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[12/06/1998; Family Court of Western Australia; First Instance]
Falconer, Commissioner, Western Australian Police v. O.S., 12 June 1998

FAMILY LAW ACT 1975

FAMILY COURT OF WESTERN AUSTRALIA

BEFORE: BARLOW J

HEARD: 25 May 1998

JUDGMENT: 12 June 1998

No. PT 1420 of 1998

BETWEEN

ROBERT FALCONER

(Commissioner, Western Australian Police)

(Applicant)

-and-

SO

(Respondent/Mother)

REASONS FOR JUDGMENT

APPEARANCES:

Mr N Monahan of Counsel, instructed by the Crown Solicitor, appeared on behalf of the Applicant.

Mr J Hedges of Counsel, instructed by the Legal Aid Commission WA, appeared on behalf of the Respondent/Mother.

JUDGMENT:

This is an application by the Commissioner of the Western Australia Police, representing the Responsible Central Authority, 'the Central Authority' for an order that three children,

namely DK born on 1st October 1991, KK born on the 24th December 1993, and EK born on the 8th December 1994, be returned to New Zealand.

The application is brought under the provisions of the Convention on Civil Aspects of International Child Abduction (known as the Hague Convention). This Convention has been incorporated into the law of Australia by operation of the Family Law (Child Abduction Convention) Regulations "the Regulations."

The respondent to the application is the children's mother, SO, "the mother."

Short Relevant History

The children's father is SK "the father." The father was born on the 2nd May 1968 at Stratford, New Zealand. The mother was born on the 19th October 1970 at Auckland, New Zealand.

It is not in dispute that some time in approximately the mid-1980s the parties commenced a relationship. What is in dispute is the nature of the relationship. The father described the relationship as a de facto one. According to the mother, the only period in which they had an extensive de facto relationship was for approximately 9 months in 1992. Otherwise the mother described the relationship as an "on off relationship." The father conceded that the parties had a "...rocky relationship". The father also conceded that during the relationship the mother and he, from time to time lived separately and apart.

According to the father, the mother and he were living together in a defacto relationship at the time of the birth of each of the children. The mother denied that this was the case.

The mother alleged that during the relationship the father was physically violent towards her on a number of occasions. Most of the incidents of alleged physical violence detailed by the mother were denied by the father. He did, however, admit some incidents.

The father did not dispute that in late 1991 the parties separated. The mother made arrangements to travel to Perth with the child D. The father made application to the District Court at Henderson, New Zealand for an order restraining her from doing so. Eventually, the matter was settled on the basis that the mother have custody of the child for a period of 3 months and that in the event of the child not being returned to New Zealand within that period, the father have custody of the child. This settlement was reflected in the terms of an order made by the District at Henderson on the 20th December 1991, which is exhibit "A" to the mother's affidavit sworn the 30th March 1998.

It was not in dispute that in September 1992 the parties again separated, following that separation, the father made application to the District Court at Henderson. On the 22nd September 1992, orders were made granting to the parties the joint custody of the child D. A further order was made restraining the mother from removing the child from New Zealand. On the 18th November 1992, on the application of the mother, an ex parte non-violence order was made against the father in the District Court at Papakura.

On the 15th February 1993, by consent, the joint custody order made on the 22nd September 1992 was discharged. A further order was made granting to the mother the custody of D, with reasonable access to the father.

In March 1997 the parties again separated. On the 21st March 1997, the mother travelled to Perth with the children. She remained in Perth since that time.

In early April 1997 the father applied to the District Court at Henderson seeking an order preventing the removal of the children from New Zealand. On the 7th April 1997, an order was made to that effect.

On the 25th February 1998, the application before me was filed by the Central Authority.

