

## [Datta v. Datta, \[2017\] A.J. No. 13](#)

Alberta Judgments

Alberta Court of Appeal

J. Strekaf J.

Heard: December 15, 2016.

Judgment: January 10, 2017.

Docket: 1601-0218-AC

Registry: Calgary

[2017] A.J. No. 13 | 2017 ABCA 9

Between Sudip Datta, Applicant/ Cross-Respondent, and Aldona Datta, Respondent/ Cross-Applicant

(20 paras.)

### **Case Summary**

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**Civil litigation — Civil procedure — Appeals — Time to appeal — Extension of time — Application by father for extension of time to file notice of appeal dismissed — Parties had three children — Family moved to St. Louis, Missouri during marriage — Upon separation, father returned to Toronto — Mother moved to Calgary — In breach of Notice Provision in divorce judgment granted in Missouri, mother failed to notify father — Fathers' application in Alberta to have children returned to St. Louis pursuant to International Child Abduction Act was dismissed — Father did not have adequate explanation for his failure to appeal in time — There was no reasonable prospect of success — International Child Abduction Act, Article 13(b).**

**Family law — Custody and access — Practice and procedure — Appeals and judicial review — Application by father for extension of time to file notice of appeal dismissed — Parties had three children — Family moved to St. Louis, Missouri during marriage — Upon separation, father returned to Toronto — Mother moved to Calgary — In breach of Notice Provision in divorce judgment granted in Missouri, mother failed to notify father — Fathers' application in Alberta to have children returned to St. Louis pursuant to International Child Abduction Act was dismissed — Father did not have adequate explanation for his failure to appeal in time — There was no reasonable prospect of success — International Child Abduction Act, Article 13(b).**

Application by the father for an extension of time to file a notice of appeal, and cross-application by the mother for an advance of costs, or in the alternative, security for costs, in the event the father was successful. The parties married in 2001, had three children, and separated in 2013. In 2009, the family moved from Canada to the United States to enable the father to pursue his career. The mother lacked the legal status to work in the United States and cared for the children. When the parties separated, the father moved to Toronto, and the mother and the children stayed in St. Louis. A divorce judgment awarded the mother sole custody and the father supervised access, which progressed to unsupervised access. The father failed to pay some of the court ordered support and many of the family bills. The mother could no longer support herself in St. Louis and moved to Calgary. In breach of the Notice Provision, the mother failed to notify the father. The father filed an application in Missouri, and was granted custody of the children based on the mother's breach of the Notice Provision (the "chasing order"). The fathers' application in Alberta to have the children returned to St. Louis pursuant to the International Child Abduction Act was dismissed. The chambers judge found that while the children were wrongfully removed from St. Louis, the exception in Article 13(b) of the applied, and returning the children to St.

Louis would put the children in grave risk of physical or psychological harm or otherwise place the children in an intolerable situation. The father filed his Notice of Appeal two months out of time. The father argued that the trial judge misapprehended the evidence by placing too much weight on the Missouri divorce judgment and not enough weight on the chasing order.

HELD: Application dismissed.

The father had a bona fide intention to appeal. He continued to seek counsel to represent him in an appeal. However, the father did not have an adequate explanation for his failure to appeal in time. There was some prejudice by the delay. Had the father appealed promptly, the matter could have been dealt with on an expedited basis before the children began a new school year. The appeal had no reasonable prospect of success. The Supreme Court had previously held that chasing orders were not binding on Canadian courts considering Hague Convention matters. The status of the chasing order was unclear both before the chambers judge and at the time of the present application.

## **Statutes, Regulations and Rules Cited**

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Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can TS 1983 No 35

International Child Abduction Act, Article 13(b)

### **Appeal From:**

Application for Extend Time to File Appeal and Cross-Application for Security for Costs.

## **Counsel**

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M. Ghert, for the Applicant/ Cross-Respondent.

M. Blitt, Q.C., for the Respondent/ Cross-Applicant.

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[Editor's note: A corrigendum was released by the Court January 11, 2017; the changes have been made to the text and the corrigendum is appended to this document.]

