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<http://www.incadat.com/> ref.: HC/E/NZ 66  
 [02/12/1994; Court of Appeal (New Zealand); Appellate Court]  
 G. v. B. [1995] NZFLR 49

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IN THE Court of Appeal of New Zealand

ca223/94

- IN THE of The Guardianship Act 1968 and the  
 - MATTER Guardianship Amendment Act 1991

- BETWEEN G

- Appellant

- A N D B(CA223/94)

- Respondent

- Coram: Cooke P

Richardson J

Hardie Boys J

McKay J

Tompkins J

- Hearing: 2 December 1994

- Counsel: J M Priestley QC, J D Howman and Vicky J Hammond for  
Appellant

G Harrison and Margaret Casey for Respondent

- Judgment: 2 December 1994

**Judgment of COOKE P**

1. An application by the father of a daughter now aged eight years for an order for her return to him in Arizona was made under the Guardianship Amendment Act 1991, s.12. The father's contention is that the mother removed the child from another Convention State, namely the United States, in breach of his rights of custody in respect of the child. The application was dismissed for want of jurisdiction by Judge Whitehead in the North Shore District Court. The Judge expressed regret that his decision appeared to defeat the child's rights under the Convention, but he regarded the terms of the New Zealand legislation as requiring that result.
2. The child had arrived with the mother in New Zealand on 25 September 1993. The District Court Judge's decision was delivered on 27 April 1994. There was an appeal to the High Court and by an order sealed on 21 September 1994 Fisher J ordered by consent that the appeal be removed into this Court. The reason for the removal was that the District Court Judge had adopted the same interpretation as was subsequently upheld by Gallen J in *F v T* [1994] NZFLR 565, where the High Court Judge had dismissed an appeal from a decision of Judge Inglis reported in 11 FRNZ 378. It may be noted that Gallen J expressed more doubt about part of the question than may have been entertained by Judge Inglis.
3. The 1991 Amendment Act was passed as stated in the long title 'To implement The Hague Convention on the Civil Aspects of International Child Abduction' and the Convention is scheduled to the Act, although the wording in the body of the Act differs in some respects from that of the Convention. A Bill at present before the House of Representatives proposes a relevant amendment which may be enacted in the future, but the Court is now of course concerned only with the legislation as it stands at present.
4. The parties separated in Arizona, having moved there with the daughter, after their divorce, by mutual consent. In the Lake County Superior Court, State of Indiana, an order had been made on 29 March 1990; it was subsequently registered in Arizona and remains definitive of the relevant rights of the parties. The material clauses read:

1. The wife shall be awarded the sole care and custody of the parties' minor child, [name omitted], born 2 November 1986.
2. The husband shall have reasonable rights of visitation with the said child to include every other week-end, alternating holidays and summer vacation.

It is the substance of those orders rather than the form and wording in which they are expressed which is important. The fact that the word 'sole' is used in defining the rights of the wife and the fact that the word 'visitation' is used in defining the rights of the husband are not determinative of the issue that this Court has to consider. It is the essence of the rights thereby vested in the parties which must guide our decision.

5. The crucial provisions of the 1991 Amendment Act are in s. 4:
  4. Rights of custody - (1) For the purposes of this Part of this Act, a person has rights of custody in respect of a child if, under the law of the Contracting State in which the child was, immediately before his or her removal, habitually resident, that person has, either alone or jointly with any other person or persons, -

**(a) The right to the possession and care of the child; and**

**(b) To the extent permitted by the right referred to in paragraph (a) of this subsection, the right to determine where the child is to live.**

**(2) For the purposes of this Part of this Act, an applicant who has rights of custody in respect of a child shall be deemed to be actually exercising those rights, even though the child is in the possession of another person, -**

**(a) If-**

**(i) The applicant has placed the child in the possession of that other person pursuant to the right referred to in subsection (1)(b) of this section; and**

**(ii) The child is intended to be in the possession of that other person for a limited period of time; or**

**(b) If the child is in the possession of that other person pursuant to that other person's rights of access in respect of that child.**

**6. The definitions in s.2 of 'rights of access' and 'rights of custody' also require consideration:**

**2. Interpretation - In this Part of the Act, unless the context otherwise requires -**

**...**

**"Rights of access" mean the right to visit a child; and includes the right to take a child for a limited period of time to a place other than the child's habitual residence:**

