

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Whalen v. Whalen*, 2017 NSCA 63

**Date:** 20170706  
**Docket:** CA 464185  
**Registry:** Halifax

**Between:**

Susan Whalen

Appellant

v.

Kenneth Whalen

Respondent

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Motion Heard:** June 15, 2017, in Halifax, Nova Scotia in Chambers

**Held:** Motion granted

**Counsel:** Jennifer K. Reid, for the appellant  
Kelsey E. Hudson, for the respondent

**Decision:**

[1] On June 15, 2017, I heard a motion brought by the applicant Susan Whalen for an order extending the time to file a Notice of Appeal. In support of the motion was an affidavit sworn by Ms. Whalen. The motion is opposed by the respondent Kenneth Whalen, who also provided affidavit evidence. The Court further had the benefit of written and oral submissions by counsel for both parties.

**Background**

[2] The parties were married and divorced some time ago. This proposed appeal arises from an application to vary the earlier Corollary Relief Judgment. Procedurally, the application did not unfold in the usual fashion.

[3] For the purpose of this decision, it suffices to note that Mr. Whalen commenced the application seeking to terminate ongoing spousal support and vary life insurance obligations contained in the Corollary Relief Judgment. Ms. Whalen opposed the application.

[4] The matter was heard in January 2017 before a Justice of the Nova Scotia Supreme Court (Family Division). Both parties were represented by counsel. On the day of the hearing, evidence was concluded, but there was not time for oral submissions. The parties do not dispute that the matter was adjourned and rescheduled to another date to conclude the hearing.

[5] When the parties appeared on the adjourned date, the trial judge proceeded immediately to render an oral decision, without hearing submissions. Apparently, the trial judge had signed and issued an order giving effect to her oral decision.

[6] The outcome was not favourable for Mr. Whalen. He appealed, citing the failure to permit submissions as the foundation for one of his grounds.

[7] In the meantime, the parties, through their counsel, undertook discussions with the Associate Chief Justice of the Family Division with respect to the procedural problem which had been encountered at the hearing. Following this interaction with the court, the parties agreed to have the matter “re-heard” to address the procedural error. Mr. Whalen filed a Notice of Discontinuance in relation to his appeal.

[8] The matter was re-heard in April 2017 by a different justice. The hearing proceeded and concluded with a decision favourable to Mr. Whalen. Ms. Whalen now wants to appeal the order arising from the second decision. Her draft Notice of Appeal raises substantive issues, but the preliminary issue relates to the appropriateness of the Supreme Court (Family Division) re-hearing a matter which it had already decided. It is alleged that the court, and specifically the second trial judge, had no jurisdiction to hear the matter and that the only means of addressing the procedural error was an appeal to this Court.

### **Analysis**

[9] *Civil Procedure Rule* 90.37(12)(h) describes a judge's authority to extend time to appeal. It provides:

90.37(12) A judge of the Court of Appeal hearing a motion ... 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.

[10] In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, Justice Bateman set out the analytical framework for motions to extend the time to appeal as follows:

[3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):

(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.

[4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (**Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

*Bona Fide Intention to Appeal*

[11] I am satisfied Ms. Whalen had a *bona fide* intention to appeal within the appeal period. I reach this conclusion not only on her evidence indicating she formed an intent to do so on the day the oral decision was given, but also that she had applied for and received legal aid during the appeal period. From the circumstances, it is also clear that she had provided instructions to counsel to appeal within the timeframe.

*Reasonable Excuse for Delay*

[12] Ms. Whalen's counsel candidly fell on her own sword. She says that she miscalculated the appeal period, based upon her misreading of the *Rules*. She had a Notice of Appeal prepared, and only found out about her error when she contacted the Court of Appeal in anticipation of filing. She was four days over the deadline. Counsel immediately filed the motion seeking the extension of time.

[13] I accept counsel's misapprehension regarding the proper filing deadline as a reasonable excuse for the purpose of this motion.

*Real Grounds Justifying Appellate Intervention*

[14] I do not intend to address all of the proposed grounds of appeal. On their face, some appear to have more merit than others, but that determination is best left with the panel. I am satisfied, however, that the ground alleging a lack of jurisdiction raises a "real ground" which may, upon fulsome consideration, justify appellate intervention.

[15] The procedural history of this matter raises the issue of when a court becomes *functus*, and the ramifications thereof. Ms. Whalen alleges the order arising from the second hearing is ineffectual due to a fatal lack of jurisdiction. In my view, that is a "real issue" worthy of a panel's consideration.

**Conclusion**

[16] The motion for extension of time to file a Notice of Appeal is granted, without costs. The draft Notice of Appeal, as appended to the affidavit of Susan Whalen, shall be filed no later than July 12, 2017.

Bourgeois, J.A.