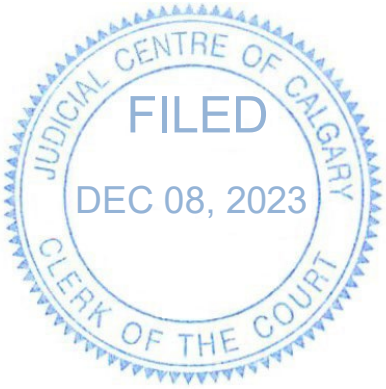
Court of King's Bench of Alberta



Citation: Kilcommons v Zapata, 2023 ABKB 691

Docket: FL01 38816
Registry: Calgary

Between:

Sionade Colby Kilcommons

Plaintiff

- and -

Hector Gerardo Trejo Zapata

Defendant

Reasons for Decision
of the
Honourable Justice R.E. Nation

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[1] This decision deals with a procedural point arising from the late filing of an application under the *Hague Convention on the Civil Aspects of International Child Abductions*, HCPIL, 25 October 1980, Hague XXVIII [*Hague Convention*].

[2] On October 26, 2023, a student-at- law appeared before me in morning chambers on behalf of the defendant, requesting a fiat on an application and affidavit "under the *Hague Convention*". Some brief background was given, including that the application was already set for a hearing on February 7, 2024, and the filing deadline for both documents had been missed. I was told that the other side had a copy of the application and affidavit, they knew the student was in court asking for the fiat, and "they have not said they have an issue with it". The fiat was signed.

[3] When plaintiff's counsel received the filed application and affidavit with the fiat, the plaintiff brought an application to set aside the fiat, to require the defendant to file the same application using a different form, and for any new application to be dated on the actual date of any such future filing. The defendant brings a cross-application for an order that the fiat backdating the application in the original form be validated.

[4] The importance of the date is that it effects whether the defendant's application was filed within the one-year period referred to in Article 12 of the *Hague Convention.*

Background Facts

[5] The relevant background facts are as follows:

1. The child, Dante, is 3 years old. She was brought to Canada from Mexico by her mother, the plaintiff, on October 7, 2022.
2. The plaintiff commenced an action under the *Family Law Act*, SA 2003, c F-4.5 starting action FL01-38816. On February 9, 2023, she obtained an interim without prejudice parenting order. The order has a preamble stating that the Court was advised that the defendant had caused an Article 16 notice to be filed under the *Hague Convention*. The Court ordered that the plaintiff was to have primary interim control of the child, pending the outcome of the *Hague Convention* application. The order specifically indicated that it was not to prejudice the *Hague* Application of the defendant.
3. The Central Authority filed a notice under Article 16 on February 8, 2023, in FL01-38816.
4. As per Family Practice Note (PN6), Justice Anderson was appointed as case management justice. Counsel for each party appeared before her and she set timelines: for the defendant to file his application under the *Hague Convention* by October 9, 2023, and subsequent deadlines for the plaintiff to respond and the defendant to reply. A hearing was set for February 7, 2024.
5. At a case management meeting, counsel for the plaintiff alerted the Justice and defendant's counsel that if the defendant did not file his application by October 9, 2023, the plaintiff would raise at the February hearing, an issue under Article 12 of the *Hague Convention* that would not otherwise be available to her.
6. Article 12 of the *Hague Convention* states that where a child has been wrongfully removed or retained in accordance with the terms of Article 3, and a period of less than one year has elapsed from the date of the wrongful removal, the Authority shall order the return of the child forthwith. If the proceeding has been commenced after the expiration of one year, (here, October 8, 2023) the return of the child shall be ordered unless it is demonstrated that the child is now settled in its new environment. Thus, the question of whether the child is "settled in the new environment" is not an issue if the filing date is before October 8, 2023.
7. The defendant's unfiled application for the return of the child and his unfiled supporting affidavit were sent to plaintiff's counsel on October 5, 2023. They were also sent to the courthouse for filing on that date.

8. Between October 6 and October 25, there were various communications between the clerk's office and defendant's counsel about what was required to file the application, and ultimately, on October 25, defendant's counsel was advised by the clerk's office that to have the application and affidavit filed with a backdated stamp date, using the date it was first sent over (October 5), a fiat would be required. This was the fiat that was requested in court and granted on October 26.