Relevant Regulations

Regulation 13(1) of the Family Law (Child Abduction Convention) Regulations provides that:

> **"[Central Authority take action to secure child's return] If the Commonwealth Central Authority:**
>
> > **(a) receives an application in relation to a child who has been removed from a convention country to, or retained in, Australia; and**
> >
> > **(b) is satisfied that the application is in accordance with the Convention and these regulations;**
>
> **The Commonwealth Central Authority must take action under the Convention to secure the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention."**

Regulation 14 provides that in relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to the Court for:

> **"an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; ..."**

Regulation 3 defined the meaning of the words "removal of the child" and the words "retention of a child." These terms are defined in Regulations 3(1) and 3(2) as follows:

> **"3(1) ["removal of a child'] A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:**
>
> **(a) were actually exercised, either jointly or alone; or**
>
> **(b) would have been so exercised but for the removal of the child.**
>
> **3(2) ["retention of a child'] A reference in these Regulations to the retention of a child is a reference to the retention of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of retention those rights:**

(a) were actually exercised, either jointly or alone; or

(b) would have been so exercised but for the retention of the child."

Regulation 4 defined the meaning of the term "rights of custody" and details how those rights of custody may arise. The Regulations provides:

"4(1) ["rights of custody'] For the purposes of these Regulations, a person, an institution or another body has rights of custody in relation to a child, if:

(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and

(b) rights of custody in relation to the child are attributed to the person, institution of other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.

4(2) [Care of the person of the child]. For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.

4(3) [How rights of custody may arise] For the purposes of this regulation, rights of custody may arise:

(a) by operation of law; or

(b) by reason of a judicial or administrative decision; or

(c) by reason of an agreement having legal effect under a law in force in Australia or a convention country.

Regulation 16 relevantly provides:

"16(1) [Where court must order child's return] Subject to subregulations (2) and (3); on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

16(2) [Where court must refuse to order child's return] A court must refuse to make an order under subregulation (1) if it is satisfied that:

(a) the removal or retention of the child was not a removal or retention within the meaning of these Regulations; or

(b) the child was not a habitual resident of a convention country immediately before his or her removal or retention; or

(c) the child had not attained the age of 16; or

(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country; or

(e) the child is not in Australia

16(3) [Where court may refuse to order child's return] A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

(a) the person, institution or other body making application for return of a child under regulation 13:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(d) the return of the child would nit be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms."

As was pointed out by the Full Court in McCall v McCall (1995) FLC 92-551 at 81,510, where an application is made within a period of one year of the removal of a child to Australia, matters arising under Regulation 16(3) provide the only basis upon which a Court may refuse an application and that the principle of the paramountcy of the child's welfare has no part to play in applications under the Convention.

<u>Grounds on which Application opposed</u>

The mother opposed the application of the Central Authority on the following grounds:

"i) the father was not exercising rights of custody to the children when the children came to live in Australia with the mother, and would not have exercised those rights had the children not been so removed or retained;

ii) the father of the said children subsequent to the children moving to reside in Australia with the mother, acquiesced in the children being removed to and retained in Australia;

iii) there is a grave risk that the return of the said children to New Zealand would expose the children to physical and psychological harm and otherwise place the children in an intolerable situation;

iv) the said children object to being returned and have attained an age and degree of maturity at which it is appropriate to take into account their views."

Rights of custody

In Director General, Department of Community Services v Crowe (1996) FLC 92-717 the Full Court at 83,636 pointed out that:

"...whether a person has rights of custody in relation to a child who immediately before his or her retention was habitually resident in a convention country other than Australia ... one must have regard to the law of that other convention country at the relevant time."

S.3 of the Guardianship Act 1968 (New Zealand) defines "guardianship" to mean:

"... the custody of a child (except on the case of a testamentary guardian and subject to any custody order made by the court) and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning."

S.6 of the Guardianship Act 1968 relevantly provides:

"(1) Subject to the provisions of this Act, the father and the mother of a child shall each be a guardian of the child.

(2) Subject to the provisions of this Act, the mother of a child shall be the sole guardian of the child if-

(a) She is not married to the father of the child, and either:

(i) Has never been married to the father; or

(ii) Her marriage to the father of the child was dissolved before the child was conceived; and

(b) She and that father of the child were not living together as husband and wife at the time the child was born."

A critical issue for determination is whether or not the removal of the children or any of them, constituted a removal within the meaning of Regulation 16(2)(a), that is to say whether the removal was in breach of rights of custody of the father. The determination of this critical issue in relation to each child depends on a determination of fact, namely whether the father and mother of the child in question were living together as husband and wife at the time the child was born.

