2017 ABCA 238
Alberta Court of Appeal

Onishenko v. Cholowski

2017 CarswellAlta 1265, 2017 ABCA 238, [2017] A.W.L.D. 4393,
[2017] W.D.F.L. 4263, 100 R.F.L. (7th) 7, 281 A.C.W.S. (3d) 582

Kathryn Onishenko (Applicant) and Thomas Cholowski (Respondent)

Sheila Greckol J.A.

Heard: July 13, 2017
Judgment: July 19, 2017
Docket: Edmonton Appeal 1703-0126-AC

Counsel: K.S.V. Linton, for Applicant
T.C. Brown, for Respondent

Related Abridgment Classifications
Family law
IX Custody and access
IX.12 Appeals
IX.12.a General principles

Headnote
Family law --- Custody and access — Appeals — General principles
Judgment on parenting matters was given after ten-day trial — Judgment dealt comprehensively with guardianship, parenting time and child support — Mother filed notice of appeal slightly more than two months after deadline — Mother brought application for extension of time to appeal — Application dismissed — Delay was explained in large part by amount of time it took to obtain Legal Aid coverage, process not in mother's control — Delay had not occasioned any significant prejudice to father or children, beyond prejudice that was inherent in appeal itself — Merits of mother's proposed appeal were weak and it would be difficult for her to satisfy standard of review if appeal were to be heard by full panel — There was apparent unfairness arising from fact that if mother had resources to launch her appeal in timely fashion, there would have been no preliminary review of merits and matter would have proceeded directly to full panel hearing — Unfairness was more apparent than real in sense that thorough examination of record on application revealed that appeal did not have reasonable prospect of success.

Table of Authorities

Cases considered by *Sheila Greckol J.A.*:

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

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 206, 2015 CarswellAlta 1090, 602 A.R. 135, 647 W.A.C. 135 (Alta. C.A.) — considered

Berro v. Berro (2001), 2001 ABCA 157, 2001 CarswellAlta 860, 286 A.R. 124, 253 W.A.C. 124, 9 C.P.C. (5th) 226, 93 Alta. L.R. (3d) 230 (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

Gordon v. Goertz (1996), [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, *(*sub nom. *Goertz c. Gordon)* [1996] R.D.F. 209, 1996 CarswellSask 199, 1996 CarswellSask 199F (S.C.C.) — followed

Grotski v. Bank of Montreal (1991), 4 C.P.C. (3d) 197, (sub nom. *Bank of Montreal v. Grotski)* 120 A.R. 149, (sub nom. *Bank of Montreal v. Grotski)* 8 W.A.C. 149, 1991 CarswellAlta 374 (Alta. C.A.) — referred to

Little v. Little (1998), 1998 CarswellAlta 1150, 228 A.R. 344, 188 W.A.C. 344, 1998 ABCA 400 (Alta. C.A.) — referred to

Lofstrom v. Radke (2017), 2017 ABCA 211, 2017 CarswellAlta 1115 (Alta. C.A.) — referred to

Murphy v. Haworth (2016), 2016 ABCA 219, 2016 CarswellAlta 1376, 2 C.P.C. (8th) 201 (Alta. C.A.) — referred to

Stoddard v. Montague (2006), 2006 ABCA 109, 2006 CarswellAlta 1826, 412 A.R. 88, 404 W.A.C. 88 (Alta. C.A.) — referred to

Statutes considered:

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 18 — considered

s. 21(6) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 14.8(2)(a)(iii) — referred to

***Sheila Greckol J.A.*:**

Introduction

1 The applicant, Ms. Onishenko, applies for an extension of time to appeal a judgment on parenting matters given after a ten day trial. She and the respondent, Mr. Cholowski, have twin children, now 5 years of age. The judgment dealt comprehensively with guardianship, parenting time and child support. At trial, Ms. Onishenko sought the return of the children to her primary care and control; the children had been in the primary care of Mr. Cholowski since August 2014. The trial judge decided that the children should remain in the day-to-day care of Mr. Cholowski (who would have sole decision making power) in Camrose, that both parents would be guardians and that Ms. Onishenko would have parenting time with the children in Edmonton as set out in a detailed order.

