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[30/03/1999; Full Family Court of Australia at Brisbane; Appellate Court]
Director-General Department of Families, Youth and Community Care v. Moore,
(1999) FLC 92-841; [1999] Fam CA 284

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Ellis ACJ., Finn and Chisholm JJ.

30 March 1999

Appeal No. NA 75 of 1998, File No. BR 10000 of 1998

BETWEEN:

DIRECTOR-GENERAL

DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE

(Appellant)

- and -

KAREN ANNE MOORE

(Respondent)

REASONS FOR JUDGMENT

APPEARANCES:

Mr Westbrook of Counsel (instructed by B T Dunphy, Crown Law, Level 11, State Law Building, 50 Ann Street, Brisbane, QLD, 4000) on behalf of the appellant.

Mr Page of Senior Counsel (instructed by Milburn Guttridge Solicitors, 419 The Esplanade, Hervey Bay, QLD, 4655) on behalf of the respondent.

JUDGEMENT: This is an appeal by the Director-General of the Queensland Department of Families, Youth and Community Care against an order made by Warnick J. on 16 November 1998. The Director-General brings this appeal in his capacity as the Central Authority pursuant to the *Family Law (Child Abduction Convention) Regulations* which have been made pursuant to s.111B of the *Family Law Act* 1975 to give effect to Australia's obligations under the Hague Convention on the Civil Aspects of International Child Abduction, and which we will refer to as "the Regulations" or "the Convention Regulations" as the context requires.

By his order of 16 November 1998 Warnick J. dismissed an application by the Central Authority for an order that a child, K, be returned from Australia to the United States of America pursuant to the provisions of the Regulations. The basis for his Honour's dismissal of the Authority's application was that he was satisfied that the child was "settled in his new environment" within the meaning of Regulation 16(1)(b) of the Regulations.

The factual background

The relevant factual background to this matter (as found by Warnick J. and unchallenged before us) is as follows. The child's mother is an Australian citizen and his father is an American citizen. They married in Australia on 23 May 1992. Following their marriage, they travelled to the United States to reside. The child was born in America on 12 October 1993. He was born with a number of health difficulties, including impairment to his hearing, and as he has grown, he has suffered from impaired speech capacity.

On or about 25 March 1997, the mother left the family home with the child at a time when the father was not at home and without informing the father as to where she and the child were going. The mother and child arrived in Australia on 27 March 1997 and have remained here ever since.

Material put before Warnick J. by the Central Authority indicated that within a couple of days of the mother's departure the father obtained legal advice, and that considerable efforts were made to locate the mother and the child. However, the father did not become aware that they were in Australia until he received a letter from the mother's father on 21 June 1997 advising him of that fact. The Authority's material before his Honour also indicated that prior to that letter, the mother's parents had effectively denied that she was in Australia.

On 4 July 1997 the mother apparently filed a Form 7 in the Brisbane Registry of the Family Court of Australia seeking a residence order in relation to the child. The application was served on the father, and he was represented when consent orders were made on 20 August 1997 providing that pending final determination of the Form 7 application, the child should live with the mother. There was also provision for telephone contact with the father.

It would seem that the father received some advice during August 1997 from American lawyers to the effect that an application under the Convention would be inappropriate and that the better course was to pursue the matter through proceedings (under the *Family Law Act* 1975) in the Family Court in Brisbane. However, as a result of subsequent advice from a Member of Congress in January 1998 and then from some Australian lawyers in June 1998, the father made an application under the Convention which resulted in the Central Authority filing on 22 September 1998 an application (in Form 2 prescribed under the Regulations) seeking an order for return of the child together with certain ancillary orders.

The Central Authority's application came before a Judicial Registrar on 24 September 1998. The Judicial Registrar ordered that the application "be consolidated with the mother's

application for a final order for residence" which had already been set down for trial on 15 October 1998. The precise terms of the Judicial Registrar's orders were as follows:

> ***"(7) That the hearing of the Residency application Number BR.7028 of 1997 be stayed.***
>
> ***...***
>
> ***(10) That the application in FC2 filed on 22 September 1998 be consolidated with the applications already set down for trial on 15th October 1998 at 10 a.m.***
>
> ***(11) That the application in FC2 be consolidated with the applications already placed on the Pending Cases List."***

We presume that the reference in these orders to "the application in FC2" is a reference to the Authority's application for the return of the child in Form 2 prescribed under the Regulations. We would comment in passing that we consider it unsatisfactory for court orders to be drawn using such meaningless terms as "the application in FC2". It is essential that court orders are drafted in language intelligible to the world at large, which in this case included the father and his American lawyers.