## **Reasons for Decision**

**J. STREKAF J.**

### **I. Introduction**

1 The applicant, Dr. Sudip Datta, seeks an extension of time to file a notice of appeal. The respondent, Ms. Aldona Datta, cross-applies for an advance of costs, or in the alternative, security for costs, in the event that Dr. Datta's application is successful.

2 Dr. Datta wishes to appeal the dismissal of his application to have his three children returned to St. Louis, Missouri pursuant to the *International Child Abduction Act, RSA 2000, c I-4* enacted to enforce the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 ("*Hague Convention*").

3 That judgment was pronounced on May 24, 2016. Dr. Datta filed his Notice of Appeal on August 24, 2016, two months out of time.

## II. Background

4 Dr. and Ms. Datta were married in 2001. They have three children, aged 14, 12 and 10. In 2009, the family moved from Canada to the United States to enable Dr. Datta to pursue his career. Ms. Datta lacked the legal status to work in the United States and cared for the children.

5 In August 2013, the parties separated and Dr. Datta moved to Toronto. Ms. Datta stayed in St. Louis, Missouri with the children. Following a trial, a judge in St. Louis granted Ms. Datta custody of all three children. The resulting February 2015 judgment was lengthy and made several findings about Dr. Datta's physical, emotional and financial abuse of Ms. Datta and the children. Dr. Datta was granted supervised access, which he exercised by travelling from Toronto to St. Louis. This progressed to unsupervised access with supervised transitions. The divorce judgment also required Ms. Datta to give Dr. Datta 60 days' written notice prior to any proposed relocation of the children's primary residence ("*Notice Provision*").

6 Ms. Datta did not work after the divorce due to her uncertain immigration status in the United States. While she was attempting to sort this out, she relied on support from Dr. Datta as ordered in the divorce judgment. He failed to pay some of this support and ceased paying many of the family bills in St. Louis, including health insurance and rent.

7 In February 2016, Ms. Datta concluded that she could no longer support herself and the children in St. Louis. She moved to Calgary, where she and the children lived with her mother. In breach of the *Notice Provision* she failed to notify Dr. Datta.

8 Dr. Datta brought actions in Missouri and Alberta. He obtained a "chasing order" in Missouri on March 8, 2016, after a hearing that was not attended by Ms. Datta or her counsel. This order - made by the same judge who granted the divorce - gave Dr. Datta custody of the children based on Ms. Datta's breach of the *Notice Provision*. The status of the March 8, 2016 order is uncertain. Counsel for Dr. Datta in the present application advised that the March 8, 2016, order was possibly stayed on March 10, 2016, pending Dr. Datta's filing of a *Hague Convention* application in Alberta.

9 Dr. Datta brought a *Hague Convention* application in Alberta. The chambers judge dismissed it because he found that while the children were wrongfully removed from St. Louis, the exception in Article 13(b) of the *Hague Convention* applied. Returning the children to St. Louis would put the children in "grave risk of physical or psychological harm or otherwise place the [children] in an intolerable situation". In reaching this decision, he relied on the findings of fact made by the trial judge in the divorce judgment and considered the children's current circumstances.

## III. Legal Test

10 A judge may extend the time to file an appeal: *Alberta Rules of Court, Alta Reg 124/2010, r 14.37(2)(c)*. The test is whether the interests of justice support granting relief: *Adderley v 1400467 Alberta Ltd, 2014 ABCA 291* at para

19, [580 AR 319](#). An applicant must show that:

- a) there was a *bona fide* intention to appeal while the right to appeal existed;
- b) there was an explanation for the failure to appeal in time that justifies the lateness;
- c) the respondent was not seriously prejudiced;
- d) the appellant has not taken the benefits of the judgment from which the appeal is sought; and
- e) the appeal would have a reasonable chance of success if allowed to proceed.

