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— Franks & Zalev - This Week in Family Law

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The Warm Blanket of Complacency

R.D. v. The Minister of Social Development, 2022 CarswellNB 461 (C.A.) — Baird, French and LeBlond JJ.A.

Timelines and child protection legislation. Child protection legislation and timelines. Two things that go together like . . . like . . . like . . . well, they just don't go together. At least not that we can tell. We should *want* them to go together. And they *should* go together. And legislation across the country mandates that they be together. But it's just not working.

This time, it's the New Brunswick Court of Appeal lamenting the endemic delays in hearing and deciding child protection matters in that province. Welcome to the club, New Brunswick. [In fairness, this is not the first time the New Brunswick Court of Appeal has dealt with such delay. See *New Brunswick (Minister of Social Development) v. H. (S.)*, 2013 CarswellNB 223 (C.A.); *New Brunswick (Minister of Family & Community Services) v. B. (S.)* (2008), 49 R.F.L. (6th) 38 (N.B. C.A.); *J.S. v. New Brunswick (Minister of Social Development)*, 2017 CarswellNB 326 (C.A.); *J.S. and J.N. v. Minister of Social Development (now Minister of Families and Children)* (2018), 21 R.F.L. (8th) 34 (N.B. C.A.); *M.V. and C.H. v. Minister of Social Development*, 2021 CarswellNB 469 (C.A.).]

R.D.'s children were placed in protective care by the Minister of Social Development (the "Minister"). In February 2022, the Minister filed an application for a six-month custody order. A procedural order in March set three days for the hearing of the application in August 2022, two weeks before the six-month order, if granted, would have expired.

Under s. 51(6) of the (soon to be repealed and replaced) *Family Services Act*, S.N.B. 1980, c. F-2.2 (the "*Act*"), when the Minister places a child in protective care, the court must hold an interim hearing no later than seven days following the placement. Furthermore, s. 53(3) requires a court to "dispose" of a Minister's application for custody within **30 days** after it is filed. However, the disposition may be delayed if the court is satisfied that "exceptional circumstances" so require. In that event, the court must set out the reasons that give rise to the delay:

> 53(3) The court shall dispose of an application made under this Part within thirty days after it is made unless the court is satisfied that exceptional circumstances require the disposition of the application to be delayed beyond such day, in which case the court may so order, stating in the order the circumstances that gave rise to the order; but a failure to comply with this subsection does not deprive the court of jurisdiction.

R.D. and the other parent objected to the application for the six-month custody order, and R.D. sought a declaration that the procedural order constituted an error of law because it violated the prescribed time limit.

The case was then adjourned so the parents could retain counsel.

In the middle of March, the lower court set dates for a trial in early August. During that appearance, counsel for the parents expressed concerns about delay. The Minister acknowledged the hearing dates fell "well outside" the 30-day time period, and that the judge had failed to identify any exceptional circumstances justifying the delay. Ultimately, the Court wrote to the parties to explain that the delay was due to lack of judicial resources. Shocker.

On March 30th, the parents successfully sought leave to appeal the procedural order. However, in May, the parents consented to the Minister's six-month custody order, rendering moot the main issue for the appeal. However, the Court of Appeal thought it was appropriate — and important — to hear at least this aspect of the appeal.

The Court of Appeal found that the lower court had gone offside the time limits of s. 53(3) of the *Act* without justification. As stated in both *S.B.* and *J.S.*, in the absence of exceptional circumstances, the time limits set by the *Act* are to be respected.

For the Court, Justice Baird noted that the procedural order that was issued in this case was symptomatic of a larger problem in New Brunswick with respect to the hearing and disposition of child protection matters, and that non-compliance with the *Act* in the Court of King's Bench, Family Division, is endemic.

The Minister argued that not all delay can be attributed to the Court or the Minister. Some delay is attributable to the parents, the lags caused by the legal aid application process, the unavailability of counsel and, more recently, COVID-19.

Justice Baird was (correctly) of the view that time limits are part of the essential framework of the *Act* as prescribed by the legislature. When the Minister places a child in protective care, the Minister is required to apply for an order immediately, and there must be an interim hearing within seven days.

But to be brutally honest, a 30-day period is ridiculous. It is impossible to meet, and the legislature should not maintain a timeline that is just not possible to comply with. The time limit is not set as an "ideal"; it is set out as a hard timetable. We understand the new Act will bring more flexibility — a good thing.

Citing the colourful language of the Manitoba Court of Appeal in *Manitoba (Director of Child and Family Services) v. H. (H.C.)* (2017), (sub nom. *Manitoba (Child and Family Services) v. H. (C.H.)*) 91 R.F.L. (7th) 1 (Man. C.A.), Justice Baird was of the view that, once a child has been apprehended and taken from his or her family, the Court, "will not be used as a remediating waiting room for the agencies and parental counsel, hoping to avoid the determinations that judges are morally and constitutionally mandated to make following apprehension."

