NOVA SCOTIA COURT OF APPEAL
Citation: *Chedrawy v. Chedrawy*, 2021 NSCA 73

Date: 20211019
Docket: CA 509059
Registry: Halifax

Between:

Christelle Halabi Chedrawy

Appellant

v.

Edgar George Chedrawy

Respondent

Judge:	Bryson, J.A.
Motion Heard:	October 6, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion to extend time to appeal an interim *ex parte* order dismissed with costs.
Counsel:	Angela Walker, for the appellant Terrance Sheppard, Q.C., for the respondent

Introduction

[1] It is better to give up nothing than to fight about nothing.

[2] By attorning to this jurisdiction, the would-be appellant concedes the relief possible from the claims made.

[3] Christelle Chedrawy seeks to appeal Associate Chief Justice O'Neil's August 16, 2021 *ex parte* order returning the parties' children to Nova Scotia after Ms. Chedrawy's surreptitious removal of them to Delaware via a temporary family visit in Lebanon. Mr. Chedrawy had consented in writing to the latter but was unaware of the former. When he learned that the children were in Delaware, he petitioned for divorce and brought an interim *ex parte* motion to have them returned to Nova Scotia.

[4] Ms. Chedrawy obtained her own *ex parte* order in Delaware but it was dissolved once that Court was apprised of A.C.J. O'Neil's order. The Delaware Court ordered the children returned to Nova Scotia. Ms. Chedrawy wants to appeal the means by which the children were returned here. She provides no explanation of how that would accomplish anything. The issues between the parties are now fully engaged in the Supreme Court (Family Division).

[5] Ms. Chedrawy argues that she was not out of time to appeal. Alternatively, she has moved to extend the time to appeal. Her motion should be dismissed because:

(a) absent extraordinary circumstances, appellate courts do not hear appeals from interim *ex parte* orders;

(b) no meaningful remedy is sought regarding the alleged errors in the decision to issue an interim *ex parte* order; and

(c) no evidence was led regarding the best interests of the children and how the proposed appeal would serve those interests.

Did Ms. Chedrawy appeal in time?

[6] On September 16, 2021, Ms. Chedrawy filed a motion to extend time to appeal the August 16 *ex parte* order. Her written submissions assume the relevant appeal period is 10 days and cite case law authorizing an extension of time to

appeal. But at the hearing, Ms. Chedrawy unexpectedly advanced the novel proposition that she did not need an order extending time because she had 30 days to appeal under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). Accordingly, the parties were invited to make additional written submissions.

[7] Ms. Chedrawy argues that s. 21(1) of the *Divorce Act* permits an appeal "from any judgment or order, whether final or interim,…" within 30 days after the order was made. She adds that *Rule* 90.13 of the *Civil Procedure Rules* refers specifically to the 30 days described in the *Divorce Act*. Since the *ex parte* order was granted under the *Divorce Act*, Ms. Chedrawy had 30 days to appeal. She says that any inconsistency between the 10-day interlocutory appeal period and the *Divorce Act* should be resolved in favour of the latter, citing federal paramountcy relied on in *Nestor v. Nestor*, 2018 BCCA 453.

[8] A more nuanced analysis than *Nestor* appears in *Elgner v. Elgner*, 2011 ONCA 483 (leave to appeal refused: [2011] S.C.C.A. No. 341), in which the Ontario Court of Appeal noted that s. 21(6) of the *Divorce Act* contemplates an appeal be "asserted, heard and decided according to the ordinary procedure" of the court to which appeal is made. It is not necessary to resolve any apparent jurisprudential conflict, because, however calculated, Ms. Chedrawy is out of time. Even if the motion to extend could be construed as an appeal, it was filed on September 16, 2021, 31 days after the issuance of the written *ex parte* order.

[9] But Ms. Chedrawy remonstrates that although ready to file on September 14, "…counsel was advised by court staff of the [need to?] file a motion for extension of the normal period of appeal because the 10 day [period?] applied and starts to run on the date the order was issued rather than the date our client became aware of the order…" These words and the draft Interlocutory Notice of Appeal confirm that discussion with staff related to an interlocutory appeal. Court staff did not err in advising that a motion to extend was necessary, because under the *Rules*, interlocutory appeals must be brought within 10 days and Ms. Chedrawy's proposed appeal was beyond that time.

[10] Ms. Chedrawy's supplementary submissions on this point are prefaced: "Ms. Chedrawy filed her appeal in time, but for the rejection from the Court". There was no rejection from the Court. Even so, ascribing fault to "court staff" for a want of correct procedure is an unbecoming abdication of responsibility for a decision counsel should have made regarding a procedure counsel should have known (see *Go Fleet Corporation v. So.*, 2021 ONSC 2199 (Div. Ct.)).

[11] However calculated, Ms. Chedrawy was out of time to appeal.

Should time to appeal be extended?

[12] Alternatively, Ms. Chedrawy urges an extension of time to appeal as authorized by s. 21(4) of the *Divorce Act*, *Rule* 90.37 (12)(h) and this Court's jurisprudence, quoting specifically from *Farrell v. Casavant*, 2010 NSCA 71 at para. 17:

> [17] Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

[13] Barring exceptional circumstances, appellate courts do not hear appeals from interim *ex parte* orders because the procedural remedy is to seek an *inter partes* hearing before the first instance judge or another judge of that court, as A.C.J. O'Neil's *ex parte* order contemplated and *Rule* 22.06 permits (see *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2017 ABCA 316 at paras. 52-55). An attempted appeal following an executed *ex parte* order may even be an abuse of process when the applicant has made no effort to have an *inter partes* hearing: *WEA Records Ltd. v. Visions Channel 4 Ltd.*, [1983] 2 All E.R. 589 (C.A.).

[14] Even applying *Farrell v. Casavant*, and allowing for good faith and reasonable excuse for delay, on the merits Ms. Chedrawy can do no better than say that A.C.J. O'Neil should have proceeded under the *Hague Convention* referred to in s. 6 of the *Child Abduction Act*, R.S.N.S. 1989, c. 67 rather than the *Divorce Act*. This is now an academic exercise. Ms. Chedrawy concedes jurisdiction. Moreover, she has led no evidence and made no submissions concerning the best interests of the children, typically required where their welfare is engaged (see

O.E.A. v. Nova Scotia (Community Services), 2021 NSCA 28; *Nova Scotia (Community Services) v. S.E.L.*, 2002 NSCA 62).

Conclusion

[15] This motion should never have been brought. The parties' time and resources would be better spent resolving the issues in the Supreme Court (Family Division).

[16] Although counsel suggest costs of $500.00, Ms. Chedrawy's last-minute assertion that she was not out of time required additional written submissions. The motion is dismissed with costs of $1,000.00 inclusive of disbursements, payable by Ms. Chedrawy to Mr. Chedrawy forthwith.

Bryson, J.A.