The meaning of the phrase 'living together' in the context of a husband and wife was considered by the High Court of New Zealand in Excell v Department of Social Welfare (1991) NZFLR 241. At 248 Fisher J. summarised the position as follows:

"There have been hundreds of decisions on the subject of cohabitation. They arise in the context of Social Security Act prosecutions divorce and dissolution, the 1963 and 1976 Matrimonial Property Acts and various other facets of family law – see for example *Lichenstein v. Lichenstein* (1986)2 FRNX 58. While the emphasis might shift according to the legal context, I think that the core elements of cohabitation for legal purposes are common to those diverse legal areas. I would summarize them in this way:

> **(a) Cohabitation for legal purposes normally requires both some form of mental commitment to live together as husband and wife and a manifestation of that commitment by conduct. No minimum period is involved. In cases of doubt an inference as to intention will usually need to be drawn from conduct.**
>
> **(b) The conduct in question is concerned not with any single factor but with an aggregation of many. No single factor is enough nor will its absence be fatal. It is the cumulative quality, quantity, continuity and duration of these factors that matters.**
>
> **(c) No list could ever be exhaustive but the indicia include the extent to which there is a sharing of on dwelling as each party's principal place of residence, emotional dependence and support, the pooling of labour and financial resources, the sharing of household activities, the provision of domestic services, the provision of financial assistance, the sharing of one bedroom, the sharing of a sexual relationship, the sharing of companionship, leisure and social activities, the sharing of parental obligations, presentation to outsiders as a couple and the exclusion of emotional and sexual relationships with third persons.**
>
> **(d) A distinction is to be drawn between legal and de facto marriage. A legally married husband and wife have a legal duty to cohabit. Cohabitation ceased only while there is an intention by either spouse to repudiate the obligations inherent in the matrimonial relationship and a manifestation of that intention by conduct. In a legal marriage it is therefore a very short step from physical proximity to an assumption of continued or renewed cohabitation, especially if the alleged cohabitation has not been preceded by any lengthy separation and where there are other ties such as children in common. The position is different where the couple in question are not legally married, especially if they have not cohabitated previously or in recent times. In those circumstances the duration of the relationship to date, and signs of permanence for the future, will assume special importance."**

In Eveleigh's case Martin J noted at 1, that subsequent to the hearing in that case she was advised by the Central Authority, that the question of whether the parties were "living together as husband and wife" at the time of the child's birth was to be determined by the court on the balance of probabilities and neither party had a higher burden of proof than the other. It is not in issue that the appropriate standard of proof is the balance of probabilities. However in this case the question was again raised as to whether, either the father or the mother bore the onus of proof in relation to the exception provided for in

Section 6(2)(b) of the Guardianship Act 1968. At the conclusion of counsel's addresses I invited them to submit further written submission in relation to this issue.

Counsel for the applicant was unable to refer me to any authority which expressly dealt with the question of onus of proof in relation to Section 6(2) of the Guardianship Act 1968. However, counsel for the applicant submitted that one of the cases cited, namely Edwards v Edwards (1979) 2 MPC 51, supported the proposition, that where a statutory provision dealing with Family Law rights provides, that a certain consequence will follow s a matter of law if the parties are "not living together as husband and wife", the "onus of proof" rests on the party who alleges that the parties were "not living together as husband and wife" and therefore that particular consequence should follow as a matter of law.

On this basis counsel for the applicant submitted, that in this case the onus of proving that the parties were "not living together as husband and wife" at the times of the children's births rested on the mother. I do not think it necessary to refer to the facts of Edwards' case. Suffice it to say, whilst the submission by counsel for the applicant is not without merit, I would not be prepared to go so far as to regard that case as authority for the proposition advances.

