NOVA SCOTIA COURT OF APPEAL
Citation: *MacQuarrie v. MacQuarrie*, 2019 NSCA 68

Date: 20190808
Docket: CA 490058
Registry: Halifax

Between:

Susan MacQuarrie

Applicant

v.

John Roderick MacQuarrie

Respondent

Judge:	Bryson, J.A.
Motion Heard:	August 8, 2019, in Halifax, Nova Scotia in Chambers
Written Release:	August 9, 2019
Held:	Motion dismissed
Counsel:	Patrick J. Eagan, for the appellant Terrance Sheppard, for the respondent

Decision:

[1] Susan MacQuarrie brought a motion in chambers to extend time to appeal the dismissal of her application before Justice Kevin Coady in which she sought a variation of child and spousal support. I dismissed the motion in chambers with reasons to follow. These are they.

[2] *Civil Procedure Rule* 90.37(12)(h) gives a judge in chambers authority to extend time to file an appeal. The test usually applied is:

> (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.
>
> (*Jollymore Estate v. Jollymore*, 2001 NSCA 116 at ¶ 22.)

[3] The *Jollymore* test is not exclusive – the ultimate question is whether justice requires that an extension be granted: *Farrell v. Casavant*, 2010 NSCA 71 at ¶ 17; *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2 at ¶ 19.

[4] Mr. MacQuarrie concedes steps one and two of the three-part *Jollymore* test but complains that there is no sustainable ground of appeal clearly articulated by Ms. MacQuarrie, whose proposed Notice of Appeal is confined to this:

> (1) The Learned Trial Justice erred in law and in fact in determining that there had not been a material change in circumstances since the issuance of the Corollary Relief Order dated June 20th, 2018, such as to permit a retroactive variation of child and spousal support[.]

[5] Section 17(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) authorizes a variation of a Corollary Relief Judgment. The change required was described by Justice Sopinka in *Willick v. Willick*, [1994] 3 S.C.R. 670:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, *if known at the time*, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. …

[6] In *Brown v. Brown*, 2010 NBCA 5 at ¶ 2, the New Brunswick Court of Appeal described the relative permanency of an alleged change "[a]s a general proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice." Brown was approved by this Court in *Smith v. Helppi*, 2011 NSCA 65 at ¶ 21.

[7] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at ¶ 13 of [1996] S.C.J. 52, the Supreme Court summarize the test:

> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[8] The burden of proof alleging a material change in circumstance rested with Ms. MacQuarrie.

[9] Justice Coady's oral decision dismissing Ms. MacQuarrie's application is not before this Court. On the record, there is no basis for saying he made an error. When questioned about the alleged changes in circumstances, counsel named two. First, Ms. MacQuarrie is paying a deficiency judgment on the matrimonial home's mortgage because her income has been garnished for that purpose by the Bank of Montreal. He says it was contemplated that an inheritance of Mr. MacQuarrie – completely paid over to Mr. MacQuarrie's Trustee in Bankruptcy – would look after mortgage arrears. He refers me to ¶ 50 of the original Corollary Relief Judgment of Justice Glen McDougall (2018 NSSC 112):

> [50] During the time that Mr. MacQuarrie was in bankruptcy he became entitled to share in the residue of a deceased aunt's estate. At the time of her death, it had an estimated value of nearly $1.1 Million. After payment of estate expenses and specific bequests, Mr. MacQuarrie stood to receive an amount that was likely to exceed $300,000.00. A significant portion of this would likely have to be paid to the Trustee in Bankruptcy to pay off creditors. Since most of Mr. MacQuarrie's debts are joint debts owed by him and his wife, she will benefit from their payment. Otherwise she would have no claim to his inheritance. But, due to this rather unique confluence of events, she will likely avoid any repayment obligations that would normally be hers to pay. But for this, she, too, might have had to declare bankruptcy.

Justice McDougall's decision does not say that Ms. MacQuarrie would avoid all obligation for joint matrimonial debts because the words he used were "she will *likely* avoid any repayment obligations that would normally be hers to pay"

(emphasis added). There was no certainty that Ms. MacQuarrie would avoid any personal obligation for joint matrimonial debts.

[10] Second, counsel says that “circumstances with respect to the parties’ daughter had changed from the time of the divorce trial in that she was no longer enrolled in post-secondary studies and, therefore, Mr. MacQuarrie was no longer obligated to pay child support to Ms. MacQuarrie for the parties’ daughter.” Again, this is not a novel circumstance. In Justice McDougall’s Decision, he said:

> [29] On a go-forward basis beginning effective May 1, 2018 Mr. MacQuarrie will pay the full off-set amount of $635.50 per month PROVIDED Chloe has returned home to live full-time with her mother. … Thereafter, and provided Chloe has returned to full-time studies at King’s University or some other similar educational institution, the monthly set-off amount will be divided equally between Chloe and her month. Chloe’s one-half ($317.75) will be contribution towards university expenses. The other $317.75 (per month) will be to cover some of the expenses incurred by Chloe’s mother in maintaining a place for her to return home … .

[11] Similar provisional payments were ordered to be made by Ms. MacQuarrie for Connor provided he returned to university. The contingency of university attendance was contemplated by Justice McDougall and encapsulated in his Order.

[12] Clearly the grounds suggested by counsel for a material change in circumstances involve matters that were before Justice McDougall or which he took into account.

[13] In the absence of Justice Coady's oral reasons, but taking into account the record before the Court, submissions of counsel, and the law, Ms. MacQuarrie has not demonstrated exceptional circumstances warranting the extension of time to file the Notice of Appeal and, particularly, has not shown "that there is a strong case for error at trial and real grounds justifying appellate interference."

[14] The application is dismissed without costs.

Bryson, J.A.