

NOVA SCOTIA COURT OF APPEAL
Citation: *Hollett v. Hollett*, 2017 NSCA 19

Date: 20170221
Docket: CA 460247
Registry: Halifax

Between:

Bruce Hollett

Appellant

v.

Charmaine Hollett

Respondent

Judge: Farrar, J.A.

Motion Heard: February 16, 2017, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: Appellant in person
Respondent not appearing

Decision:

[1] Mr. Hollett is self-represented. He makes a motion to extend the time to appeal the order of Justice Beryl MacDonald dated November 1, 2016. The time to appeal the order expired on December 1, 2016. In support of the motion, Mr. Hollett filed his own affidavit. The respondent, Charmaine Hollett, was served with the Notice of Motion, however, did not attend Court. I heard Mr. Hollett's motion in her absence. I was advised after the hearing by court staff that Ms. Hollett was contacted and she explained, although she was served, she was too ill to attend the hearing.

[2] By way of background, the parties were married on May 15, 1985, and separated on November 7, 2012. They registered a separation agreement with the court on March 17, 2014, in which Mr. Hollett agreed to pay Ms. Hollett spousal support in the amount of \$1,739 per month.

[3] On May 2, 2016, Mr. Hollett filed a variation application under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) in which he sought to vary the spousal support payable. Pending the determination of the variation application, Mr. Hollett's obligation to pay spousal support was suspended by an order granted May 25, 2016.

[4] On November 1, 2016, the variation application was heard before Justice MacDonald with both parties being self-represented.

[5] The application judge found that Mr. Hollett had failed to prove, on a balance of probabilities, that he was unable to obtain employment providing him with income. As a result, she dismissed his application and imputed income to him requiring him to pay spousal support in the amount of \$1,739 per month, the same amount contained in the Separation Agreement. She also discontinued the suspension of collection of spousal support payments.

[6] Finally, the order provided that it would be filed for enforcement with the Maintenance Enforcement Program:

17. The payments must be made to Charmaine Feetham (formerly Hollett) and sent by Bruce Hollett to the Maintenance Enforcement Program, P.O. Box 803, Halifax, Nova Scotia B3J 2V2 while the order is filed for enforcement with the Maintenance Enforcement Program.

[7] On January 21, 2017, Mr. Hollett received his CPP cheque and came to the realization that Maintenance Enforcement was garnishing all but \$115.01 of his cheque.

[8] He says it was at this time that he formed the intention to appeal the November 1, 2016 order imputing income to him. Although this is not contained in his affidavit, in response to questioning at the time of hearing, he said that he did not appeal the order of November 1st earlier because he did not think there was any way that they would be able to collect from him because he was not earning any income. However, when he found out that they could garnish his CPP payments he decided to appeal.

[9] With this backdrop I will now turn to whether I should grant the extension of time to file an appeal of the order of November 1st.

Analysis

[10] Rule 90.37(12) gives a judge of the Court of Appeal the authority to extend the time to file a notice of appeal:

90.37(12) A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:

...

(h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[11] In *Farrell v. Casavant*, 2010 NSCA 71, Beveridge, J.A. explained the test for granting an extension of time to appeal as, ultimately, a determination of whether it is in the interest of justice to grant the extension (¶17). In determining whether it is in the interest of justice, common factors to be considered are:

- the length of the delay;
- the reason for the delay;
- the presence or absence of prejudice;
- the apparent strength or merit in the proposed appeal; and
- the good faith intention of the appellant who exercises his or her right of appeal within the prescribed time period.

[12] The relative weight to be given to any of these factors may vary from case to case (*Farrell*, ¶17).

[13] I am not satisfied that it is in the interest of justice to grant the extension of time in these circumstances. I say this for the following reasons:

1. Mr. Hollett was aware on November 1st that income was being imputed to him;
2. Between November 1st and January 21st, Mr. Hollett was content to allow the determination of the imputation of income to stand and took no steps to appeal the order;
3. It was only on receipt of his CPP cheque that Mr. Hollett realized that his CPP was being garnisheed. It was not the decision of the application judge that was the impetus for the appeal but rather its enforcement; and
4. The order of November 1, 2016 provided it would be filed with the Maintenance Enforcement Program for enforcement.

[14] This leads me to the conclusion that Mr. Hollett did not form a *bona fide* intention to appeal the order prior to December 1, 2016. He was aware of the potential of Maintenance Enforcement seeking to enforce the order but was prepared to let the order stand on the mistaken belief that it could not be enforced. Unfortunately for Mr. Hollett, that is not evidence of a *bona fide* intention to appeal the order within the time limits. Mr. Hollett's intention to appeal the order only arose as a result of extraneous matters, that being the collection of the amounts due to Ms. Hollett.

[15] As a result, I would not exercise my discretion to extend the time for filing an appeal. I dismiss the motion, however, in these circumstances where Ms. Hollett was not required to attend at Court for the hearing of the motion, I would not make any order as to costs.

Farrar, J.A.