In relation to this issue, counsel for the applicant also referred to Regulation 16(2)(a) and submitted that:

> **"...for the Court to be satisfied that the removal of the children was not a removal within the meaning of the *Regulations*, it would be necessary for it to conclude that the removal was not in breach of (the father's) rights of custody, that to reach that conclusion it would have to be satisfied that rights of custody were not attributed to (the father) under a law in force in New Zealand, and that to reach that conclusion the Court would have to be satisfied that (the father) and the (mother) were not living together as husband and wife at the time the children were born.**
>
> **In other words, the terms of reg. 16(2)(a) of the *Regulations* suggest, in the context of this case, that the (mother) bears the onus of satisfying the Court that (the father) and the (mother) were not living together as husband and wife when the children were born, because unless the Court is positively satisfied, on all the evidence, of that fact it would not be able, on that basis, to be satisfied that the removal of the child was "not a removal of the child within the meaning of these *Regulations*."**

Thus it was submitted that the onus rested:

> **"...on the party opposing an order for return who seeks the benefit of the conclusion which would follow as a matter of law, pursuant to s6(2) of the *Act*, from a positive finding that the parties were not living together as husband and wife at the time the children were born."**

I find myself in agreement with this submission. In other words, in my view, the onus is upon the mother to satisfy me on the balance of probabilities, that at the time each of the children were born, she and the father were not living together as husband and wife. I should perhaps add, that if my conclusion in relation to the matter of onus is incorrect, and that if it be the case that neither the mother nor the father have a higher burden of proof than the other, my decisions in relation to each of the grounds relied upon by the mother would nit have been different.

According to the husband, the mother and he were living together in a defacto relationship at the time each of the children was born. The mother denies that this was the case.

In relation to the child D, in paragraph 11 of the father's affidavit sworn the 9th April 1998 he stated:

> **"I believe that we lived in a house in Sunnyvale together. I am sure that we were living there together when D was born. In any event regardless of the address, we were definitely living together when D was born."**

The husband went on to state that he was present at D's birth and the he "...cut the umbilical cords of all three children".

In support of the claim that he was living with the mother in a defacto relationship at the date of D's birth, the father referred to paragraph 4 of an affidavit sworn by the mother on the 17th November 1992. In paragraph 3 of that affidavit the mother referred to a period of separation. She concluded that paragraph by stating the father eventually persuaded her to return, In paragraph 4 of the affidavit the mother went on to state:

> **"ALTHOUGH there was a slight improvement for a short time, the Respondent eventually returned to his old habits of drinking, partying and not staying at home. Although for 6 weeks after the birth he was more attentive and home more often this did not continue and the partying and staying out weekend and nights and bringing friends home continued."**

According to the father, during each pregnancy the mother was attended by a midwife namely HS, According to the father, Ms S made home visits prior to each birth and he was present during those visits. The wife admitted that Ms S was the midwife for two of the children's birth. She did not specify which children. The mother agreed that the father was present on one or two occasions when Ms S called.

The father's sister DK swore an affidavit on the 9th April 1998. In paragraph 2 of that affidavit she stated, that when the mother and father were together, she spent a lot of time at their home. She confirmed the mother and father were definitely living together as a couple when each of the children were born.

The father's mother, MK, swore an affidavit on the 9th April 1998. In that affidavit she stated, that when the father and mother lived in New Zealand, she often visited them. She confirmed the father and mother were:

> **"...definitely living together as a couple when each of the children were born. I can clearly remember this. Throughout SK and SO's relationship they did have many short separations but they always reconciled and they lived together more than they were ever apart."**

The father also relied on an affidavit of one JC sown the 22nd May 1998. According to Mr. C he was absolutely positive the father and mother were living together when all three of their children was born. In paragraph 5 of his affidavit Mr. C stated:

> **"WHEN SO went into labour with SK and SO's eldest child, D, I was staying overnight at their house. SK took SO to the hospital in the morning and I stayed at the house until SK returned. SK was definitely living with SO when she returned home from the hospital with D."**

According to the mother, at the time she discovered she was pregnant with D, the father and she were living separately apart. When she was two and a half months pregnant she travelled to Perth. She stayed there for three months. On the mother's return to New Zealand the father and she resumed living together. According to the mother, after three months they again separated. She moved into a one bedroom unit in Henderson, New Zealand. According to the mother, it was whilst she was living in this unit that D was born. Also according to the mother, after D was born, the father moved in for the odd night or two.

