NOVA SCOTIA COURT OF APPEAL
Citation: Strickland v. Strickland, 2004 NSCA 81

Date: 20040615
Docket: CA 220990
Registry: Halifax

Between:

Russell Edward Strickland

Applicant

v.

Deborah Margaret Strickland

Respondent

Judge:	Justice M. Jill Hamilton
Application Heard:	June 10, 2004, in Halifax, Nova Scotia, In Chambers
Held:	Application granted and time for filing Notice of Appeal is extended to June 21, 2004
Counsel:	Julia E. Cornish, for the appellant Elizabeth Cusack, Q. C., for the respondent

Decision:

[1] This is a contested application by Mr. Strickland for an extension of time to file a notice of appeal appealing a March 5, 2004 order of Justice C. Richard Coughlan, of the Supreme Court of Nova Scotia, issued following a confirmation hearing held pursuant to s. 19 of the **Divorce Act**, R.S.C. 1985 c. 3 (2nd Supp.). The provisional order sought to be confirmed at the hearing before Justice Coughlan was issued April 7, 2003 by Justice Brigitte M. Robichaud, of the Court of Queen's Bench of New Brunswick, Family Division. The provisional order varied the retroactive and ongoing child support payable by Mr. Strickland based on a deemed annual income of $30,000. Justice Coughlan's order differed as to the amount of retroactive child support and deemed Mr. Strickland's annual income to be $55,000.

[2] Mr. Strickland's New Brunswick counsel received a facsimile copy of Justice Coughlan's order on or about March 10, 2004 from Mrs. Strickland's Nova Scotia counsel. She received from the court a copy of all Nova Scotia court documentation relating to the confirmation hearing on March 26, 2004 and then advised Mr. Strickland of the decision. On April 15, 2004 Mr. Strickland instructed his New Brunswick counsel to appeal the confirmation order. The material relating to the appeal and instructions to proceed with the appeal were received by Mr. Strickland's newly engaged Nova Scotia counsel April 20, 2004. The application for an extension of time to file a notice of appeal was filed May 6, 2004 by Nova Scotia counsel on behalf of Mr. Strickland. The hearing of the application was set for May 13, 2004, but was adjourned to June 10, 2004, at the respondent's request.

[3] The application was made approximately one month after the time for filing the notice of appeal expired.

[4] Counsel for Mrs. Strickland argues that the application should be denied because Mr. Strickland knew the decision would be coming at the beginning of March and should have taken steps to obtain it rather than remain "willfully blind" to it, that his New Brunswick counsel should have taken steps to obtain the Nova Scotia court documentation in early March rather than wait for the court to forward it to her in the normal course, that Mrs. Strickland will be prejudiced if the application is granted since she spent the approximately $16,500. she received as a result of the confirmation order and the garnishee action she took because she has

no money to repay it, that there is no evidence as to the merits of the appeal, that there is no proof that Mr. Strickland intended to file a notice of appeal within 30 days of Justice Coughlan's order, and that there are no special grounds to extend.

[5] The factors to consider on an application such as this are set out in paragraphs 22 and 24 of **Jollymore v. Jollymore** (2001), 196 N.S.R. (2d) 177:

> [22] In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:
>
> (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.
>
> . . .
>
> [24] I prefer a less rigid approach. Cases cannot be decided on a grid or chart. Ultimately the objective must be to do justice between the parties. I agree with the observations of Justice Hallett of this court in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 at para. 14:
>
> > There is nothing wrong with this three part test but it cannot be considered the only test for determining whether time for bringing an appeal should be extended. The basic rule of this court is as set out by Mr. Justice Cooper in the passage I have quoted from **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, supra. That rule is much more flexible. The simple question the court must ask on such an application is whether justice requires the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done. A review of the

> older cases which Mr. Justice Cooper referred to in **Scotia Chevrolet Oldsmobile Ltd. v. Whynot** and which Mr. Justice Coffin reviewed in **Blundon v. Storm** make it abundantly clear that the courts have consistently stated, for over 100 years, that this type of application cannot be bound up by rigid guidelines.