Furthermore, we consider it unfortunate, and indeed undesirable, that the hearing of an application for the return of a child under the Convention Regulations was consolidated with the hearing of an application for residence orders in respect of the same child. It is true that ultimately Warnick J. determined the Convention application for the return of the child first and in an entirely discrete manner before deciding the residence application. However, it seems to us, that at least some of the contentious issues in this appeal regarding the admissibility of the Family Report might perhaps have been avoided if the matters, or even the hearing of them, had not been consolidated. We would emphasise that we consider it essential that if an application under the Convention Regulations is pending, it be determined ahead of, and preferably separately from, any application for parenting orders under the *Family Law Act* 1975. We do, of course, acknowledge that in this case the parenting order proceedings (in which the father initially participated) were on foot before the proceedings under the Convention Regulations.

The consolidated applications apparently came before Warnick J. on 15 October 1998, but were not in fact heard until the following day, 16 October 1998. The hearing proceeded on the basis of written evidentiary material and submissions only. Certain objections were taken on behalf of the Central Authority to some of the evidence. But it will be more convenient to discuss those objections in the context of our consideration of the grounds of appeal which relate to the admission of that evidence.

<u>The decision of Warnick J.</u>

His Honour delivered his judgment on 16 November 1998. After referring to the Central Authority's application which was before him, and also stating that "(t)here are also alive between the mother and father application and cross-application for parenting orders", his Honour set out the factual background (as we have already recorded it). His Honour then made findings concerning the then current arrangements for the child. As his Honour's findings in this regard go to the heart of this appeal, it is necessary to set out what his Honour actually said (at Appeal Book 13-14):

> ***"Upon the arrival of the mother and [K] in Australia they had commenced residence with the mother's parents in Toogoom near Hervey Bay, South East Queensland.***
>
> ***However, in the first half of this year, the mother, with [K], moved to her own accommodation. The mother and [K] presently reside in a two-bedroom duplex in Hervey Bay. [K] has his own room. He has a number of friends who come over to play.***
>
> ***[K] attends dancing classes at Urangan Pre-school. He attends classes at the Sandy Strait Pre-school, in 1998, five full days per fortnight. At both pre-schools there are teachers who specialise in children with hearing difficulties. He attends a martial arts class, and gymnastics. He also has regular contact during the week with his maternal grandparents, including a regular family dinner on Sunday evenings."***

His Honour then went on to refer to the contents of a report (or reports) by the Teacher in Charge of the Special Education Developmental Centre attended by the child and also of a Family Report, which were in evidence before him. As the admission of these various reports is the subject of specific grounds of appeal, it will be more convenient to set out what his Honour said about those reports when we discuss the relevant grounds of appeal.

His Honour next considered and rejected the mother's claim that she and the child were not "habitually resident" in the United States when they left there in March 1997. He also considered, and determined in the affirmative, the issue of whether at the relevant time the father had rights of custody. No issue arises in this appeal regarding his Honour's determination of these matters of the child's habitual residence or the father's rights of custody.

His Honour then considered the operation in this case of Regulation 16(1), which is in the following terms:

> ***"Subject to sub-regulations (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 one year after the day on which the child was removed to or retained in Australia; or***
> >
> > ***(b) if the day on which the application was filed is at least one 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."***

Specifically with regard to the operation of Regulation 16(1)(b), it will be recalled that the child was removed from the United States on or about 25 March 1997 and that the Authority's application for his return was not filed until 22 September 1998. Against the background of this time lapse and the provisions of Regulation 16(1)(b), it was the mother's case before his Honour that the child was settled in his new environment, and his Honour accepted this to be so, saying (at Appeal Book 17):

> ***"I am satisfied on the evidence in the mother's case that the child is settled in his new environment. In making such a finding I accept that the test requires more than evidence of a child who is happy, secure and adjusted to surrounding circumstances, and that it involves findings as to a physical element of relating to***

and being established in a community and an environment, as well as an emotional constituent denoting security and stability.

I accept that it does not relate to, "per se", the relationship with the mother.