Background

2 Ms. Onishenko was represented by a Legal Aid lawyer at trial. After the trial judgment was pronounced on February 23, 2017, Ms. Onishenko inquired of Legal Aid about coverage for an appeal and was told that it would take up to 30 days to get an opinion on the merits. Ultimately, coverage was not confirmed until early June 2017.

3 It is Ms. Onishenko's evidence that, after the trial, she was advised to apply for an extension of time to file an appeal. She deposes that she did her own research about how to obtain an extension and also considered filing a notice of appeal rather than seeking an extension of time. In the end, she decided against filing a notice of appeal because she learned that doing so would trigger a requirement to order transcripts, which she could not afford without Legal Aid coverage. Instead, on March 14, 2017, she sought an extension of time to file an appeal but applied to the Court of Queen's Bench, rather than to a justice of this Court. She obtained three "extensions" from the Court of Queen's Bench, which together purported to extend the time to appeal to June 9, 2017. In each case, Ms. Onishenko obtained the extensions *ex parte*; the first one was served on Mr. Cholowski on March 28, 2017, so that he was aware of Ms. Onishenko's intention to appeal.

4 Ms. Onishenko filed her notice of appeal with this Court on May 30, 2017. The time to appeal the parenting judgment expired one month after its pronouncement — i.e., March 23, 2017: see rule 14.8(2)(iii) of the *Rules of Court*, AR 124/2010. Hence, Ms. Onishenko needed to apply to this Court for an extension of time to appeal. The purported "extensions" of time obtained from the Court of Queen's Bench were not effective to do so, since only a judge of this Court may extend the time to appeal.

Factors relevant to extending time to appeal

5 The leading case on extensions of time to appeal is *Cairns v. Cairns*, [1931] 4 D.L.R. 819 at 826-7, [1931] 3 W.W.R. 335 (Alta. C.A.) [*Cairns*], which sets out various factors for the Court to consider:

(i) a *bona fide* intention to appeal while the right existed;

(ii) an explanation for the delay which serves to excuse or justify it;

(iii) an absence of serious prejudice to the respondent, such that it would not be unjust to disturb the judgment;

(iv) the applicant must not have taken the benefit of the judgment being appealed; and

(v) a reasonable chance of success on the appeal.

The factors are not a set of necessary conditions, such that if one is not met the Court must decline the application: *Cairns* at 829; *Stoddard v. Montague*, 2006 ABCA 109 at para 8, (2006), 412 A.R. 88 (Alta. C.A.) [*Stoddard*]; *Lofstrom v. Radke*, 2017 ABCA 211 at para 3, 2017 CarswellAlta 1115 (Alta. C.A.) (JA) [*Loftstrum*]. The Court has the discretion to extend time even if not all parts of *Cairns* are met.

Intention to appeal

6 In this case it is clear that Ms. Onishenko had a *bona fide* intention to appeal the parenting order from the start, which has continued uninterrupted to the present. That is evidenced by her three applications, in the wrong venue and (inappropriately) without notice, to extend the time to appeal.

Excuse for the delay

7 Ms. Onishenko has an explanation for the delay, which serves to excuse it. She did not file a notice of appeal soon after the judgment was pronounced because she knew that doing so would trigger the requirement to order transcripts. She could not afford the transcripts without Legal Aid coverage and it took more than two months for Legal Aid to confirm that the appeal was covered. The delay in obtaining Legal Aid coverage is the primary explanation for the delay in this case and Ms. Onishenko cannot be blamed for it. Indeed, she contacted Legal Aid on several occasions during the period of delay to inquire about progress.

8 The other part of the explanation for the delay is that Ms. Onishenko made three applications for an extension of time to appeal in the wrong court; if time had been extended by a judge of this Court, there would have been no delay and no need for the present application. The error in seeking "extensions" from the Court of Queen's Bench is excusable. Ms. Onishenko initially decided to seek an "extension" from the Court of Queen's Bench, relying on her own research because she did not have a lawyer. She may have applied for the third "extension" at the Court of Queen's Bench, on May 27, 2017, on the advice of her lawyer. Although some single judge decisions of this Court say that delay caused by errors of legal counsel are less excusable, "there is no rigid rule that an error by counsel is not a sufficient explanation": *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 206 at para 7, 602 A.R. 135 (Alta. C.A.). In any event, counsel's error did not cause much of the overall delay.

