

NOVA SCOTIA COURT OF APPEAL
Citation: Koval v. Brinton, 2010 NSCA 18

Date: 20100301
Docket: CA 323360
Registry: Halifax

Between:

Rebecca Suzanne Koval

Applicant/Appellant

v.

Donald Jeffrey Brinton

Respondent

Judge: The Honourable Mr. Justice Jamie W.S. Saunders

Application Heard: February 25, 2010, in Halifax, Nova Scotia, in Chambers

Held: Application for an extension of time granted.

Counsel: Judith A. Schoen, for the appellant
Respondent in person

Decision:

[1] After considering the parties' submissions I announced my decision granting the appellant's motion to extend time to file her notice of appeal, with reasons to follow. These are my reasons.

[2] The appellant sought leave to extend time to file her notice of appeal. Ultimately, she hopes to persuade this Court to set aside the order of Nova Scotia Supreme Court Justice Douglas C. Campbell dated December 22, 2009, thereby effectively confirming the Provisional Order of the New Brunswick Court of Queen's Bench dated April 23, 2009.

[3] The matter first came before me in Chambers on February 4, 2010. In an affidavit sworn January 27, the appellant declared that due to the holiday season and the nature of the proceedings, she did not receive Justice Campbell's order until January 14 or 15, 2010 when the deadline for filing her appeal had almost expired. By the time she was able to retain Ms. Schoen the appeal period had run out.

[4] The respondent, appeared at the hearing and opposed the appellant's motion to extend time. He challenged the truthfulness of the assertions set out in the appellant's affidavit.

[5] After hearing the respondent's initial objection I explained that he would not be permitted to "give evidence" from his place in the gallery. If he were serious in opposing the motion I was prepared to adjourn the proceedings so that he would have time to file a proper affidavit. I directed that the appellant would also be given the opportunity to file her own supplementary affidavit in response, if so advised.

[6] The motion was then adjourned to today, being February 25. By that point the record included the appellant's initial affidavit sworn January 27; the respondent's affidavit sworn "February 2010" (the exact date is not disclosed); and the appellant's reply affidavit sworn February 17.

[7] Essentially, the respondent challenges the appellant's statements that she did not receive Justice Campbell's order until January 14 or 15, 2010, thereby leaving

the impression that she knew nothing about its terms until it was too late to initiate an appeal.

[8] The respondent swears (as does his sister in a supporting affidavit sworn "February, 2010" (again the precise date is not stated), that the parties held discussions in the lobby of a hotel in Saint John, New Brunswick on December 27, 2009, at which time the appellant appeared to have detailed knowledge of the results of the hearing before Campbell J. This leads the respondent to state in his affidavit:

7. ... Ms. Koval had ample time between December 27 and January 22, 2010 to investigate, research and if necessary discuss options or the appeal procedure with legal counsel.
8. On January 14 or 15, 2010, the dates that Ms. Koval provides in her affidavit as receiving the order, Ms. Koval still had 7 days to file a request to appeal or at the very least request for an extension to file an appeal.

[9] In her reply affidavit, the appellant gives a different version of what transpired in the hotel lobby on December 27.

[10] For my purposes, this morning, it is not necessary for me to decide matters of credibility. I am able to address the merits based on facts which are not contested.

[11] I accept the following facts:

- (i) a divorce judgment and corollary relief order was issued in these proceedings by the Court of Queen's Bench of Alberta on May 23, 2008;
- (ii) the appellant filed a provisional application pursuant to the **Divorce Act** in the Court of Queen's Bench of New Brunswick and after appearing there obtained a provisional order from Mr. Justice Bruce A. Noble dated April 23, 2009 which directed:
 1. The respondent's income is provisionally set at \$43,788.00 resulting in a child support

payment of \$630.00 per month,
commencing January 1, 2009.

2. The respondent shall be responsible for payment of one half of special expenses pursuant to s. 7 of the ***Child Support Guidelines***. The existing expenses are child care in the net yearly expense of \$6,087.00 and net health expenses of \$1,763.00 per year.
3. This order is provisional only and is of no force and effect until confirmed by the appropriate court in the Province of Nova Scotia.
4. This order is effective as of April 9, 2009.

