



Civil Appeal No. 4 of 2026

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL
JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER 2022: No. 391**

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 29 September 2026

Before:

**THE PRESIDENT, JUSTICE OF APPEAL IAN KAWALEY
(Sitting as a Single Judge)**

Between:

FATHER

Applicant

- and -

MOTHER

Respondent

Appearances: Mr Bruce Swan for the Applicant

Heard: On the papers

Date of Ruling: 29 September 2026

**RULING ON APPLICATION FOR AN ENLARGEMENT OF TIME WITHIN
WHICH TO SEEK LEAVE TO APPEAL**

Introductory

1. Following a 5 day hearing in May 2025, Wheatley J (Actg) (the “Judge”) delivered a 41 page judgment on 18 December 2025 which provided the basis for an Order in relation to the custody, care and control of the child of the family (B) (the “Decision”). Mr Swan appeared for the Applicant below after the first day of the hearing. The Decision permitted the Respondent to move to Canada with B in her primary care and control. Based on findings that the Applicant was guilty of domestic violence, his access rights were limited to virtual access, the Mother was given sole decision-making power over educational matters and the Mother’s address was withheld from the Applicant for her protection.
2. On 17 February 2026, the Applicant’s counsel filed a Notice of Appeal against the Decision. Assuming that the Decision was final not interlocutory in character, and that a six week time limit for appealing rather than a 14 day time limit for seeking leave to appeal applied, the Notice of Appeal was almost 3 weeks out of time. It seemingly did not come to the Acting Registrar’s attention until in or about September 2026 that the appeal purportedly filed ought to have been an application for an enlargement of time within which to seek leave to appeal and, once notified, the Applicant’s counsel promptly filed an Affidavit in support of the correct application on or about 15 September, 2026.
3. To save time and costs, I have decided to deal with this application on an *ex parte* basis on the papers, subject of course to the automatic right for my own decision to reviewed by the full Court.

The procedural framework

4. Order 1/5 of the Rules of the Court of Appeal (the “Rules”) provides:

“1/5 Enlargement of time and departure from Rules

1 The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interests of justice .

2 Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so

enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.

3 An application for enlargement of time within which to appeal may be heard and determined by a single Judge; but, if the Judge refuses an application made under this provision, the party aggrieved by such refusal shall be entitled to have the application heard and determined by the Court.” [Emphasis added]

5. According to Order 1/2, the term “‘Court’ means the Court of Appeal for Bermuda”. The Rules empower the Supreme Court to deal with applications for leave to appeal, but confer no power to enlarge the time within which to appeal or seek leave to appeal. Order 2 /3 provides that where leave to appeal is required, the application must be made to the Supreme Court within 14 days of the decision appealed against and, if leave is refused, leave must be sought from the Court of Appeal within 7 days of the refusal.
6. There has seemingly been some lack of clarity over the years as to whether the Supreme Court can deal with enlargement of time applications together with applications for leave to appeal. Why this should be is unclear. Order 1/5 explicitly confers jurisdiction on this Court to extend time in all matters, and so it is difficult to see how it can be said there is a gap in the Rules which can be filled by reference to English practice under 2/35. Order 2/36 provides that “*Whenever an application may be made either to the Supreme Court or to the Court, it shall be made in the first instance to the Supreme Court*”. This clearly applies to leave to appeal applications under Order 2/3; however, there is no provision for the Supreme Court to deal with applications to extend time in relation to applications for leave to appeal.
7. This position seems anomalous, because it is inconvenient for this Court to deal with enlargement of time first, before the Supreme Court can deal with the question of leave to appeal if time is extended. An amendment of the Rules should perhaps be considered in this regard.
8. The discretion to extend time is governed by Order 5/1:

“5/1 Waiver of non-compliance with rules

Non-compliance on the part of an appellant with these Rules or with any Rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court consider that such non-compliance was not wilful, and that it is in the interests of justice that non-compliance be waived. The Court may in such manner as they think right, direct the appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given.” [Emphasis added]

9. The governing principles for applying these rules were described by this Court in *Phillips-v-Phillips* [2001] Bda LR 7 (at page 3) as follows by Nazareth JA (Astwood P and Zacca JA concurring):

“Order 2 r.4(2) of the Rules of the Court of Appeal, with reference to applications made to the Supreme Court for leave to appeal, requires every application for enlargement of time within which to appeal, to be supported by good and substantial reasons for failure to appeal in time, and by grounds of appeal which prima facie show good cause why the appeal should be heard. These requirements are subsumed in the follow dicta.