9. On October 26, defendant's counsel gave notice to the plaintiff's counsel that a student was going to apply for the fiat that morning. The notice was only received at the plaintiff's counsel's office at 10 am, around the time the student appeared and obtained the fiat.

Argument of the Applicant (Plaintiff)

[6] Counsel for the plaintiff highlights that the application filed by the defendant was a form 27, rather than an originating application (form 7), as is mandated by Rule 3.8 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*).

[7] The plaintiff argues that PN6 is directive, stating that the party seeking a court order directing the return of the child "must" file a form 7 originating application, pursuant to Rule 3.8 of the *Rules,* clearly identifying it as an application for the return of a child under the *Hague Convention*. Counsel argues that the Court cannot allow another form to be used, due to the directive language.

[8] Due to the defect in the form filed, the application that the defendant was trying to file is a nullity and must be refiled, according to the plaintiff's reading of PN6.

[9] Counsel for plaintiff also argues that any corrective discretion given to a Justice under rule 1.5 cannot backdate the date of actual filing, as to do so would prejudice his client by being unable to raise the "settled in its environment" argument, should the Court find that there was a wrongful removal or retention.

[10] Finally, the plaintiff argues that to allow any fiat to remedy the form or date of filing is contrary to the administration of justice. This is due to the incomplete disclosure to the Court on October 26: misrepresenting that notice had been given to the plaintiff's counsel, when no advance notice was in fact received.

Argument of the Cross Applicant (Defendant)

[11] Counsel for the defendant argues that Rule 1.5 can be used to remedy any shortfall or noncompliance with the *Rules*. Rule 1.5 provides that if there is an irregularity in a commencement document, pleading document, affidavit or prescribed form, a party may apply to the Court to cure the contravention, non-compliance or irregularity, or to set aside the application or proceeding. It further provides that the court must not cure the irregularity if to do so would cause irreparable harm to any party.

[12] Counsel argues that it is important to understand the unique facts here. This action, FL01-38816, had already been started by the plaintiff, in which she obtained an interim order, and in which the Authority filed its notice. Case management meetings had already occurred, anticipating the defendant's application being filed. The filing and hearing dates were set by

Justice Anderson. Counsel argues that this is significantly different from the usual *Hague Convention* case, where there is no such order, and the first step in the matter is the originating notice filed by the applicant parent who wants return of the child. Counsel argues that it made no sense to file an Originating Application, where there was already an action. Had the defendant filed a form 7 originating application, the two actions would have to be consolidated anyway. Additionally, the hearing date for the *Hague Convention* application had already been set in the FL01-38816 action.

[13] Here, argues the defendant, counsel for the mother had been provided with the unfiled copy of the application and affidavit on October 5, and at that point had raised no issue as to form. In actual fact, the plaintiff at the time of arguing this application had already filed her response affidavit, and the defendant filed his reply affidavit, to comply with the filing dates ordered in case management, and to be sure to keep the February hearing date.

[14] The defendant's position is that this is not a case where the application, affidavit or their contents were unknown to the plaintiff until after the one-year period had expired. Counsel argues that against this backdrop, in the circumstances of the documents being rejected by the clerk, that no one is prejudiced. It is suggested that this is the type of situation that Rule 1.5 can be used to remedy.

[15] Counsel argues that in fact, it is her client, the defendant, who would be prejudiced if the backdating of the application is not validated. Forcing the defendant to file a form 7 at this point would mean that the plaintiff may have an additional argument against returning the child, which would not exist if the application was filed withing to the one-year period.

The Law

FP6

[16] PN6 indicates how *Hague Convention* applications are to be handled in Alberta. It states among other things that Applications pursuant to the *Hague Convention* are to be dealt with expeditiously and be assigned to the appropriate case management justice. PN6 acknowledges that when the Central Authority becomes aware of an impending application in Alberta for the return of a child that meets the criteria under the Convention, the Central Authority shall file with the court a notice pursuant to Article 16 of the Convention and provide that to the designated *Hague* Justice.

