

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Whalen v. Whalen*, 2018 NSCA 37

**Date:** 20180502

**Docket:** CA 464185/CA 460889

**Registry:** Halifax

**Between:**

Susan Whalen

Appellant

v.

Kenneth Whalen

Respondent

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**Judge:** The Honourable Justice David P.S. Farrar  
**Appeal Heard:** March 27, 2018, in Halifax, Nova Scotia  
**Subject:** Family law. Variation of spousal support. *Functus officio*.  
**Summary:** Mr. Whalen filed a Variation Application seeking to have his spousal support obligation reduced and the requirement to maintain life insurance as security for spousal support decreased. Ms. Whalen, in her reply, sought an increase of spousal support.

The matter first came on for hearing before Justice Elizabeth Jollimore. After hearing evidence, she scheduled a date for the parties to make final oral arguments. However, on the date scheduled for oral argument, the judge rendered her final decision and dismissed both Mr. Whalen's and Ms. Whalen's applications. After being made aware by Mr. Whalen's counsel that the parties thought they were there to do final argument, the judge brought the matter to the attention of ACJ O'Neil. ACJ O'Neil arranged a telephone conference between the parties where he asked them to consider a solution to the potential procedural misstep.

The parties subsequently agreed to retry the matter before another judge.

Mr. Whalen, who had filed a Notice of Appeal from Justice Jollimore's decision, discontinued his appeal.

The matter was reheard by Justice Beryl MacDonald, who allowed Mr. Whalen's application, reduced the amount of spousal support, reduced the amount of insurance required, and put an end date to the payment of spousal support.

Ms. Whalen appealed the decision of Justice MacDonald. Mr. Whalen then had his appeal from the decision of Justice Jollimore reinstated.

**Issues:**

- (1) Was the Supreme Court, Family Division *functus officio* as Justice Jollimore had given her decision and issued an order?
- (2) Did Justice Jollimore err in failing to give the parties an opportunity to present final argument?

**Result:**

Both appeals are allowed. The Supreme Court, Family Division was *functus officio* once the Court issued its order. It was not open for the Court to rehear the matter. Further, the parties could not consent to giving jurisdiction to the Court.

Mr. Whalen's appeal was also allowed. It was an error for the judge not to allow the parties to make final arguments.

Neither party sought costs and none are awarded.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 16 pages.*