It is entirely in the discretion of the court whether to grant or refuse an extension of time to appeal. The factors normally taken into account in deciding whether to grant or refuse such an extension are

- (i) the length of the delay;*
- (ii) the reasons for the delay;*
- (iii) the chances of the appeal succeeding; and*
- (iv) the prejudice to the respondent if the application is granted.*

(C M Van Stillevoeldt BV v El Carriers Inc[1983] 1WLR 297; Vaucrosson v Bank of Bermuda, Civil appeal 14 of 1995),”

10. Section 12 (2) (a) of the Court of Appeal Act 1964 provides that “*no appeal shall lie without leave*”. The statute gives no express guidance as to the distinction between final and interlocutory decisions, but the distinction is nowadays based on case law generally clear. In the matrimonial law context, however, some indirect guidance is given because section 12 (3) identifies the main types of order which are final in character (“*a decree absolute for the dissolution or nullity of marriage or a final order for the dissolution or nullity of marriage*”). But even this is not comprehensive. In an admittedly different context, the practical difficulties which can flow from having an automatic right to appeal part of an order while being obliged to seek leave about a separate interlocutory limb prompted Roberts P to observe in *Rego-v-Rego* [1990] Bda LR 7 (at pages 1-2):

“It is perhaps to be noted that it does not seem sensible to require leave to be given for any appeal to this Court against an order for periodic payments, because these are interlocutory in character, whereas a party against whom an order is made for a payment of a lump sum needs no such leave. It would, in our view, be better to amend the law so as to provide a right of appeal to an aggrieved party against any order, whether final or interlocutory, in matrimonial proceedings.”

11. It is really only on the basis of experience rather than any easily identifiable matrimonial law authority that it seems obvious that an order relating to the care and control of children has traditionally been recognised by the courts as interlocutory in character. Judicial statements made in relation to general civil litigation do not translate smoothly into the matrimonial law sphere. Nonetheless, in *Consolidated Contractors International*

Company SAL v. Munib Masri [2009] CA (Bda) 11 Civ (at [15]) Auld JA (Zacca P and Ward JA concurring) approved:

“...the approach of Bingham LJ (as he then was) in Holmes v Bangladesh Biman Corp [1988] 2 Lloyd’s Rep 120, at 124, in the context of trial of a preliminary issue: “... a broad commonsense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline’s favour, have ended the action.”

Merits of application for an enlargement of time

Grounds for the delay

12. The application for leave to appeal ought to have filed on or about 2 January 2026 and the Applicant imperfectly signified his intention to appeal the Decision just over 6 weeks after the time for appealing expired. The Applicant’s explanation for the delay are set out in paragraphs 4-5, the bulk of his Affidavit addressing his grounds for wishing to appeal. In essence, he was on holiday abroad with his son, considering the judgment and attempting to raise funds for an appeal. When he instructed his lawyer, the appeal was filed promptly.
13. Assuming in the Applicant’s favour that he was incorrectly advised that the deadline for filing was six weeks after the 18 December 2025 Decision (i.e. on or about 30 January 2026), there is no “*good and substantial*” explanation at all for why the relevant deadline could not have been met, either by (a) him filing a holding appeal as a litigant-in-person, or (b) his lawyer filing a holding notice of appeal with further grounds to follow. The impression given by the Applicant’s evidence is that his appeal preparations proceeded at their own pace as if he was not subject to any specific constraints of time.

Merits of the appeal

14. Does the appeal appear so meritorious that this overrides the absence of any satisfactory explanation for the delay? The grounds of appeal set out in the Applicant’s Notice under the umbrella heading of failing to consider the recommendation of Court Social Worker (“CSW”) for a welfare check in Ontario were the following:
 - (1) the CSW had sought information about the child’s living conditions;
 - (2) the Judge failed to consider evidence that the Mother would fail to keep the child enrolled in education;
 - (3) the Judge failed to consider the fact that the CSW was unable to confirm the child’s residential address;