[17] PN6 confirms that neither notice under Article 16, nor seeking the assistance of the Central Authority constitute an application for the return of the child. PN6 states that the party seeking a court order directing the return of the child must file an originating application (form 7) pursuant to rule 3.8 of the *Rules* and a supporting affidavit. PN6 states that when the originating application is filed, the clerk's office shall assign the same file number if a King's Bench action already exists, and it mandates that the application will be case managed by the *Hague* Justice.

The Applicable Rules of Court

[18] Rule 3.2(6) states that if an action is started in one form but should have been started or should continue in another, the Court may make any procedural order to correct and continue the proceeding and deal with any related matter.

[19] Rule 1.5 allows the Court to cure contravention, non-compliance or irregularity, but states that the Court must not do so if it would cause irreparable harm to any party. Also, it should be in the overall interest of justice to cure the contravention.

Relevant Cases

[20] It is clear that the Court of Appeal has indicated that Practice Notes do not have the full force of law, (as would, for instance, the *Rules* or Statutes) but are rather informational statements for guidance: ***Huitt v Huitt***, 2021 ABCA 235 at paras 7, 8. That being said, the Court should always attempt to support them, as they are set out to facilitate the proper regulation of litigation.

[21] In ***Kwadrans v Kwadrans***, 2023 ABCA 203, the applicant filed a notice to attend docket court in order to commence an appeal of an arbitration award, rather than filing an originating application. Because section 46 of the *Arbitration Act*, RSA 2000, c A-43is silent on how an appeal must be commenced, rule 3.2(5) applies and mandates that such arbitral award appeals must proceed by way of originating application. The Court of Appeal explained, at paras 25 to 27, that the chambers judge was not permitted to cure the incorrect form because a notice to attend family docket court does not commence an action. The chambers judge was thus bound by the express prohibitive language of the *Arbitration Act* and the *Rules* and did not have the power to extend the appeal period. To have allowed the application would effectively have extended a limitation period set in a Statute.

[22] In ***Patrus v Alberta (Workers' Compensation Board)***, 2014 ABCA 117, an appellant worker appealed the Appeals Commission ruling of a Workers Compensation Board (WCB) decision. The trial judge rejected the WCB's argument that the only avenue for appeal was judicial review. The *Workers Compensation Act*, RSA 2000, c W-15allows for statutory appeal and the Court of Appeal has already stated that "the standard of review will be the same whether the matter is brought forward by judicial review, or by way of appeal": ***Alberta (Workers' Compensation Board) v Buckley***, 2007 ABCA 7 at para 14. The Court of Appeal noted that the trial judge stated that he would have come to the same conclusion had the proceedings been brought by judicial review. It thus concluded that no prejudice was suffered by the fact that the proceedings were commenced as an appeal, and there was no error by the trial judge in exercising jurisdiction over the appeal.

[23] In ***Makar v Luedey***, 2013 ABQB 189, Justice Wacowich retroactively extended the time for document service by the Plaintiff by two days, rather than dispensing with service. This was because he found that the Plaintiff had exercised due diligence in trying to locate the Defendant for service. He stated at para 15 that "courts will generally take steps to cure a procedural defect as long as it does not cause substantial prejudice to the other party. Further, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown".

[24] In ***Karas v Mongeon***, 2018 ABQB 149, Justice Yungwirth used Rule 3.2(6) to consolidate actions, extending the time for service of a Statement of Claim beyond the limitation date, in order for the action to continue in the correct form. Here, there would have been serious consequences for the applicant (the plaintiff in an unjust enrichment claim) if the application for time extension was denied. Additionally, plaintiff's counsel thought the Statement of Claim had already been served, based on conduct by the defendant.

Application of the Law and Rules to the Facts

1. Directive Wording

[25] I will first deal with the question of whether PN6's use of the words "shall" is directive and cannot be relieved against.

[26] ***Huitt*** makes it clear that Practice Notes are informational, and do not have the same legislative force of law as a statute. I would note that directive words in practice notes are often overcome by the use of fiats. For example, Family Practice Note 2 is replete with the word "must". Paragraphs 29 and 30 of that Practice Note, which outline form requirements for affidavits, are often relaxed by way of fiat, when there is urgency or a reason the affidavit does not comply that does not offend the reason for the PN2 directive.

