fact. The applicable standard of appellate review is the "palpable and overriding error standard"; that is, absent an error in legal principle, we may intervene only if persuaded that the judge made a clear and determinative error: see, for example, **Hendrickson v. Hendrickson**, 2005 NSCA 67, (2005), 232 N.S.R. (2d) 131 (C.A.) at para. 6.

[6] The judge linked the health coverage issue to Mr. MacDougall's spousal support obligations set out in the Minutes of Settlement and the corollary relief judgment. He found (and this conclusion is not challenged) that those spousal support obligations had been discharged. The judge concluded, looking at the agreement as a whole, that it was not consistent with the parties' intentions at the time of their agreement or with the support provisions of the **Divorce Act** that Mr. MacDougall would be required to maintain his former spouse on his medical/

dental insurance after he had discharged his other spousal support obligations to her, he had remarried and she was in a new relationship. As he said:

> The circumstances have substantially changed, materially changed, beyond the reasonable contemplation of the parties; and to enforce that clause as a forever clause, in my view, would not promote the support objectives of the **Divorce Act**.

[7] We are not persuaded that the judge made any clear and determinative error in applying the legal principles to the facts of the case in the way he did.

[8] The appeal is dismissed. The respondent is entitled to costs fixed at $1,000.00 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.