In this case, the Court of Appeal clearly accepted that adjourning the application beyond 30 days without identifying exceptional circumstances was an error of law.

That then begged the question of what actually counts as "exceptional circumstances" under s. 53(3) of the *Act*? What circumstances would permit a court to deviate from the prescribed 30-day time limit?

Notably, the legislature was alive to the likely problem of a 30-day time limit. As noted by the Court of Appeal, s. 53(4) of the *Act* was enacted to ensure that child protection applications were not dismissed on account of delay:

> 53(4) No application shall be dismissed because of a procedural defect or lack of conformity with any requirement of this Part if the court is satisfied that
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> (a) the defect or lack of conformity has been or can be compensated for by such substituted procedures as the court determines to be adequate in the circumstances; or
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> (b) failure to cure or compensate for the defect or lack of conformity has not resulted in or will not result in substantial prejudice to the interests of a person who may be affected by the outcome of the proceedings.

As the best interests of children are paramount, procedural defects should not trump a hearing meant to protect children.

However, part of protecting the best interests of children is also ensuring a prompt hearing and avoiding delay. And Justice Baird ultimately agreed that a "certain complacency" had developed by both the courts and the parties in child protection proceedings.

Drawing on the interpretation of "exceptional circumstances" set out by the Supreme Court of Canada in *R. v. Jordan*, 2016 CarswellBC 1864 (S.C.C.) (where the determination of "exceptional circumstances" was said to depend on the "good sense and experience" of trial judges), and the further observations of the Supreme Court in *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, 2000 CarswellMan 469 (S.C.C.), Justice Baird was of the view that the following situations might permit a court to deviate from the 30-day period otherwise prescribed by s. 53(3):

a) The parents request, or consent to, a brief adjournment for reasons that are consistent with the *Act*;

b) The Minister and the parents agree they need more time to "put their lives in order," within the context of the *Act*;

c) There are medical emergencies or other unforeseen events that would prevent the hearing taking place on time; or

d) The case is particularly complex.

Notably missing from this list is a general lack of judicial resources. Parents and children should not suffer because of the failure of the system to ensure there are sufficient resources so that these cases can be heard as required by the *Act*.

So, what to do?

Justice Baird noted that in *Jordan*, the Supreme Court had not been shy about making specific recommendations and offering advice to judges, as well as to legislators as to how to deal with endemic delay. Regrettably, her Honour did not take the next step of making specific suggestions to deal with the endemic delay in child protection matters — perhaps because time limits in child protection hearings are statutorily prescribed rather than constitutionally required. That said, some specific direction would have been most welcome. Absent such specific recommendations, the immediate impact of this decision may very well be increased compliance with time limits — until the warm blanket of complacency again cloaks the child protection regime. We will have to see what the new New Brunswick legislation — the *Child and Youth Well-Being Act* (currently Bill 114) — has to offer.

Despite the issue being moot, it was determined that the lower court's failure to comply with the *Act* in making the procedural order was an error of law.

Time, Time, Time; See What's Become of Me . . . And My *Hague* Application

Leigh v. Rubio (2022), 75 R.F.L. (8th) 251 (Ont. C.A.) — Benotto, Zarnett, and Thorburn JJ.A.

In *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.), the Supreme Court of Canada made it clear that child abduction cases under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*") ***must*** be dealt with expeditiously, and that judges ***must*** control the process to ensure that the matter is completed as quickly as possible:

> [83] The first object of the *Hague Convention* is the prompt return of children: see Article 1(a). For this reason, **contracting states are required, by Article 2, to "use the most expeditious procedures available" to secure within their territories the implementation of the *Hague Convention*'s objects.**
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> . . . . .
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> [88] Despite the quick work of all the judges below in deciding the case before them and releasing reasons for their decisions, this proceeding was unacceptably delayed. **The hardship and anxiety that such delays impose on children are exactly what the *Hague Convention*'s contracting parties sought to prevent by insisting on prompt return and expeditious procedures.**

> [89] In light of this appeal, this Court has taken steps to ensure that *Hague Convention* cases are flagged internally and expedited by our registry. I hope other Canadian courts will consider what further steps they can take to ensure that Hague Convention proceedings are determined using the most expeditious procedures available. **Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much civil litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously**. [emphasis added]

Unfortunately, none of this happened in *Leigh v. Rubio*.

The parties in *Leigh* were from Peru. They were married in Peru in 2012, and their son was born in Peru in February 2013. They separated shortly after their son was born. They had always lived in Peru.