**"Rights of custody" has the meaning given to that term by section 4(1) of this Act:**

**7. In my view, notwithstanding the argument of Mr Harrison to the contrary, those definitions are not mutually exclusive. A right of intermittent possession and care of a child will fall within s.4(1)(a) and to that extent will fall within the definition of rights of custody also. No doubt it may also fall within the definition of rights of access, so there is a possibility of overlap. But no convincing reason has been given in argument for postulating a sharp dichotomy between the two concepts. Nor has anything to suggest mutual exclusiveness been derived from the Convention. Some rights under the Act or the Convention will attach to custody, some to access. The circumstance that remedies may in a given case be open under either head is unimportant on the question of interpretation. Here, because of the nature of the application made to the Court, we are concerned with custodial rights only. Incidentally the concept of shared care, which as counsel informed us from the bar currently features in Family Court practice in New Zealand, is consistent with this approach.**

**8. Interpreting s.4 in its natural and ordinary sense in the light of its purpose and context, it appears to me that a parent who has substantial intermittent rights to the possession and care of the child comes within subs.(1)(a). On that point I am driven to differ from the interpretation now under appeal, with full respect for the expertise in this field of the Judges who have adopted it. The point is simply one of the natural and ordinary meaning of language and scarcely bears elaboration.**

9. As to paragraph (b), Judge Whitehead had expert affidavit evidence before him from Mr James Mueller, Attorney-at-Law of Arizona and currently Chairman of the Family Law Section of the State Bar of Arizona. The Judge found:

It is clear therefore from Mr Mueller's evidence that the applicant has a right to determine the child's place of residence which can only be usurped by an application before the Arizona Court to modify the applicant's visitation rights. The burden of such an application falls upon the custodial parent being the respondent in this case.

10. It is obvious that the Judge was using the expression 'custodial parent' to reflect the language of the Indiana order. That in no way derogates from the view I have expressed as to the necessity to look at that order in terms of the substance of the rights conferred.
11. I think that the affidavit supported the Judge's finding. As Mr Mueller put it, the mother's right to determine the residence of the child was 'subject to existing visitation orders'. Mr Harrison rightly accepted in argument that the parents could effectively and lawfully agree about the future residence of the child, as indeed they implicitly did when they moved to Arizona. The true view is thus that jointly they had and have the right to determine where the child is to live. A joint right is enough under the subsection.
12. It should be added that there was no separate argument that, if the father had rights of custody within the meaning of s.4, at the time of the removal they were not actually being exercised or would not have been so exercised but for the removal. 'Time' in s.12 (1)(c) and like contexts in the 1991 Act should be liberally construed to give effect to the Convention.
13. For these reason, in my opinion, jurisdiction is established on a straightforward reading of the New Zealand legislation. It also accords with the spirit of the Convention. Counsel for the respondent accepts that a s.13 ground cannot be mounted. I would allow the appeal and direct the remission of the case to the North Shore District Court for the making of an order for the return of the child.
14. Tompkins J authorises me to say that he concurs in the decision. The Court being unanimous, there will be remission of the case to the District Court for the making of an order for the return of the child to the United States and any appropriate incidental orders.

**Judgment of Richardson J**

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15. The object of the Guardianship Amendment Act 1991 as stated in the long title is to amend the Guardianship Act 1968 in order to implement the Hague Convention on the Civil Aspects of International Child Abduction. While there are some differences in expression I cannot discern in the statute a legislative intent to depart in matters of substance from the Convention and to modify the obligations which New Zealand accepted in acceding to the Convention. That being so it is sufficient to go straight to s4 which is central to the resolution of the present appeal. Subsection (1) provides:

"For the purposes of this Part of this Act, a person has rights of custody in respect of a child if, under the law of the Contracting State in which the child was, immediately

before his or her removal, habitually resident, that person has, either alone or jointly with any other person or persons-

(a) The right to the possession and care of the child; and

(b) To the extent permitted by the right referred to in paragraph (a) of this subsection, the right to determine where the child is to live."

16. I emphasise, because it is relevant to the application of both para (a) and (b) in this case, that it is sufficient if the right in question is held either alone or jointly with any other person or persons.