[27] The case at bar is distinguishable from ***Kwadrans*** where there was express, directive language in the *Arbitration Act*.

[28] There is no such prohibition from relief when dealing with directive words in a Practice Note. As a result, the Court can relieve against the incorrect form in this case.

2. Rules Allowing Corrective Action

[29] The plaintiff's counsel argues that to cure the non-compliance and allow the fiat to stand is contrary to the administration of justice as the student misrepresented the matter before the Court: curing it would be contrary to Rule 1.5(4)(d). What the student did was an error and poor practice by failing to: provide a complete history; clarify that the notice to the lawyer was just that morning; identify or highlight the issue of the form of the application; and explain the effect of the one-year period. However, the student did not say the other side consented. Rather, I wrongly assumed that the plaintiff consented from the brief introduction given, which included the fact that a hearing was set in February and the fact that notice was given. I do not find this was an intentional misrepresentation meaning that the administration of justice should not support consideration of curing the non-compliance.

[30] The issue of the effect on Article 12 requires careful consideration. If the fiat is allowed to stand, both parties are in the situation that they would have been had the application been filed on the date it was sent for filing, within the one-year period. If the error is not corrected, the plaintiff will have an additional argument to stop the return of the child, in the event that the defendant is successful in convincing a court that the child has been wrongfully removed or retained within the terms of Article 3.

[31] The aim of the *Hague Convention* is to streamline applications, so the issue of whether the child must be returned can be decided as quickly as possible. The focus is to benefit the child. The addition of the argument of settlement in the new environment, is to address the situation of applications not being brought diligently and within a period of one year. The intent is to encourage the application to be brought in a timely fashion.

[32] If there had been no previous litigation between the parties, the filing of the defendant's application would have been the first step in an Alberta Court between the two parties about their child. In that situation, there would have been no action started, no litigation about the child in Alberta, no appointment of a case management justice, no deadlines established, and no hearing date set. This would have been more akin to the ***Kwadrans*** case.

[33] Here, the defendant first had notice that the plaintiff was in Calgary with the child when a notice in Family Docket Court was served upon him by email, advising him that the plaintiff was attending court to get a morning chambers date to deal with interim parenting. Ultimately that matter was heard, this action FL01-38816 was started, and an interim court order granted. This interim order anticipated the defendant would bring an application.

[34] There was already an action started when the Notice of the Central Authority was filed, and that Notice was filed in this action the day before the interim order was granted. Case management of the *Hague* matter was already happening in this action. The deadlines and court dates were set on the understanding that the defendant would be filing the material in question, which in fact, his counsel prepared and sent to other counsel and to the courthouse for filing within the deadline.

[35] This situation is more akin to the ***Patrus*** case, and also the ***Karas*** case. In the latter a curative rule was used to consolidate actions, where one action was arguably filed beyond a limitation date. To allow the fiat to stand preserves the status quo of the litigation as it was planned and envisioned by the parties, and how it was proceeding.

[36] The plaintiff has argued that she may be prejudiced if the fiat is allowed, as she would lose an additional argument if the defendant were successful in his application that the child was wrongfully removed. However, to require the father to refile may result in prejudice to him: if he can prove wrongful removal, he would be prevented from return of the child if the child is subsequently found to be settled in the new environment.

[37] In the circumstance, I do not find that curative action is prejudicial or will cause irreparable harm such that it would be prevented under rule 1.5(4)(a). The curative powers of rule 1.5 can therefore be applied here.

[38] The cross-application of the defendant is allowed: the fiat may remain, allowing the defendant's application as filed to remain in form 27 instead of form 7, with the date stamp on the application to remain as the date it was sent for filing, October 5, 2023.

Conclusion

[39] The application of the plaintiff is dismissed and the cross- application of the defendant allowed.

Heard on the 21st day of November 2023.
Dated at the City of Calgary, Alberta this 8th day of December, 2023.

Rosemary Nation

R.E. Nation
J.C.K.B.A.

Appearances:

Max Blitt, K.C.
for the Plaintiff

Lisa Handfield
for the Defendant