[6] In addition, s. 21(4) of the **Divorce Act** provides that an extension may be granted on special grounds:

> An appellate court or a judge thereof may, on special grounds, either before or after the expiration of the time fixed by subsection (3) for instituting an appeal, by order extend that time.

[7] I agree with counsel for Mrs. Strickland that there is no evidence that Mr. Strickland had a *bona fide* intention to appeal when the right to appeal existed or even within 30 days of his New Brunswick counsel receiving a facsimile copy of the order.

[8] I am satisfied, however, that part of the reason for Mr. Strickland not having a *bona fide* intention to file an appeal within the permitted appeal period is the delay inherent in the provisional order procedure involving two separate court hearings in two provinces. Certain **Civil Procedure Rules** such as 57.12(3) and 70.21(3) dealing with the time for filing an answer to a petition for divorce, provide a responding party residing out of the province with double the time afforded to a party residing within the province. No such extended time frame is permitted for appeals from provisional proceedings even though similar difficulties of dealing with courts in different provinces may be involved.

[9] I am also satisfied part of the reason for Mr. Strickland not having a *bona fide* intention to file an appeal within the permitted appeal period may be attributed to his New Brunswick counsel's failure to bring Justice Coughlan's decision to his attention for some time.

[10] This satisfies me that Mr. Strickland had a reasonable excuse for his delay in not filing his notice of appeal within the prescribed time period. Once he was

aware of Justice Coughlan's decision shortly after March 26, 2004, he instructed his New Brunswick counsel to appeal within 20 days. It then took some time for Mr. Strickland to retain Nova Scotia counsel to act on behalf of the appeal.

[11] I am also satisfied it is arguable that there is merit to Mr. Strickland's appeal given the significant differences between the two decisions, the provisional decision of Justice Robichaud and the confirmation decision of Justice Coughlan. I think this is particularly so, given that the main focus of the matter before the court was attributed income.

[12] The delay inherent in provisional proceedings, both in obtaining information from a court in another province and the need to hire counsel in another province to appeal the confirmation order, the delay in Mr. Strickland's New Brunswick counsel bringing Justice Coughlan's order to his attention, the substantial difference between the two decisions and the relatively short time within which this application was brought after the expiry of the appeal period, amount to special grounds.

[13] The cases referred to by Mrs. Strickland's counsel can all be distinguished, most involving longer periods of delay: **Berro v. Berro** (2001), 286 A.R. 124; **Rose v. Bulkowski** (2000), 271 A.R. 363; and **Fitzgerald v. Foote** (2003), 225 Nfld. & P.E.I.R. 64, **Rosenke v. Rosenke** (1999), 237 A. R. 363 involving a respondent who failed to appear at trial, and none involving provisional proceedings in different provinces.

[14] The question is whether the fact Mrs. Strickland has already spent the money she received means that she would be prejudiced to such an extent that justice requires that the application that I would otherwise grant, be denied.

[15] There is no evidence before me as to when Mrs. Strickland received this money or when she spent it in terms of the 30 day appeal period. Her affidavit states the following with respect to how she spent the money:

> 3. As I had a number of outstanding debts to family members due to difficulties collecting child support, the high costs of caring for my children and these legal proceedings and because of other needs relating to my family, I spent all of the funds received, including a payment of a portion of my legal bill and some direct financial assistance to my children for their current needs. As a result, none of those funds remain;

[16] The garnishee order was issued March 4, 2004, one day prior to Justice Coughlan's order. There is no evidence Mr. Strickland or his New Brunswick lawyer received a copy of the garnishment order.

[17] I am not satisfied Mrs. Strickland's spending of this money amounts to sufficient prejudice to her to cause me to deny this application which I would otherwise grant. If the panel hearing the appeal determines the appeal should be allowed, there are ways it can address this issue such as providing time for payment or setting off any amount owed by Mrs. Strickland to Mr. Strickland against money owed by Mr. Strickland to her.

[18] Accordingly, I grant the application and order that the time for filing the notice of appeal is extended to June 21, 2004.

Hamilton, J. A.