17. The decree of the Indiana Court in relation to parental rights in respect of the child provided:

"that the wife shall be awarded the sole care and custody of the parties' minor child, [name omitted], born November 2 1986; that the husband shall have reasonable rights of visitation with the said child to include every other week-end, alternating holidays and summer vacation:"

18. Notwithstanding the nomenclature employed, and in particular the expressions "sole care and custody" and "visitation", the effect of the order was that the visitation rights carried possession and care of the child for substantial periods for the indefinite future. It follows in my view that under the court order, and jointly with the mother, the father had the right to possession and care of the child for the purposes of s4(1)(a).

19. Then as to para (b) the expert evidence of Mr J W Mueller as to the law of Arizona was that the custodial parent has the right to determine the residence of a minor child inside or outside the State of Arizona on a permanent basis subject to existing visitation orders; that when a custodial parent intends to remove a minor child from the State of Arizona on a permanent basis then such a move would effectively modify visitation rights of the non-custodial parent; and that the removal in this case was in breach of the various rights of the father including his visitation rights and his right to have input into and if necessary to have litigated the issue of whether the child should have been removed from Arizona at all.

20. In terms of s4(1) it is sufficient if the right to determine where the child is to live is a right that may be shared jointly with any person or other persons. If both parents agree then they exercise that right jointly. If, as here, the father does not consent then the court where the child is habitually resident has jurisdiction to determine whether the child can be taken to another jurisdiction to live. In *C v C* [1989] 2 All ER at 648 the Court of Appeal recognised that the right to determine a child's residence may be a divided right and that, if a parent has the right to object to a change of residence of the child and is not consulted or refuses consent, the removal of a child from the jurisdiction would be wrongful within the meaning of the Convention. And the report of the second meeting of the Special Commission to review the operation of the Hague Convention (1993) noted at p28 that the argument that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without the consent of the other parent constituted only a modality attached to the right of custody and not a situation of joint custody, had been rejected by a French court as well as by courts in Austria, Australia, the United Kingdom and the United States of America.

21. Mr Harrison submitted, however, that the concepts of rights of custody and rights of access under the Act and the Convention were mutually exclusive and that custody rights were reposed in the primary care giver. I can see nothing in the scheme and purpose of the legislation and the Convention to justify departing from the ordinary and natural meaning of the words employed in s4. Under the statute and the Convention questions of rights of custody and rights of access are directed to different subjects and there is nothing inconsistent with the parent having both rights of custody, if the access rights extend to intermittent possession and care of the child, as well as those access rights themselves. Whether those rights are rights of custody is important in determining questions relating to the forum in which custody questions are to be determined. If they are, then the parent can claim under s12(1) that at the time the child was removed to New Zealand those rights would have been exercised but for the removal. Access questions arise differently. They are directed to arrangements for organising or securing the effective exercise of rights of access.
22. I would allow the appeal. I agree with the orders proposed by the President.

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| <p style="text-align: center;"><b>Judgment of HARDIE BOYS J</b></p> |
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23. I agree with the judgments that have been delivered by the President and by Richardson J and make only some brief observations.
24. The case falls for decision under s 12 of the Guardianship Amendment Act 1991, an Act which, according to its long title, was enacted in order to implement the Hague Convention on the Civil Aspects of International Child Abduction. It is incumbent on the Court to construe the Act in a manner that will as far as possible give effect to that purpose.
25. The issue in this Court has been as to the meaning of s 4(1) which enacts, but in a more extended form and with one particular difference, Article 5 of the Convention. The difference is that while the Convention defines rights of custody in a single formula, the statute has a two-fold cumulative formula. In this case I think nothing turns on the distinction because I am satisfied, for the reasons already given by my brethren, that both aspects are satisfied. The father has, jointly with the mother, although to a lesser extent, the right to possession and care of the child, and jointly with her has the right to determine where the child is to live: this because the reality is that his consent is required to a change of residence, or failing that there must be an order of the Court (see *C v C* [1989] 2 All ER 465 at 648).
26. I accept Mr Harrison's point that the Convention and the statute differentiate between rights of custody and rights of access as defined by them. That is necessary because they deal with two quite different situations. One is the removal of the child from a country in breach of a parent's custodial rights, the other is the facilitating of access between one country and another; while the reference to access in s 4(2)(b) simply ensures that the claim of a parent with custodial rights is not defeated by a parent while exercising access rights.
27. There is however no valid reason to take the distinction further in order to differentiate, for the purposes of s 4(1), between the one who is sometimes called the primary care giver and the one who has what used to be called visiting rights, and to say that the former has rights of custody, but the latter has none. To draw such a

