

2007 CarswellAlta 164, 2007 ABCA 55, 391 W.A.C. 318, 401 A.R. 318, [2007] A.W.L.D. 1863, [2007] W.D.F.L. 2059

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Felker v. Felker

Cherryl Lynn Felker (Applicant / Appellant / Plaintiff) and Terry Roy Felker (Respondent / Respondent / Defendant)

Alberta Court of Appeal

C. Hunt J.A.

Heard: February 7, 2007

Judgment: February 15, 2007

Docket: Calgary Appeal 0501-0264-AC

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Counsel: S.T. Fitzgerald as agent for J.E. Davison, Q.C. for Applicant

D.P. Castle for Respondent

Subject: Family; Property

Family law --- Family property on marriage breakdown — Practice and procedure — Practice on appeal — Time to appeal.

Cases considered by C. Hunt J.A.:

Armstrong v. Armstrong (2006), 60 Alta. L.R. (4th) 21, 377 W.A.C. 48, 391 A.R. 48, 30 R.F.L. (6th) 279, 2006 ABCA 228, 2006 CarswellAlta 895 (Alta. C.A.) — referred to

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — followed

Hudson v. Bower (1968), 67 W.W.R. 564, (sub nom. *Shewschuk, Re*) 1 D.L.R. (3d) 288, 1968 CarswellAlta 77 (Alta. C.A.) — referred to

Statutes considered:

Matrimonial Property Act, R.S.A. 2000, c. M-8

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 159(7) — referred to

R. 506 — referred to

C. Hunt J.A.:

1 The appellant seeks an extension of time in which to serve and file her Notice of Appeal from the decision of a chambers judge granting the respondent's application for a declaration concerning his exemption under the *Matrimonial Property Act*, R.S.A. 2000, c. M-8.

Background

2 The parties permanently separated 11 weeks after their marriage on July 7, 2001. On May 10, 2002, the appellant filed a statement of claim for divorce and division of matrimonial property. The respondent sought a declaration of exemption regarding certain pre-marital assets.

3 The chambers judge granted the respondent's application, finding that the respondent was entitled to the value of the property he acquired and held prior to the July 2001 marriage. It is not disputed by the parties that the respondent entered the marriage with \$363,691.00 in assets. The chambers judge concluded that the net market value of the respondent's assets was \$346,779.69. He granted the respondent's application, declaring that he was entitled to an exemption of \$363,691.00 and that the exempted value exceeded the market value of his current assets.

4 The chambers judge released his reasons on May 18, 2005 and the Order was filed on August 10, 2005. On August 15, 2005, the Order was served on the office of the appellant's counsel. He was on vacation and did not admit service until August 30, 2005. The appellant filed and served her Notice of Appeal on September 19, 2005. Rule 506 of the *Alberta Rules of Court*, A.R. 390/68, requires that a Notice of Appeal be filed within 20 days of the appealed order being signed, issued and served.

5 Before a motions panel on November 16, 2006, the appellant conceded that she was out of time to file her appeal and now seeks leave to extend the time to file her Notice of Appeal.

Analysis

6 The appellant must:

(i) Show there was a bona-fide intention to appeal while the right to appeal existed, and that the failure to appeal was by reason of some special circumstances which served to excuse or justify such failure;

(ii) Account for the delay and show that the other side was not so seriously prejudiced thereby as to make it unjust, having regard to the position of both parties, to disturb the judgment;

(iii) Show that he has not taken the benefits of the judgment from which he is seeking to appeal; and

(iv) Show that he would have a reasonable chance of success if allowed to prosecute the appeal.

Cairns v. Cairns, [1931] 4 D.L.R. 819 (Alta. C.A.)

7 The appellant has demonstrated an intention to appeal during the relevant time. The explanation for the delay concerns her counsel's apparent misunderstanding of the effect of service of the Order on his office during his absence. Although such mistakes ought not to be rewarded, if the delay is short and no prejudice is shown (which is the case here), a mistake by counsel can be considered a special circumstance that will permit an extension of time: *Hudson v. Bower* (1968), 1 D.L.R. (3d) 288 (Alta. C.A.); see also Binnie J.'s comments where the Supreme Court of Canada refused leave to appeal in *Kapelus v. University of British Columbia et. al.*, Bulletin of February 19, 1999. There is nothing to suggest that the appellant has taken the benefits of the judgment.

8 This leaves the question of whether the appellant can show a reasonable prospect of success on the appeal. An application to extend time can be denied if the merits of the appeal are too weak, even if they are not absolutely hopeless or frivolous: *Armstrong v. Armstrong*, 2006 ABCA 228, 391 A.R. 48 (Alta. C.A.) . The proposed grounds of appeal are:

1) The declarations granted by the trial judge were effectively an order for summary judgment in a matrimonial property proceeding and thus contrary to Rule 159(7) of the *Rules of Court*; and

2) The chambers judge erred in allowing the respondent to trace his original exemption to his current assets.

9 Whatever the merit of these grounds of appeal, another potential problem with the chambers judge's decision arose during oral argument. Simply put, there appears to be a disconnect between the Reasons and the Order. In the Reasons at paras. 47, 49 and 52, the chambers judge explained why he would not grant a final order under the *Matrimonial Property Act*. Nonetheless para. 3 of the Order stated that the respondent was entitled to such a final order. Neither of the counsel who argued this motion were directly involved in the application before the chambers judge. They were unable to explain this discrepancy. In my view, this is enough to satisfy the fourth branch of the *Cairns* test.

Conclusion

10 The appellant's application for leave to extend time to file a Notice of Appeal is granted, and the time is extended to September 19, 2005.

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