Prejudice caused by the delay

9 The relevant question here is whether the delay in filing an appeal, rather than the existence of the appeal, has seriously prejudiced Mr. Cholowski or the children: *Murphy v. Haworth*, 2016 ABCA 219 at para 14, 268 A.C.W.S. (3d) 717 (Alta. C.A.); *Grotski v. Bank of Montreal* (1991), 120 A.R. 149 at para 6, 4 C.P.C. (3d) 197 (Alta. C.A.). The delay at issue is slightly over two months.

10 It is obvious that an appeal will create uncertainty about the children's future living arrangements and that the children have an interest in certainty about their lives. However the uncertainty is not determinative for two reasons. First, Ms. Onishenko will argue that the distribution of parenting time and decision making rights in the judgment under appeal is not in the best interests of the children, for various reasons. If that is right, the children also have an interest in the order being corrected on appeal. Second, the uncertainty about the children's living arrangements will be caused by the appeal itself and not the two month delay in filing a notice of appeal.

11 In conclusion, there is no appreciable harm occasioned by the delay in this case.

Benefits of the judgment

12 Ms. Onishenko has exercised parenting time with the children in accordance with the terms of the judgment under appeal but this does not offend the rule against taking the benefits of the judgment: see *Armstrong v. Armstrong*, 2006 ABCA 228 at para 45, 60 Alta. L.R. (4th) 21 (Alta. C.A.) [*Armstrong*]. That rule prevents an applicant from "blowing hot and cold" — taking inconsistent positions toward a judgment under appeal. Ms. Onishenko has exercised her right to parenting time with the children and, on appeal, will seek more time with them, among other things. She is not taking inconsistent positions. To adopt the words of Côté JA in *Armstrong*, Ms. Onishenko is permissibly "blowing hot and hotter (taking and seeking more of the same)".

Reasonable chance of success

13 Ms. Onishenko will argue that the parenting order fails to deal with several of the guardianship powers set out in s 21(6) of the *Family Law Act*, SA 2003, c F-4.5. She will also argue that parts of the parenting order are clearly not in the children's best interests on their face. For example, she will argue that although she is a joint guardian of the children, the judgment gives her no right to contact the children's school or medical professionals without Mr. Cholowski's consent, which puts the children at risk when in her care and excludes her from decision-making on important matters of health and education. Ms. Onishenko will also argue that the trial judge approached the case as a mobility case, rather than a parenting case, thus drawing the focus away from a pure examination of the best interests of the children. She will argue that this led to the trial judge applying the wrong law and misapprehending the evidence.

14 Mr. Cholowski concedes that all the powers of guardianship delineated in s 21(6) of the *Family Law Act* are not included in the order under appeal. His counsel advises this occurred through oversight in drafting the order and has undertaken to file a consent amended order including those powers as shared. His counsel also indicated that it was not Mr. Cholowski's intention to prevent Ms. Onishenko from contacting the children's medical and educational professionals; and this aspect of the order, too, will be clarified by filing a consent amended order.

15 As to the balance of Ms. Onishenko's proposed appeal, Mr. Cholowski denies that it has a reasonable prospect of success because (a) the standard of review of decisions on custody and parenting is deferential and no error of principle can be shown and (b) the trial decision was influenced to a great degree by credibility findings, which are hard to reverse on appeal.

16 This was not a classic mobility case but the change required by the children reaching school age and the geographic distance between the parties' residences were relevant considerations in the reasoning of the trial judge.

17 Until 2014, the children were in the primary care of their mother in Edmonton. As a result of an event that occurred that year, the children were placed in the primary care of their father, who had moved to Camrose in 2013. They remained in the father's primary care, confirmed by a consent interim parenting order of November 2015. That order provided that the children would remain in the primary care of their father but the parents would essentially share parenting time on a three week rotation with the children living partially in Edmonton and partially in Camrose. This arrangement is no longer viable as the children will attend school this fall.

18 As of the date of trial, in early 2017, the father advanced a shared parenting regime as an option, but according to the submission of his counsel, there was no prospect of Ms. Onishenko moving to Camrose. She has a family in Edmonton and her position at trial was that primary parenting of the twins should be with her in Edmonton.