After the parties separated, they engaged in extensive family law litigation in Peru, and in 2018, the Court in Peru granted them joint custody of their son. The decision was upheld by the Peruvian Court of Appeal. In its decision, the appellate court in Peru also:

> [43] . . .
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> • Confirmed the importance of the father's relationship with the child;
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> • Referred to the fact that the mother had been repeatedly in violation of court orders and had received multiple warnings;
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> • Found the mother's allegations to be unsubstantiated;
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> • Made no mention of violence on the part of the father, but commented that there had been "violence on both sides";
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> • Confirmed that the various restraining orders (called "protective measures") do not imply that abuse was committed and do not suspend the father's rights;
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> • Expressly stated, that "it is also determined that the . . . father shows no signs of altered mental status that may pose risks for the [child] and the [child] wants his father to visit him";
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> • Stated that the mother's claim that the father's wish to extend visitation with the child to harm her "is based on subjective matters and cannot set aside the results of the social inquiry and psychological reports filed, nor can it void the validity to enforce an order that has been issued by a higher court"; and
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> • Ordered that the mother not leave the country without the father's consent.

In October 2019, in breach of the Peruvian Court of Appeal's Order, the mother and the child left Peru without the father's consent, came to Ontario, and refused to return.

In March 2020, the father commenced an Application in Ontario under the *Hague Convention* to have the child returned to his habitual residence in Peru. The mother defended the Application on a number of grounds, including that ordering the child to return to Peru would expose him to a grave risk of harm under Article 13(b) of the *Hague Convention*, which provides as follows:

> Article 13
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> Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
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> . . . . .

> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The Ontario hearing started on September 21, 2020, which was almost a year after the child was removed from Peru, and almost seven months after the father commenced his Application. While this delay is obviously inconsistent with the expedited process required by the *Hague Convention*, given that the COVID-19 pandemic had only just started, and virtual hearings were still in their infancy, we suspect that it actually took significant effort by the Court and the parties to get the matter ready to be heard this quickly.

But things then went seriously off the rails. What was meant to be a prompt six-week determination under Article 11 of the Hague Convention actually took an incredible 68 weeks. Even though the evidence in chief from the parties and most of their witnesses went in by affidavit, the hearing still took 33 days spread out over five months to complete (from September 2020 to February 2021). It then took another four months for the decision to be released (in June 2021).

Part of the reason the hearing took so long was due to technical issues with Zoom, and the fact that much of the evidence had to be translated. However, a significant part of the delay was caused because the parties were permitted to call a significant number of collateral witnesses, including friends, family members, and former lawyers, to give evidence about events that happened during the course of the parties' relationship.

In lengthy reasons (84 pages), the hearing judge ultimately concluded that the mother had wrongfully removed the child from Peru. However, she nevertheless dismissed the father's request for return because she was satisfied that the mother had established that the child would be exposed to a grave risk of harm under Article 13 because of the father's abusive conduct, and because the Peruvian justice system was not able to control or prevent the husband's behaviour from continuing:

> [288] **Peru has a system in place for dealing with family law cases, including those that involve domestic violence. However, it appears that the mother has not been adequately protected.** If the child were ordered to be returned to Peru, the mother would return to Peru with him. If she were to return to Peru with him, I do not doubt that she would continue to face more of the same. She will not find practical support there. **The mother and the child have protective measures in their favour but it appears that the father will be free to continue to approach her without consequence.** [emphasis added]

The father appealed to the Ontario Court of Appeal. He was self-represented by that point (a very serious problem in *Hague* matters), and he did not perfect his appeal in a timely manner. As a result, it took until July 2022 for the appeal to be heard (almost 13 months after the hearing judge's decision was released). Two months later (in August 2022), the Court of Appeal released its decision.

Although the Court of Appeal ultimately dismissed the father's appeal, it did not do so because it agreed with the hearing judge's decision, or the process that was followed. In fact, the Court took the most serious issue with the conduct of the hearing, and raised a number of concerns about the correctness of the decision.

With respect to the conduct of the hearing, the Court of Appeal found that the hearing judge erred by not taking control of the process, and allowing the hearing to go on far too long:

> [26] To conclude that the mother had established grave risk, **the application judge conducted a year-by-year analysis of the mother's allegations, seemingly delving into every issue and allegation the parties made from the date of their separation and reciting allegations and counter-allegations at length.** Parents, friends, family members, former lawyers, and others gave protracted evidence. Since translators and interpreters were required, this approach exponentially augmented delay. **This is not the mandated approach from *Balev***, as outlined in para. 89:

> Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much litigation in Canada, Hague Convention proceedings should be *judge-led, not party-driven, to ensure they are determined expeditiously*. [Emphasis added.]