According to the father, when the children K and E were born, the mother and he were living together in a house in Te Atatu. The mother agreed that both K and E were born whilst she was living in this house. According to the mother she moved to the house in Te Atatu in October 1993 and that thereafter the father stayed with her on odd nights.

The father claimed that he was present at the birth of both K and E. The mother agreed the father took her to the hospital for the birth of K. In paragraph 6 of Mr. C's affidavit he stated:

> **"WHEN SK and SO's second child, K was born, SK and SO were still living together. I am pretty sure that I went out with SK the night that K was born and had drinks to celebrate, together with some other friends."**

In paragraph 7 of Mr. C's affidavit he stated:

> **"WHEN SK and SO's youngest child, E, was born, I had not see SK or SO as frequently as I had at other times during our friendship. However, I am positive that they were still living together at that time also. I saw them often enough to know their living arrangements."**

According to the mother the father was not around when she was taken to the hospital for the birth of E. According to the mother the father turned up at the hospital later that day. Also according to her, the father returned home and arranged for the two boys to be looked after by one of her cousins. The wife agreed the husband visited her in Hospital at this time.

Before I proceed further, I note that in relation to the factual issue as to whether or not the mother and father were living together as husband and wife when each of the children were born, there was conflicting evidence in relation to the extent the father performed duties of a domestic nature when living with the mother.

I have concluded in relation to each of the children, that at the time of their birth the father and mother were living together as husband and wife. In reaching these conclusions I have in particular had regard to the following matters:

> **(a) The involvement of the father in each of the births of the children, leads me to conclude that at the time of their births the relationship of the father and mother was not an estranged one.**
>
> **(b) That involvement, namely being present on occasions when the midwife attended the mother prior to the births, attending at hospital for the births, cutting the umbilical cords, suggests that a much closer relationship existed between the parties at the time of the births than the mother would have me believe.**

> **(c) Paragraph 4 of the mother's affidavit sworn the 17th November 1992 suggests, that at the time of the birth of D the mother and father were living together.**
>
> **(d) Although the evidence of the witnesses DK, MK and JC, lacked precision in relation to the location of where the mother and father were living at the time of the births of each of the child, the fact remains they were quite definite, that at the relevant times the mother and father were living together. There was a lack of similar evidence present on behalf of the wife.**

In the result the totality of the evidence leads me to conclude, that probably the parties were living together as husband and wife at the time of the birth of each of the children. It follows from these findings, that pursuant to S6 of the Guardianship Act 1968, the father is a guardian of each of the children.

In Crowe's case the Court considered the rights granted to a guardian in New Zealand under the Guardianship Act 1968 and whether those rights included the right to determine the place, including the Country of residence. In Crowe's case the mother and father were married and therefore the fact each were guardians of the child in question was not an issue. The Court noted at 83,637 that:

> **"...under the law of New Zealand, both the father and the mother were each a guardian of the child and each had the rights referred to in s 3 of the New Zealand legislation. In the absence of a Court order to the contrary, either party could remove the child from New Zealand and determine that the child should live in Australia. However, such a removal and determination by one parent would not bring an end to the rights of the other parent. The retention of C in Australia interfered with the rights of the mother in that she was thus prevented from exercising her rights as a guardian in New Zealand. The mother had rights of custody according to New Zealand law immediately before C's retention. Whether those rights of custody are rights of custody within the meaning of the Regulations and whether there has been a breach of those rights, are matters to be determined in accordance with Australian law.**
>
> **Rights of custody for the purposes of the Regulations are set out in reg 4 thereof and include the right to determine the place of residence of the child. Thus, the rights of custody which the mother had under New Zealand law were rights of custody within the meaning of the Regulations. However, there would only be a breach of those rights if, at the time of retention, the rights of custody were actually being exercised, either jointly or alone, or those rights would have been so exercised but for the retention of the child.**
>
> **"The question is not, ... whether there is any evidence that the mother abandoned her rights of custody but rather whether, at the relevant time, the rights were actually being exercised or would have been but for the retention."**