Features of the child's settled state in his new environment are:

- *The child is established in a close relationship with the maternal grandparents with whom he lived up until earlier in 1998.*
- *The child has now lived for some six months or thereabouts in the premises to which he and the mother moved.*
- *It is apparent that the child has made friends in the community and at school.*
- *He is involved in a number of activities and has been for some time.*
- *He has made advances in his emotional and social development.*
- *[K]'s environment includes the involvement of persons attending to his special needs arising from his hearing and related difficulties. He is part of a program specifically planned for him. Medical intervention is under serious consideration.*

I conclude that [K]'s environment has attained considerable significance for him."

His Honour also concluded with respect to the operation of Regulation 16(1)(b) that, even if the court finds that the subject child is settled in the new environment, a discretion still remains in the court to return the child to the country from which the child had been removed. In the event, however, his Honour was not prepared to exercise that discretion in this case, and accordingly, he dismissed the Authority's application for the return of the child.

Having dismissed the Authority's application, his Honour turned to the cross applications for residence orders under the *Family Law Act 1975*. His Honour first recorded the fact that at the outset of the hearing before him, the father's legal representative had been given leave to withdraw, with the result that there had been no appearance by the father in respect of the residence order applications, and that in those circumstances the mother had sought a final residence order. His Honour then expressed the view that it was "certainly arguable that final orders ought be made in the mother's favour". However, he also expressed a "lingering concern that the father may not have been aware that if the application by the Authority was dismissed, the court might proceed in his absence to make final parenting orders pursuant to the *Family Law Act".*

Accordingly, his Honour made final orders for the child to live with the mother and for there to be telephone contact with the father "contingent upon service of a copy of (such) orders on the father and his failure to file an Address for Service in the application for parenting orders within 60 days thereafter".

<u>The grounds of appeal</u>

The fourteen grounds of appeal contained in the Central Authority's Notice of Appeal can be grouped into three categories according to subject matter. The first group (Grounds 1 - 5) is concerned with the admission into evidence of the Family Report and the two reports, being "an Ascertainment Report" and a "Progress Report" prepared by the Teacher in

Charge of the Special Education Developmental Centre, which the child attends, and with the weight then attached to those reports.

The second group (Grounds 6-13) is concerned with the findings made by his Honour which led him to the conclusion that the child was settled in his new environment, and also with the correctness of that conclusion. The final ground (Ground 14) is concerned with the exercise of the purported discretion as to whether or not the child should be returned, notwithstanding the finding that he was settled in his new environment.

The admission of, and weight attached to, the Family Report and the "Ascertainment" and "Progress" Reports (Grounds 1 –5)

As we mentioned earlier, his Honour in the course of his reasons for judgment, after having described the current living, schooling and extra-curricular arrangements for the child, went on to refer to, and place some reliance on, the contents of a report or reports (annexed to the mother's affidavit or affidavits), from the Teacher in Charge of the Special Education Developmental Centre attended by the child and also to a Family Report (which, there is no dispute, had been prepared for purposes of the residence proceedings).

The Family Report

In relation to the Family Report, the transcript (at Appeal Book 307) of the hearing before Warnick J., reveals that at the outset of that hearing, Counsel for the Central Authority drew his Honour's attention to a list of objections which had been forwarded to his Honour on the previous day. That list appears in the Appeal Book (at page 255), and in relation to the Family Report sets out the following objections:

- ***Ordered pursuant to Order 25 Rule 5 for the purposes of subsection 55A(2) or section 62G or 65G of the Act;***
- ***Not prepared for purposes of the Convention Regulation 26;***
- ***Not relevant to issues of Hague Convention Application.***

Counsel then proceeded in his oral submissions "to raise a very strenuous objection" to "reliance" on the Family Report, and in this regard he referred his Honour to the following passage from the decision of Brennan CJ., Dawson, Toohey, Gaudron, McHugh and Gummow JJ. in *De L v. Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 659:

> ***"The report of the Court Counsellor identified the proceedings as involving an application under the Convention for the return of the children and a cross-application for custody in Australia. It continued that the purpose of the report was "to ascertain the wishes of the children and their maturity to express those wishes". While that description might have been apt in relation to a custody application, it did not correctly identify the issue which arose under the Convention application. Thus, the present application was determined by the primary judge upon reliance, at least to a significant degree, upon the report of the Court Counsellor which had not been directed to the relevant issue concerning the objections of the children. The Full Court was correct in holding that, on that account, the proceedings were "fatally flawed"."***