[27] Paragraph 59 of the application judge's reasons acknowledge the troubling delay and explain that "there were delays caused by COVID health concerns, technical issues (including issues with Zoom both in and out of the courtroom) and issues with the availability of witnesses and interpreters". None of those issues can justify the extent of the delay. Rather, **the expansive nature of the hearing which detailed events over a six-year period led to inevitable delay. An allegation that the art. 13(b) exception applies does not cancel the court's obligation under the Convention for prompt resolution.** Since the hearing days were not consecutive, the hearing extended for a period of five months. The total time elapsed from March 2019 [*sic*], when the father filed his application, to the release of the decision was well over a year. [**emphasis** added]

The Court of Appeal also had three other significant concerns about the hearing judge's reasons themselves.

First, based on the hearing judge's reasons, it appeared that she simply re-stated and adopted the mother's evidence about the various altercations the parties had over the years as fact, without any meaningful explanation as to why she preferred the mother's evidence to the father's.

Second, the Court of Appeal was troubled by the lack of explanation as to why the hearing judge disagreed with the findings the courts in Peru had already made about the matter. While the Court of Appeal recognized that the hearing judge was not *bound* by these findings, it concluded that the "failure to address the discrepancies between her findings and those of the Peruvian family courts causes concern."

Finally, the Court of Appeal was concerned that the hearing judge had not explained the basis for her conclusion that "the courts in Peru are not capable of determining the child-related issues." This is a matter of comity. If Canada expects Peru to respect the decisions of Canadian courts, Canadian courts must do the same absent clear and articulable reasons.

However, because of the significant amount of time that had already passed since the child was removed from Peru (in October 2019), and because the child was, by then, apparently estranged from the father, the Court of Appeal concluded that it was "simply too late" to return the child, and that the only option at that point was to send the matter back to the Superior Court to be decided afresh. The Court also ordered an expedited assessment about the needs of the child under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, and asked the Superior Court to appoint a single judge to case manage the ongoing proceeding.

In terms of how the case ought to have been handled, the Court of Appeal indicated that, at the start of the hearing, the hearing judge ought to have exercised her case management function to address whether and why it would be appropriate or necessary to permit the parties to re-litigate what had already happened in Peru, and then give directions to ensure the hearing could be completed expeditiously.

We agree with the Court of Appeal's comments about the problems with how long this case took. To repeat what we said in our comment on *McBennett v. Danis* (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) in the 2021-44 (November 15, 2021) edition of *TWFL*, which was another family law case that took 30 days to try:

> We also want to comment on the length of the trial in this case. Family law cases should never take 30 days to try. Not only are long family law trials unaffordable for the vast majority of Canadians, but they also hoard already scarce resources from other cases that would benefit from timely judicial intervention.
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> In a recent article in the Lawyers Daily, Brenda Hollingsworth wrote about how Florida's civil jury system has managed to get to the point that it is now expected that a regular civil jury trial will take no more than a week, and that if it does not finish by then, there is a strong chance that the trial judge will declare a mistrial. (Florida Man completes personal

> injury jury trial in five days by Brenda Hollingsworth, online: https://www.thelawyersdaily.ca/articles/29209/florida-man-completes-personal-injury-jury-trial-in-five-days-brenda-hollingsworth.)
>
> If a regular personal injury civil jury case can be tried in five days or less, there is no reason we should not be able to do the same in family law cases in Canada. We simply cannot keep giving family law litigants unlimited amounts of court time. Before a trial is scheduled, the parties must be given strict time limits, and they need to be held to them. If lawyers and parties know that they have a limited amount of time to present a case, that is what will happen. There is no absolute right to a trial on all issues or in all cases; there must be a reason to expend the personal and societal resources: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.).

However, it is also important (and only fair) to note that the hearing judge was not entirely responsible for what happened here. *Hague* cases require serious pre-trial planning, and it is critical at the pre-trial stage that limits are placed on the number of witnesses who can be called and the amount of court time each party is given to call their respective cases. Parties are not entitled to as much trial time as they want or think they need.

Fortunately, the Ontario *Family Law Rules* were recently amended to try to avoid repeats of what happened in this case. The new Rule 37.2 provides, among other things, that in *Hague Convention* cases, a judge shall be assigned to manage the matter and ensure its progress, and the parties shall meet with a judge within seven days of the case being commenced to timetable the matter, set a hearing date, and make any other necessary Orders. It also provides that the *Family Law Rules* shall be applied in a manner that will provide "the timeliest and most efficient disposition of the case that is consistent with the principles of natural justice and fairness to the parties and every child involved in the case." Hopefully, this new *Rule* will help ensure that abduction cases are dealt with far more expeditiously than they are now.

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