In Crowe's case the mother was at the time of retention actually exercising rights of custody. The Court went on to state at 83,637:

> **"Additionally, at the date of retention, the mother had rights of custody within the meaning of the Regulations and those rights included the right to determine the place (including the country) of residence of C. The father had an equal right. The exercise of that right by the father does not, however, bring to an end**

> **the equal and separate right of the mother. The retention of C in Australia interfered with the right of the mother to determine the place of residence of C and was an interference with another incident of the mother's right of custody which would have been exercised but for the retention of the child."**

Having regard to my conclusion, that at the time the mother removed the children from New Zealand the father was a guardian of each of them, I am satisfied that the removal of the children to Australia and the retention of them in Australia constitutes a breach of the father's rights of custody, namely the prevention of him exercising his rights as a guardian in New Zealand and in particular his right to determine the place of residence of the children and that but for the retention, the father would have exercised those rights.

Acquiescence

In Re A and anor (minors) (abduction: acquiescence) (1992) 1 ALL ER 929 the Court of Appeal considered what amounted to acquiescence in the context of Article 13 of the Convention (reflected in Regulation 16). That decision was considered by Murray J in the Police Commissioner of South Australia v Temple (1993) FLC 92-365. At 79,828 Her Honour paraphrased the headnote from that case as follows:

> **"1. In determining whether a parent could be said to have acquiesced in the unlawful removal or retention of a child by the other parent within art. 13 of the convention each case has to be considered on its own special facts.**
>
> **2. Acquiescence can be either**
>
> > **(a)(i) active acceptance signified either by express words of consent, in which case there has to be clear and unequivocal words or**
> >
> > **(ii) by conduct and the other party has to believe that there has been an acceptance, or**
> >
> > **(iii) conduct inconsistent with an intention by the aggrieved parent to insist on legal rights and consistent only with an acceptance of the status quo, or**
> >
> > **(b) Passive acquiescence inferred from silence and inactivity for a sufficient period in circumstances where different conduct is to be expected on the part of the aggrieved parent.**
>
> **3. A parent cannot be said to have acquiesced in the unlawful removal or retention of a child within art. 13 unless**
>
> > **(a) he is aware of the other parent's act of removing or retaining the child,**
> >
> > **(b) is aware that the removal or retention was unlawful and**
> >
> > **(c) is aware, at least in general terms, of his rights against the other parent, although it is not necessary that he**

> **should know the full or precise nature of his legal rights under the convention.**
>
> **4. Since acquiescence is not a continuing state of mind, and acceptance of the unlawful removal or retention cannot be withdrawn once known to the other party, although an attempt to do so soon after the acceptance is notified to the other party will be relevant to the exercise of discretion to return the child."**

The principles relevant to the Temple case were those detailed in paragraphs 1, 2 and 3. Her Honour adopted those principles. With respect I also adopt them.

I note that in Director-General, Department of Families, Youth and Community Care v Thorpe (1997) FLC 92-785, Lindemayer J, after considering a number of relevant authorities, concluded at 92,785 that:

> **"...acquiescence may be either passive or active, If it is active then, of course, there must be clear indication of it, and there must be some communication of it to the other party. However, it may also be passive, and acquiescence may be inferred by the Court from a course of conduct by the party now seeking to rely upon the Convention or the Regulations without any word expressed to the other party such as might otherwise be thought to be involved, at least in a consent."**

The matter of acquiescence was more recently considered by the House of Lords In re H and others (minors) (abduction: acquiescence) (1997) 2 WLR 563. There Lord Browne-Wilkinson said at 575-6:

> **"...the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said *In re S (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819, 838 "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact." The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. The trial judge, in reaching his decision on that question of fact, will not doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent that to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent he held to have acquiesced."**

The father denied he had delayed the institution of these proceedings. He had instructed solicitors and without delay commenced proceedings in New Zealand. In May 1997 he changed solicitors. Those solicitors advised him, that before any application pursuant to the provisions of the Hague Convention could be instituted, he would have to place with hem sufficient funds to cover the fares of the children and an adult chaperone from Australia to New Zealand. The father then instructed his solicitors to make application to a Legal Aid Committee for sufficient funds to cover the air fares. On 7th August 1997 advice was received, that Legal Aid for this purpose had been refused. According to the father he then

had to make his own arrangements and try and raise the required money. Because of his low income it took him some time to do this. In the meantime, according to the father, his solicitors were preparing documentation in support of the application. By December 1997 he had been able to raise the funds to cover the fares.