(iii) The respondent appeared before the Supreme Court of Nova Scotia (Family Division) on November 23, 2009, and obtained an order from Justice Douglas C. Campbell dated December 22, 2009, which states in part:

1. **UPON** Donald Jeffrey Brinton having been found to have a current annual income of \$46,639.00, he is ordered to pay child support for the two children of the marriage

Jacob Derek Brinton, born July 29, 2004

Nora Rebecca Frances Brinton, born July 10, 2006

at the rate of \$663.00 per month, payable in two installments of \$331.50, commencing the 15th day of April, 2009 and continuing on the 15th and 30th day of each month thereafter until further order of the Court.

2. **THAT** the Respondent shall continue to name the children for coverage in his medical and dental insurance plan through his place of employment.
3. **THAT** commencing on the 15th and 30th day of November, 2009 and on the 15th and 30th day of each month thereafter, until further order of a court of competent jurisdiction, there shall be no contribution by the

Respondent to special expenses incurred for the subject children.

- (iv) The appellant did not appear at the hearing before Campbell J.
- (v) Justice Campbell's order was forwarded to Court Services of Saint John, New Brunswick postmarked January 11, 2010. The documentation was sent to the New Brunswick Attorney General in Fredericton and then ultimately forwarded to the originating court in New Brunswick.
- (vi) Justice Campbell's order was then mailed to the appellant by staff at the Court of Queen's Bench of New Brunswick, and was received by the appellant on January 14 or 15, 2010.
- (vii) The appellant contacted officials with the Nova Scotia Supreme Court (Family Division) in writing on January 18, 2010, seeking additional documentation which had not been provided as related to Justice Campbell's confirmatory order.
- (viii) The appellant, who works and resides in New Brunswick, retained Ms. Schoen to represent her interests on this appeal, and swore her initial affidavit in New Brunswick on January 27, 2010.
- (ix) Ms. Schoen's notice of motion and supporting documentation were couriered to the Prothonotary's office at the Law Courts in Halifax by cover letter dated January 27, and stamped as received the next day.

[12] Appeals or motions for leave to appeal must be commenced within the time prescribed by the relevant legislation, or as may be otherwise permitted by a judge. My discretion to grant an extension is outlined in **Civil Procedure Rule 90.37(12)(h)** which states:

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.

[13] The law applicable to extensions of time is well known. See, for example, **Jollymore v. Jollymore Estate**, 2001 NSCA 116 (in Chambers), and **W. Eric Whebby Ltd. v. Doug Bohner Trucking & Excavating Ltd.**, 2007 NSCA 26 (in Chambers).

[14] I find that the appellant has satisfied the necessary requirements. I am prepared to exercise my discretion by extending the time for filing her intended notice of appeal. I accept that as soon as she became aware of the precise terms of Justice Campbell's order and its consequences, she took practical and timely steps to retain counsel and launch an appeal. I find that she always intended to appeal and that she has put forward a reasonable explanation for the slight delay in getting it underway. Her proposed notice of appeal raises at least arguable grounds. For example, Ground (3) provides:

(3) The Trial Justice erred in the application of the Federal Child Support Guidelines, and in particular:

- a) disallowing the Appellant's **Section 7** claim;
- b) considering the Respondent's travel to and from New Brunswick to constitute "unusually high costs associated with access to a child";
- c) effectively utilizing **Section 10** of the **Guidelines** to eliminate a **Section 7** claim; and
- d) considering **Section 10** of the **Guidelines** although not plead by the Defendant.

Finally, there is absolutely no prejudice to the respondent. The appellant's appeal does not operate as a stay of Justice Campbell's decision. Thus, the respondent suffers no ill effects; in fact, Campbell J.'s variation of the New Brunswick order works to the respondent's advantage which, after all, is the basis for the appellant's proposed appeal. A short extension of time will enable these issues to be decided on their merits, and will bring about a just result in the circumstances of this case.

[15] Accordingly, I grant the appellant an extension until 4:30 p.m. on Wednesday, March 10, 2010 to file her notice of appeal. I fill fix costs for both Chambers appearances, in the aggregate, at \$750.00 inclusive of disbursements, and I direct that these will be costs in the cause.

[16] As I explained in Chambers, once the appellant has filed her notice of appeal, it will be her responsibility to file a certificate of readiness and then follow standard procedures in arranging a teleconference with the Chambers judge in order to set dates for the filing of facta and the eventual hearing of the appeal.

Saunders, J.A.