COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *D[redacted] v. D[redacted]*
2009 BCCA 371

Date: 20090730
Docket: CA037280

Between:

A[redacted] D[redacted]

Respondent
(Plaintiff)

And

K[redacted] D[redacted]

Appellant
(Defendant)

Before: The Honourable Mr. Justice Chiasson
(In Chambers)

On appeal from: Supreme Court of British Columbia, February 27
(*D[redacted] v. D[redacted]*, E018533)

Oral Reasons for Judgment

Counsel for the Appellant:	F.G. Reif
Counsel for the Respondent:	A.E. Thiele
Place and Date of Hearing:	Vancouver, British Columbia July 30, 2009
Place and Date of Judgment:	Vancouver, British Columbia July 30, 2009

[1] **CHIASSON J.A.**: Dr. D[redacted] applies for an extension of time to file a notice of appeal from the order of a Chambers judge pronounced February 27, 2009, ordering him to pay retroactive child support of $114,522 and ongoing child support of $4,308 per month from January 1, 2009.

[2] The material disclosed that Dr. D[redacted] has not made the required monthly payments. He has paid a lesser amount based on a previous consent court order. This matter was discussed because it is clear this Court may decide not to entertain an appeal when an appellant is in violation of a court order (*Larkin v. Glase*, 2009 BCCA 321).

[3] The respondent did not apply to dismiss the application on this basis and did not favour an adjournment to give Dr. D[redacted] time to remedy his default. She wanted to proceed with the application.

[4] There was a short adjournment during which counsel for Dr. D[redacted] attempted, but failed, to reach him, but left messages for him. Counsel advised me on behalf of his client that Dr. D[redacted] would pay the deficiency in his ongoing support obligation and would pay the full amount in the future. On this basis I agreed to proceed with the application.

[5] The criteria applicable to the application were set out in *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.) and are as follows:

1. was there a *bona fide* intention to appeal;
2. when were the respondents informed of the intention;
3. would the respondents be unduly prejudiced by an extension of time;
4. is there merit in the appeal;
5. is it in the interests of justice that an extension be granted.

[6] The fifth question is overarching.

[7] An extension of time to file a notice of appeal should not be granted if the appeal is without merit (*Franks v. B.C. (A.G., B.C. Benefits Board)*, 1999 BCCA 165)

[8] Dr. D[redacted] deposes "[a]t all times since the judgment in this matter was handed down I have intended to appeal it...". The first criterion is satisfied.

[9] In a March 10, 2009, e-mail counsel for Dr. D[redacted] advised counsel for the respondent as follows:

> Dr. D[redacted] is contemplating an appeal of the decision but a voluntary adjustment of the total amount payable to reflect the abovementioned concerns may go a long way in persuading him not to bother with this costly exercise.
>
> ...
>
> ... Dr. D[redacted] remains greatly aggrieved that the Judge did not grant his adjournment request and if he appeals it will likely be partially on that basis. Suffice it to say that I will not be handling his appeal.

[10] I consider this to be some indication of an intention to appeal, although it is at best equivocal.

[11] Apart from time itself, I see no prejudice to the respondent. The notice of appeal should have been filed at the end of March. It was filed on July 13, 2009, with Dr. D[redacted]'s present application. Counsel advises he was not aware it could have been filed earlier. At most, Dr. D[redacted] was three and one-half months late. I do not consider the delay inordinate or the prejudice undue.

[12] The most difficult aspect of this application is a consideration of the merits of the appeal.

[13] In 2006 the parties entered into a consent order that provided for monthly child support of $1,459 based on Dr. D[redacted]'s reported income of $123,945. The order required the disclosure of each party's personal tax return and Dr. D[redacted]'s corporate tax return. The order provided for a review of child support if either of the parties' two children ceased to reside with the respondent or ceased full-time attendance at a post-secondary educational institution. At that time their daughter was 18 and their son 20 years old.

[14] Dr. D[redacted] did not disclose his corporate income.

[15] Eventually, the parties realized that Dr. D[redacted] corporate income should have been, but was not, included in the consideration of child support as reflected in the consent order.

[16] The respondent sought retroactive child support from January 1, 2006 and an increase in ongoing child support. Dr. D[redacted] applied for an order the children were no longer children of the marriage and contribution from the respondent for expenses of the children.

[17] Dr. D[redacted] contends the judge erred by not determining whether there had been a material change in circumstances as required by s. 17 of the *Divorce Act*, 1985, c. 3 (2nd Supp.). The respondent asserts that it was understood the consent order was wrong. She states there was a mutual misunderstanding concerning the treatment of Dr. D[redacted]'s corporate income and that this allowed the judge to set aside the consent order and increase the ongoing child support.

[18] I do not have a copy of the application brought by the respondent. That is, I do not know whether it was an application to vary the consent order or to set it aside. Dr. D[redacted] contends it should have been addressed by an appeal or the error of the parties could have been dealt with in an action against their lawyers. Apparently, no argument was made to the Chambers judge that there had not been a material change in circumstances. Dr. D[redacted] contends s. 17 (4.1) of the *Divorce Act* requires the judge to address the issue and states the change must be a change of fact and not merely the realization of a mistake.

[19] Relying on *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231, 2006 SCC 37, Dr. D[redacted] asserts the judge did not undertake the required analysis of the circumstances of the parties and the children in his consideration of a retroactive award of child support. He also contends the judge went too far back in time by erroneously concluding Dr. [redacted] was guilty of blameworthy conduct in not disclosing his corporate income information.

[20] Dr. D[redacted] asserts the judge erred concluding the son was a child of the marriage because he had lived on his own and travelled extensively before returning to school. That is, he is self-sufficient and, perhaps, malingering. The respondent contends the judge was very fair to Dr. D[redacted] because he deducted $1,000 per month to take into account the son's earning capacity and attributed $3,000 per month to the daughter who soon was likely to be no longer a child of the marriage, leaving the son with $1,308 monthly only.

[21] Dr. D[redacted] contends the judge erred by averaging his past three years' income to arrive at a child support obligation going forward in 2009. There was evidence Dr. D[redacted] has sold his dentistry practice and will work less, earning a lower income. Apparently, there was no evidence of what Dr. D[redacted] was likely to earn in 2009.

[22] I consider Dr. D[redacted]'s chances of success on this appeal to be poor, but I cannot state his appeal is frivolous or without some merit.

[23] In all of the circumstances of this case, it is my view that in the interests of justice the requested extension of time should be granted on terms.

[24] Dr. D[redacted] has a right to appeal. His conduct accounted for two months of the delay, which is not a great deal, although that delay is culpable. He states he intended to appeal, but discontinued his retainer of trial counsel shortly after the judge's decision was made. He apparently did nothing to find out what was needed to prosecute his appeal and incorrectly assumed that the judge's order did not have immediate effect. This conduct represents a cavalier attitude by Dr. D[redacted] in attending to his responsibilities to his children and to the court.

[25] I grant an extension of time to file a notice of appeal to July 14, 2009, provided that on or before August 31, 2009, Dr. D[redacted] pays to the respondent the full amount of the ongoing child support ordered by the judge on February 27, 2009, and provides confirmation to this Court he has done so. He is, of course, obliged to continue that support until it is varied by this Court or the Supreme Court.

[26] The respondent shall have her costs of this application in the amount of $600, payable forthwith, in any event of the cause.

"The Honourable Mr. Justice Chiasson"