*Adderley* at para 8

#### IV. Analysis

**11** I am satisfied that Dr. Datta had a *bona fide* intention to appeal. He continued to seek counsel to represent him in an appeal, although he could have acted more diligently in this regard. However, Dr. Datta did not have an adequate explanation for his failure to appeal in time. Dr. Datta has been involved in significant litigation arising out of this divorce, with additional actions pending in the Missouri and Alberta courts. Dr. Datta's experience in litigation should have caused him to inquire with counsel--either counsel he had retained on other issues or was attempting to retain in relation to this appeal--about the appropriate deadline for filing an appeal. On his own evidence, he was aware by July 21, 2016 that the time to appeal ran from the date of the judgment and that he had missed the deadline, yet failed to file his application to extend time for more than a month.

**12** There was some prejudice by the delay. Had Dr. Datta appealed promptly, the matter could have been dealt with on an expedited basis before the children began a new school year.

**13** The issue of whether the applicant has taken the benefits of the judgment is not relevant in this case.

**14** The central issue on this application is whether the appeal would have a reasonable chance of success. The decision of a chambers judge applying the legal test to a set of facts on a *Hague Convention* application is a mixed question of fact and law that should not be disturbed absent palpable and overriding error: *AS v AW*, [2013 ABCA 133](#) at paras 18 and 23, [544 AR 246](#).

**15** Dr. Datta argues that the trial judge misapprehended the evidence by placing too much weight on one Missouri judgment (the February 2015 divorce judgment) and not enough weight on another Missouri judgment (the March 8, 2016, chasing order). The February 2015 judgment made several findings of fact adverse to Dr. Datta's parental capacity and detailed his abuse of Ms. Datta and the children. The March 2016 order granted Dr. Datta custody of the children based on Ms. Datta's breach of the Notice Provision.

**16** The Supreme Court has held that chasing orders are not binding on Canadian courts considering *Hague Convention* matters: *Thomson v Thomson*, [\[1994\] 3 SCR 551](#) at para 75, [119 DLR \(4th\) 253](#). In addition, the status of the March 2016 order was unclear both before the chambers judge and at the time of this application.

**17** Dr. Datta also submits that the chambers judge erred by considering the wrong period of time by basing his decision largely on the past rather than current events. I do not find that to be the case. The chambers judge was concerned about the impracticability of returning the children to Missouri given the lack of immigration status of either parent. He stated:

Put in context, the children in this case, under a Missouri Court order, face being returned to a father who is not ready nor fit to provide primary care for them in Missouri. According to the Missouri Court, his residence is now Toronto. He has no immigration status to work in the United States. His parenting plan is to take the children to Toronto and use his elderly parents as caregivers while he is working. No orders or other mechanisms have been put in place in Missouri or Toronto, to ensure that the children would be adequately

cared for, protected and safe. In order to assess the proportionality of a return order concerning the children, it is necessary to take into account their best interests and well-being, and in particular the seriousness of the difficulties which they are likely to encounter in Missouri, and the strength of social, cultural and family ties in Canada, either Calgary or Toronto as compared to St. Louis.

I have also had to consider what the oldest child says, who does not want to live with the father. I also consider the seriousness of any difficulties and risk which may be encountered in St. Louis by the mother, the only primary caregiver they have ever known, who would be accompanying the children, if ordered returned. It is impossible to believe that the children's best interests would be served by their return forthwith to St. Louis and the primary care of the father.

In conclusion, and in light of all the foregoing considerations, the Court is not convinced that it would be in the children's best interests for them to return to St. Louis. The Court takes the view that while the children's removal had been wrongful within the meaning of Article 3 of the *Hague Convention*, in applying Article 13(b) of the Convention, there is a great risk the children's return would expose them to physical and psychological harm or otherwise place them in an intolerable situation.

**18** In the circumstances, having regard to the applicable deferential standard of review, I find that that an appeal would have no reasonable prospect of success.

## **V. Conclusion**

**19** The application for an extension of time is dismissed.

**20** As a result, I need not consider the cross-application for advanced costs or security for costs.

Reasons filed at Calgary, Alberta this 10th day of January, 2017

J. STREKAF J.

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## **Corrigendum**

Released: January 11, 2017

The appearances page has been edited.