

In the Court of Appeal of Alberta

Citation: Thomson v Thomson, 2025 ABCA 89

Date: 20250312
Docket: 2401-0288AC
Registry: Calgary

Between:

Erika Margueratt Thomson

Respondent
(Plaintiff)

- and -

Graeme Thomson

Applicant
(Defendant)

**Reasons for Decision of
The Honourable Justice April Grosse**

Application to Extend Time to File Notice of Appeal

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Introduction

[1] The applicant, Graeme Thomson, wants to appeal a parenting order dated July 11, 2024 (the Parenting Order). However, Mr Thomson did not file a notice of appeal within the appeal period. He applies for an extension of time to commence his appeal.

[2] The Parenting Order followed a full-day oral hearing and involved one 13-year-old child identified as having special needs. The presiding justice met with the child in advance of the hearing and the child was represented by counsel. Following the hearing, the presiding justice varied the parenting arrangement from 50/50 shared parenting to the respondent, Ms Thomson, having primary day-to-day care of the child and Mr Thomson having one to two days of parenting time each month. Mr Thomson challenges the Parenting Order, as well as the presiding justice's preliminary decision to refuse Mr Thomson's application for a Practice Note 8 assessment.

[3] For the reasons set out below the application to extend the time to file a notice of appeal is granted.

Guiding Principles

[4] This Court has the discretion to extend the time to appeal. In deciding whether to exercise that discretion, the Court is guided by several factors, described in *Cairns v Cairns*, [1931] 4 DLR 819 at 826-827 (Alta SC AD):

1. Was there a *bona fide* intention to appeal while the right to appeal existed, and was there some special circumstance that would excuse or justify the failure to appeal in time;
2. Is there an explanation for the delay and was the other side so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;
3. Has the applicant taken the benefits of the judgment from which appeal is sought; and
4. Would the appeal have a reasonable chance of success if allowed to proceed.

1199096 Alberta Inc v Imperial Oil Limited, 2024 ABCA 166 at para 5.

[5] These factors are “weighed to determine if it is in the interest of justice to permit the appeal to proceed”: *Piikani Nation v Kostic*, 2017 ABCA 350 at para 21.

Preliminary issue: Is the Parenting Order interim or final?

[6] It became apparent during the hearing of Mr Thomson’s application for permission to extend time that there is an issue as to whether the Parenting Order was interim or final. That could impact the application, particularly as it relates to whether the appeal has a reasonable prospect of success. While both interim and final parenting decisions are subject to deference, this Court has stated many times that an appeal is rarely an effective way to deal with interim parenting orders: for example, see *Bitz v Preuss*, 2024 ABCA 4 at para 11.

[7] At the time of the application hearing before me, the parties had not filed a transcript of the hearing that took place in the Court of King’s Bench or of the oral decision. The parties had the transcript, and I had listened to a recording of the oral decision, but I took the application under reserve to allow an opportunity to review the transcript, which I have now done.

[8] The following points relate to the issue of whether the Parenting Order should be treated as interim or final:

- The Oral Hearing Order, which led to the one day hearing, refers to Ms Thomson’s “application for a variation in parenting” [emphasis added]. It calls for evidence in chief by affidavit with an opportunity for oral cross-examination during the hearing. The Oral Hearing Order refers to the “trial justice” being advised that counsel for the child has requested an advance judicial meeting between the justice, counsel for the child and the child.
- While making representations at the outset of the parenting hearing in the Court of King’s Bench in support of Mr Thomson’s application for an adjournment to obtain a Practice Note 8 assessment, former counsel for Mr Thomson said, “So, Mr Thomson ... is seeking a PN8 to assist with a final determination of a parenting order.” [emphasis added].
- Counsel for Ms Thomson made the following representation to the court with respect to the PN8 adjournment request:

For this not to go ahead is a very, very big concern. Justice Dario [who had heard a request for a fiat a few weeks before] asked what we were seeking, an interim or a final order at that fiat appearance. I said ultimately a final order would be ideal for my client not to go through this process but respectfully an interim order is what the Court generally grants to see how this child goes through the period of time. So, it is an interim order we are seeking today. [emphasis added]

- In oral argument, counsel for Ms Thomson stated:

So, we respectfully ask for the decision our application says one to two days a month. That would be an interim order but there is no end date on it. [emphasis added]

- In discussing the drafting of the form of order arising out of her decision, the presiding justice stated:

But certainly the nature of this relief that I am granting is interim in nature. There has been questioning. Assuming there may even be a practice note 9 [sic] at some point. There may actually be trial in the future. So, there – somewhere in the order it should say interim. [emphasis added]

- The form of order approved as to form and content by counsel for Ms Thomson, former counsel for Mr Thomson and counsel for the child, and signed by the presiding justice, is silent on whether it is “interim” or “final”.
- While Mr Thomson suggests the formal Parenting Order does not properly reflect the oral decision of the presiding justice, he has not sought any relief under Part 9 of the *Rules of Court*.
- In the hearing before me, Ms Thomson took the position that the Parenting Order is interim only in the sense that parenting orders can always be varied upon demonstration of a material change in circumstances. She stated that no trial on parenting is planned and she argued that a trial is not necessary.

[9] It is troubling that three lawyers appear to have signed off on the form of order and presented it to the Court of King’s Bench justice for signature without drawing to her attention that it did not include the word “interim”, notwithstanding her direction, and that counsel are now unable to agree on whether the Parenting Order should be treated as interim or final. However, I am unable to resolve those concerns in the context of this application.

[10] I have determined that for the purposes only of this application for an extension of time, the Parenting Order will be treated as final. That characterization is not binding for any other purpose. However, in light of the wording on the face of the order and the position taken by Ms Thomson, I am not satisfied that it would be fair to Mr Thomson to consider his application on the assumption that the Parenting Order will be treated as interim going forward.

Should an extension of time be granted?

[11] On Mr Thomson’s evidence, it is not clear whether he had a *bona fide* intention to appeal the Parenting Order during the appeal period, or whether he never really turned his mind to an

appeal during the appeal period because it never occurred to him that a right of appeal could arise until costs were addressed. In either case, I am prepared to accept that Mr Thomson was always unhappy with the Parenting Order and intended to take whatever steps were available to him to try to achieve a different result.

[12] Mr Thomson's explanation for his delay is that his previous counsel did not tell him his appeal period ran from the date the parenting decision was made. He assumed that the decision was not complete until costs were decided and counsel never raised the issue of an appeal prior to dealing with costs. He relied on counsel to inform him of his options. Mr Thomson did not waive privilege over his communications with his former counsel on a limited basis to allow his evidence to be tested, but in fairness, he was not questioned on his affidavit, nor was he asked to waive privilege. An error or failure to inform on the part of counsel can be a legitimate explanation for delay. On the record before me, I accept that Mr Thomson has a reasonable explanation for his delay.

[13] Mr Thomson has not taken advantage of the decision. Ms Thomson has not demonstrated any material prejudice to her arising from the delay itself.

[14] With respect to the merits of the proposed appeal, parenting decisions involve the exercise of discretion and are entitled to significant deference, absent an extricable error of law or palpable and overriding error: *JM v EM*, 2022 ABCA 49 at para 26. At this time, Mr Thomson has not identified a particular error of law. His main argument is that the presiding justice gave too much weight to the wishes of the child, particularly in the absence of expert evidence. It is not the role of this Court to re-weigh the evidence. However, the Parenting Order made a significant change in parenting. It is possible that the presiding justice made the Parenting Order thinking it was interim, and it is now being treated, at least to some extent, as final. In these circumstances, I exercise my discretion to grant permission to extend time to appeal the Parenting Order in order to do justice between the parties.

[15] On its own, I would not grant the application to extend the time to appeal the refusal of the PN8 assessment. Mr Thomson left the request for the PN8 assessment to the last minute and whether a PN8 assessment should be ordered is a discretionary decision. However, the PN8 issue is an ancillary issue to the main appeal of the Parenting Order and I am hesitant to interfere with the arguments or remedies that could be available to the parties and to the Court. Further, the presiding justice in the Court of King's Bench referred to the PN8 as a tool "to assist the Court in making a final determination as to parenting and decision making." She invited Mr Thomson to re-apply for a PN8 assessment at a later time on new evidence. Yet, the Parenting Order is now being treated, at least to some extent, as final. Accordingly, I would also extend time to appeal the decision refusing the PN8 assessment.

Disposition

[16] The application to extend time to appeal is granted.

Application heard on February 12, 2025

Reasons filed at Calgary, Alberta
this 12th day of March, 2025

Grosse J.A.

Appearances:

L. Kachur

A. Bishop

for the Applicant

C.L. Mercier

for the Respondent

R. Laroia

for the Child