**distinction would defeat the objective of the Convention which is to ensure that questions of residence along with other questions affecting the child's welfare are normally to be dealt with by the Courts of the child's habitual residence.**

- 28. I therefore agree that the appeal should be allowed and the case remitted to the District Court.**

**Judgment of McKAY J**

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- 29. By decree of the Lake County Superior Court of the State of Indiana dated 29 March 1990, the respondent wife was awarded the sole care and custody of the child of the parties, and the husband was given reasonable rights of visitation with the child to include every other weekend, alternating holidays and summer vacation. The father alleges that the wife wrongfully removed the child to New Zealand from Arizona in the United States, contrary to the Hague Convention and to the Guardianship Amendment Act 1991.**
- 30. The Family Court Judge reached the conclusion that the removal of the child was wrongful in accordance with the laws of Arizona, and wrongful pursuant to the provisions of the Hague Convention, but was not wrongful under the provisions of Section 4(1)(a) of the Guardianship Amendment Act 1991. An appeal to the High Court was removed to this Court by an order made by the High Court on 4 August 1994.**
- 31. The Guardianship Amendment Act 1991 is described in its long title as:**
- "(a) To amend the Guardianship Act 1968 in order to implement the Hague Convention on the Civil Aspects of International Child Abduction; and**
- (b) To provide for matters incidental thereto".**
- 32. That being its declared purpose, it should so far as possible be construed in a manner which will implement the Convention and accord with its terms. It is unfortunate that for reasons which are not readily discernible the Act has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries. Some of the differences appear to be significant. One such difference is the basis for the conclusion reached by the Family Court Judge.**
- 33. The application is brought under section 12. One of the requirements of that section is that the child was removed from another Contracting State in breach of the applicant's rights of custody in respect of the child. Rights of custody are defined in section 4 as follows:**
- "(1) For the purposes of this Part of this Act, a person has rights of custody in respect of a child if, under the law of the Contracting State in which the child was, immediately before his or her removal, habitually resident, that person has, either alone or jointly with any other person or persons, -**
- (a) The right to the possession and care of the child; and**

**(b) To the extent permitted by the right referred to in paragraph (a) of this subsection, the right to determine where the child is to live.**

**(2) For the purposes of this Part of this Act, an applicant who has rights of custody in respect of a child shall be deemed to be actually exercising those rights, even though the child is in the possession of another person, -**

**(a) If -**

**(i) The applicant has placed the child in the possession of that other person pursuant to the right referred to in subsection (1)(b) of this section; and**

**(ii) The child is in the possession of that other person pursuant to that other person's right of access in respect of the child."**

- 34. The question is whether the father has rights of custody which have been breached by the removal of the child to New Zealand. Although the Indiana Court order refers to the wife having "sole custody", the word does not appear to be used in the same sense as it is used in the Convention or in the New Zealand statute. The terms of the order clearly give the father the right to the possession and care of the child during alternating holidays and summer vacations. The wife does not have the sole right to determine where the child is to live, because the father's right of access must be observed. This is made clear by the expert evidence of Mr Mueller. Where the child is to live can to this extent be determined only by the agreement of both parents. The father, therefore, has jointly with his wife the right to determine where the child is to live.**
- 35. It follows that the father has rights of custody in terms of section 4, and that these rights have been breached by the wife's removal of the child to New Zealand without his consent.**
- 36. Mr Harrison argued that the Act and the Convention are careful to distinguish rights of custody and rights of access, each being treated separately. While this is true, the respective definitions appear to overlap rather than to be mutually exclusive. The fact that a right of access includes a right to take the child for a limited period of time to a place other than the child's habitual residence, does not preclude that right being also a right of custody if it satisfies the requirements of section 4.**
- 37. The other requirements in section 12(1) are clearly satisfied. The grounds of the application being therefore made out, the Court is required by subsection (2) to make an order that the child be returned forthwith. I would, therefore, allow the appeal. I agree with the orders proposed by the President.**

**Solicitors:**

**Simpson Grierson Butler White, Wellington, for Appellant**

**Bruce A J Stuart, Auckland, for Respondent**

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