The father admitted that after the mother left New Zealand he did not attempt to contact her. According to the mother, she did not institute custody proceedings in Australia because she was advised, that if she did so, the father would be advised of her exact whereabouts. However, according to the mother had the father wanted to he could have made contact with her through members of her family who were living in Western Australia. According to the father, he did not attempt to make such contact because he knew it would not be well received.

The mother has failed to satisfy me that the father acquiesced in the children being removed to and/or retained in Australia. The husband's action in immediately instituting proceedings in New Zealand and thereafter seeking advice in relations to the institution of an application under the Hague Convention is inconsistent with such acquiescence. I accept the husband's explanation for the delay in the institution of these proceedings. I also accept his explanation for failing to attempt to make contact with the children. I am not persuaded it would be appropriate to draw an inference of passive acquiescence from the delay and lack of attempted contract.

Grave Risk of Harm

In Gsponer v Director General, Department of Community Services, Victoria (1989) FLC 92-001 the Full Court considered the interpretation of Regulation 16(3)(b) and in particular what was required to establish a "grave risk" within the meaning of that Regulation. The Court concluded that the three categories (namely physical harm, psychological harm, or otherwise placing the child in an intolerable situation) should be read separately. At 77, 159 the Court went on to state:

> **"However it needs to be emphasised that there must be a "grave risk" of the occurrence of one or more of such events. Further, it is impossible to ignore the existence of the words "or otherwise." The consequence of those words is to link the quality with each of the first two categories must have to the emphatic words which describe the third category ("an intolerable situation"). That is, it is not the grave risk of *any* physical or psychological harm which would satisfy the first two aspects of this subparagraph. The physical or psychological harm in question must be of a substantial or weighty kind."**

In Murray v Director, Family Services ACT (1993) FLC 92-416 the Full Court after noting at 80, 259 that:

> **"...New Zealand has a system of Family Law and provides legal protection to persons in fear of violence which is similar to the system in Australia" –**

went on to state:

> **"It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts.**

> **In our view and in accordance with the views expressed by this Court in *Gsponer's* case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available. Similar views have been expressed by the courts of other countries eg Segal J in the Superior Court of New Jersey in *Tahan v Duquette* (24/6/92 unreported). In *Re: A (A Minor) supra; Re: Evans* (Court of Appeal England, 20/7/88 unreported).**
>
> **For us to do otherwise would be to act on untested evidence to thwart the principal purposes to the Hague Convention, which are to discourage child abduction and, where such abduction has occurred, to return such children to their country of habitual residence so that the courts of that country can determine where or with whom their best interests lie."**

In the mother's affidavit sworn the 30th March 1998, she detailed a number of incidents in which she claimed the father physically assaulted her. The father denied that most of these incidents occurred. However he did admit to a number of assaults. The mother did not allege the father had been violent to the children, however she did allege they had witnessed many acts of physical violence and verbal abuse towards her and further that the father had on occasions verbally abused them. The father denied that any of the physical assaults had occurred in the presence of the child. Whilst he admitted the children may have witnessed some of the arguments which occurred between him and the mother, he denied he had ever abused them.

Having regard to the father's admissions, there is no doubt that on occasions he acted in a physically violent manner towards the mother. Without the benefit of hearing and seeing the mother and father give evidence, I am unable to determine whether the further incidents of violence referred to by the mother occurred and if so the nature of those incidents. According to the mother the children witnessed many acts of physical violence inflicted on her by the father. This claim is inconsistent with the contents of a report prepared pursuant to an order made on the 28th April 1998. I will refer to that report in relation to the fourth ground relied on by the mother. Suffice it to say at this stage, that according tot he author of that report, the child D did not actually witness any assault inflicted by the father on the mother.