19 Ms. Onishenko's primary argument on appeal is that the trial judge erred in treating this case as a mobility application, skewing his view of the evidence and the law in making the parenting decision. The trial judge said this in his reasons for decision, at paras 10 and 144:

> [10] Neither party structured their position to focus on a mobility issue. Indeed, counsel for Ms. Onishenko observed "it may not be a big issue". However, she, in effect, is arguing that the children should be relocated to a different city, approximately 90 kilometers distant from their present and primary home. Under the circumstances the factors cited in *Gordon v Goertz*, [1996] 2 SCR 27, as well as the *Family Law Act* of Alberta, SA 2003, c F-4.5 require consideration.
>
> . . .
>
> [144] Mobility cases typically involve an application by a custodial parent wishing to relocate with the children. This case does not involve the prospect of a future relocation.

20 He concluded at paragraphs 149 and 150:

> [149] A parenting regime should maximize contact with each parent that is consistent with the child's best interests. Both parties admitted the Practice Note 7 conclusion that [the twins] have bonded with both parents. They similarly accept each other's ability to satisfy the children's basic needs. They also agree that an equally shared parenting arrangement would be acceptable if residing in the same community.
>
> [150] I conclude that maximum contact with each parent by [the twins] is in their best interests. However, the realities of geography and need for stability necessarily restricts maximum contact.

21 In the final result, the trial judge articulated the criteria for consideration of the children's best interests under the *Family Law Act*, as well as the considerations guiding mobility applications in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 134 D.L.R. (4th) 321 (S.C.C.) [*Gordon*] (at paragraphs 64-67); he made findings of credibility (at paragraphs 99-102); and did a thorough best interests analysis (at paragraphs 157-166).

22 Ms. Onishenko proposed that the parenting arrangement shared between her home in Edmonton and the father's home in Camrose change to a primary parenting regime with her in Edmonton. The *Gordon* criteria assist in the inquiry into best interests in the context of changed circumstances, relocation; here there were changed circumstances and the mother argued the children should be relocated to her home for their primary residence. The trial judge used the *Family Law Act* and *Gordon* analytic tools to arrive at a conclusion regarding the children's best interests in this context, including reference to a large amount of evidence presented in a ten day trial. The applicant has not demonstrated that the trial judge erred in using the analytic criteria set out in *Gordon*, together with those set out in s 18 of the *Family Law Act*.

23 Some authorities hold that where an applicant seeks to extend the time to appeal a parenting order, the term "reasonable prospect of success" means something more than the appeal that could succeed; an appeal merely being arguable or not hopeless is insufficient: *Armstrong* at para 16; *Berro v. Berro*, 2001 ABCA 157 at para 17, 286 A.R. 124 (Alta. C.A.); *Little v. Little*, 1998 ABCA 400 at para 15, 228 A.R. 344 (Alta. C.A.).

24 I conclude that Ms. Onishenko has articulated grounds of appeal that, while not hopeless, appear to have only a slight chance of success, given the standard of review on appeals from parenting decisions, given the trial judge's findings of fact and findings with respect to credibility; and given his conclusions as to the best interests of the children. I find that the proposed appeal does not have a reasonable prospect of success.

Conclusion

25 Ms. Onishenko filed her notice of appeal slightly more than two months after the deadline. The delay is explained in large part by the amount of time it took to obtain Legal Aid coverage, a process not in her control. The delay has not occasioned any significant prejudice to the respondent or the children, beyond the prejudice that is inherent in the appeal itself.

26 However, reluctantly I must conclude that the merits of Ms. Onishenko's proposed appeal are weak and it would be difficult for her to satisfy the standard of review if the appeal were to be heard by a full panel. There is an apparent unfairness arising from the fact that if Ms. Onishenko had the resources to launch her appeal in a timely fashion, there would have been no preliminary review of the merits and the matter would have proceeded directly to a full panel hearing. However, the unfairness is more apparent than real in the sense that a thorough consideration of the record on this application reveals that the appeal does not have a reasonable prospect of success.

27 Taking all of the factors into consideration, I am satisfied this is not an appropriate case to extend the time to appeal.

Application dismissed.