- (4) the Judge failed to have due regard for the absence of any corroboration of the Mother's evidence in relation to violence on the Father's part towards the child.
- 15. The prospects of success of these grounds must be measured against the relief sought by the Applicant, which expressly seeks only a suspension of the Decision but implicitly complains that it was invalidly made. Account must also be taken of any additional elaboration of these grounds that might take place based on the Applicant's evidence, which deals more fully with why he is dissatisfied with the decision. The complaints made can be summarised as follows:
 - (a) he does not have adequate information about his son's living and schooling arrangements (paragraphs 6-7);
 - (b) the Judge had no evidential basis for finding he was an abusive person towards the Respondent whose evidence was designed to hurt the Father (paragraphs 8-12, 20-21);
 - (c) the Judge failed to have regard to the best interests of the child, and the potential harm flowing from the Mother's disregard of the CSW's advice in relation to the educational interests of the child. The Mother's removal of the child was designed to evade supervision of the Court and the CSW over the child's welfare (paragraphs 13-19).
- 16. The Decision was fundamentally based on the conclusion that that the child should be in the sole care of the Mother and that the Father's access to the child (including information about the child's school and residence) should be restricted because of his domestic violence. The Mother required protection from personal violence and the child required protection from being exposed to witnessing domestic violence, the Judge found. The approach adopted was entirely logical and clearly explained by the Judge.
- 17. Accordingly, only complaint (b) requires evaluation at this stage. Complaints (a) and (c) are only arguable if complaint (b) is assumed to have realistic prospects of success. Factual findings made by a trial judge can be set aside by an appellate court if there is no evidential basis for them as the Applicant complains. The critical findings include the following:
 - (a) the Father was found (at [122]) to be "*manipulative and deceptive*" for reasons which are then clearly set out;
 - (b) the Father was found to be "*disrespectful and aggressive when attending Court hearings...His overall contempt for the Mother was obvious and undoubtedly will impact B in a negative manner*" ([128]);

- (c) the CASW's findings on various matters were rejected for reasons which are rational on their face. One significant overarching consideration was the finding that the "*CASW spent an inordinate amount of time of what appears to be advocating for the Father rather than playing a neutral role for the Court. This appeared in various forms throughout these proceedings*" ([138]) The treatment of the Mother by the Department during the proceedings, in contrast, was "*astonishing*" ([131]);
 - (d) the CASW was said to have admitted failing to fully investigate the domestic abuse allegations due to an oversight which the Judge described as "*horrifying*" ([146]). Documents suggested that the allegations the Mother made were not investigated by the Department because they were regarded as historic and she had no visible injuries at that time. A Police report was made in connection with an allegation that the Father had knocked the Mother unconscious on one occasion, but the investigation was closed in circumstances that suggested the investigating officer was surprised at this decision ([150]). The Judge acknowledged that "*the evidential hurdles in domestic violence cases are notoriously difficult to meet*" ([151]); and
 - (e) the Mother's complaints of domestic were ultimately accepted as genuine by the Judge who heard her evidence and considered potentially supportive surrounding evidence (including her evaluation of the Father).
18. These findings were recorded after the parties' respective positions had been summarised. The Father's position was set out at [89]-[105] (pages 18-21 of the Judgment). This was firstly that although it was conceded that B should move to Canada with the Mother, the Father wished to continue to have involvement with the child's upbringing. Secondly, the Father placed considerable reliance on the evidence of the CASW. The Judge recorded that "*Mr Swan submitted that significant weight should be placed on the CASW's conclusion that there was no credible evidence to support the Mother's allegations of abuse, violence, or harassment by the Father*" ([97]). On the face of the Judgment, therefore, the Judge appreciated quite clearly that the Father contested the Mother's abuse allegations on the basis that they were untrue and unsubstantiated as found by the CASW. She found the Mother to be the more credible witness and accepted her evidence while rejecting the Father's and key elements of the CASW's evidence and/or reports having heard oral evidence from all concerned.
19. As Lord Sumption opined in the Bermudian case of *Mutual Holdings (Bermuda) Limited and others (Appellants) v Diane Hendricks and others* [2013] UKPC 13:

“28. An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness... As Lord Hoffmann observed in *Biogen Inc v Medeva Plc* [1997] RPC 1, 45,

‘The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.’”

20. It is difficult on the basis of the material presently before the Court to see what arguable basis there is or might be for this Court to set aside the key findings made by the Judge in this case, bearing in mind she was applying the civil burden of proof. These materials do not “*prima facie show good cause why the appeal should be heard*” as required by *Philipps-v-Phillips* (above). It is easy to understand why the Applicant is unhappy with the Decision and the adverse findings made against him; it is difficult see how he can succeed in setting those findings aside on appeal.

Conclusion

21. The Applicant has failed to meet the test for obtaining an enlargement of the time within which to seek leave to appeal because he has not advanced a good and substantial reason for the delay nor identified a good cause as to why the appeal should be heard. The application is accordingly refused. This decision is subject, of course, to the Applicant's right to apply to renew this application before the full Court.