The father conceded the children may have witnessed some of the arguments which occurred between him and the mother. Having regard to the contents of the report to which I have already referred, I think it likely that the child D at least has also witnessed what the author of the report describes "...the aftermath of violence between (D's) parents and the physical and emotional effect he perceives this has had on his mother." In the absence of hearing and seeing the parties give evidence, I am unable to reach a conclusive view as to whether or not the father has on occasions abused the children by calling them names.

I think it unlikely, that if the children were returned to New Zealand, the father would act in a way towards them which would expose them to physical or physiological harm, or otherwise place them in an intolerable situation. To the extent that there is a risk the children could be exposed to harm of the type envisaged in Regulation 16(3)(b) by virtue of conduct towards the mother, there is no reason to think the children would not be able to be protected from that risk by the relevant New Zealand authorities.

In the result the mother has failed to persuade me there is a grave risk, that the return of the children to New Zealand would expose them to physical or physiological harm, or otherwise place them in an intolerable situation.

Objection to being Returned

In De L v Director General, NSW Department of Community Services & Anor (1996) FLC 92-706 the High Court considered Regulation 16(3)(c). At 83, 453 the majority concluded:

> **"...there is no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as "the child objects to being returned". The term is "objects". No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No "additional gloss" is to be supplied".**

In a separate judgment Kirby J at 83, 456 after noting that the "paramountcy principle" was not applicable in proceedings under the Regulations went on to state:

> **"...if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree if maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]" enable it to be said that a particular consideration is extraneous. That subject-,matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion."**

On the 28th April 1998 an order was made pursuant to Regulation 26, that a report be prepared by a Family and Child Counsellor and Welfare Officer with the following terms of reference:

> **"(a) whether the child DK objects to being returned to New Zealand so that the Courts of that country may determine where and with whom he should live;**
>
> **(b) if the child objects to being returned, the reasons for that objection;**
>
> **(c) the degree of maturity of the child as to whether it would be appropriate to take account of his views;**
>
> **(d) the cognitive development of the child;**
>
> **(e) the emotional development of the child."**

Pursuant to that order a report dated the 25th May 1998 was prepared. I do not think it necessary to refer to that report in detail. In summary the observations and conclusions of the author of the report are as follows:

> **(a) The child's understanding of the reason for his interview was to advise of his father's maltreatment of his mother.**
>
> **(b) The child was under the misapprehension that should he return to New Zealand it would be without his mother and sisters. The concern was compounded by his belief, that once he returned to New**

Zealand, his father would prevent him leaving that country and from seeing his mother again.

(c) The child's fundamental objection to returning to New Zealand centred on his alarm, that he be parted from his mother and sisters and that the separation would be permanent.

(d) When asked how he would feel if he were to return to New Zealand in the company of his mother the child replied that he would "...feel happy in that event..."

(e) Other objections to returning to New Zealand concerned the relevant merits of the climate in Australia and the number of friends he had at school.

(f) The child's cognisance of development was such as one would expect for a child of his age.

(g) The child was socially competent and well adjusted emotionally.

(h) The child found it difficult to conceptualise abstract notions such as what might happen in the future. The child lacked the required capacity to understand the long term and significant impact of the decision to be made regarding his future.

(i) The child had no understanding of the concept, that the Court in New Zealand, might make an order that he stay in New Zealand or be returned to Australia.

The contents of the report leads me to conclude, that having regard to D's age and degree of maturity, it would not be appropriate to have regard to his views. In any event the report does not indicate that D has any basic objection to returning to New Zealand. To the extent he had an objection, it was based on a misconception, namely that he would be parted from his mother and sisters and that the separation would be permanent.

Proposed orders

For these reasons I conclude that the application should be granted and the following order made:

1. That the children, DK, KK and EK be returned forthwith to New Zealand.

2. That for the purposes of the said children to New Zealand the mother, SO be permitted to remove the said children from Australia.

I will hear from counsel as to what further orders, if any, should be made.

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law