Counsel then submitted to his Honour (at Appeal Book 308):

> ***"The exact same principles apply here. That report was prepared for the issues of residency as between the mother and the father. It is not addressed to the issues relevant for the Hague Convention, and should not be relied upon in that regard."***

However, his Honour ruled that he would permit the mother to rely on the Family Report notwithstanding that it had been prepared for use in the residence proceedings. His ruling was in the following terms (see Transcript at Appeal Book 311):

> ***"I intend also to allow you to rely upon the Family Report, because it seems to me that the Family Report arguably offers factual evidence of relevant matters for my consideration under the subsections of Regulation 16 of the relevant regulations, notwithstanding that I accept Mr Parrott's submissions that it was not ordered for that purpose and, on the face of it does not direct itself to the pertinent questions. But the fact that it does not direct itself to the pertinent questions does not render it, on the face of it, does not render it inadmissible if it may be argued that whatever it set out to do, it in fact addresses the relevant matters.***
>
> ***It is a matter of argument, no doubt, which I will hear ultimately as to what use can be made of the matters referred to in the report. It may be that its use is limited to consideration of the proviso in paragraph (b) of sub-regulation 1 of Regulation 16."***

Then in his reasons for judgment his Honour made the following reference to the Family Report (at Appeal Book 14):

> ***"Part of the evidence before me is a Family Report dated 9 October 1998 prepared pursuant to court order. The report writer records the purpose of the report as "…. to assist the court in relation to a contact and residency dispute between the parents ….". It has become common in applications under the Hague Convention Regulations for a report to be obtained from a counsellor, addressed to the question of whether the child or children objects or object to being returned to the relevant country and whether the child or children is or are of such an age and degree of maturity to make it appropriate to take account of the child or children's views. The report before me is not such a report. Counsel for the Authority objected to its reception. I accepted the report into evidence, for I considered some, at least, of its content relevant to issues before me, notwithstanding that I am not dealing with an application for parenting orders under the Family Law Act.***
>
> ***The court counsellor concluded that the mother had been able to establish a stable environment for herself and her son. [K] told the counsellor the names of five of his friends at pre-school and the name of his teacher. He told the counsellor his favourite foods and that he spent time with his "Nanny and Pop". The reporter also had contact with [K]'s pre-school teacher who advised that [K] would be able to proceed on to Grade 1 in 1999."***

By Ground 1(a) it is asserted that his Honour "wrongly admitted [into] evidence over objection" the Family Report. In support of this ground it was submitted (as it had been at trial) in reliance on the passage from the High Court majority judgment in *De L* quoted in paragraph 24 above that the Report had not been prepared for any of the limited purposes of the Convention (or perhaps more correctly, the Regulations made to give effect to the Convention).

In addition, it was submitted before us that the Court should have exercised its discretion not to admit the report. This was because the report would have little probative value having

been (a) based only on (i) interviews with the mother who had not revealed to the Counsellor (who wrote the report) the circumstances of her removal of the child from the United States without notice to the father, and (ii) interviews with the mother's parents who had not revealed to the Counsellor their role in initially deceiving the father as to the child's whereabouts; and (b) compiled without the benefit of an interview with the father.

The same submissions were also put in support of Ground 3, by which it was asserted that his Honour had erred by placing undue weight on the Family Report. In addition, in support of Ground 3, it was submitted that comments in paragraphs 18, 20 and 21 of the Family Report (see Appeal Book 302 – 3) concerning the mother's encouragement of the child's various activities, the mother's focus on his various needs, and the child's capacity to name five school friends and his teachers, did no more than establish the mother's good intentions with respect to the child and the child's awareness of his surroundings; they did not provide evidence that the child was settled in his environment.

It is clear from the introductory pages of the Family Report that it was prepared pursuant to an order made under s.62G(2) of the *Family Law Act* 1975 on 10 June 1998 for purposes of the proceedings between the parents of the child for residence and contact orders. However, by virtue of s.62G(8), such a report "may be received in any proceedings under this Act." The expression "this Act" is defined in s.4 of the *Family Law Act* to include "the regulations and the Rules of Court". The expression "the regulations" is not defined in the *Family Law Act*. However, given the provisions of s.17(r) of the *Acts Interpretation Act* 1901 to the effect that the expression "Regulations" in any Act means "Regulations under the Act", we conclude that when used in the *Family Law Act*, the expression "Regulations" includes the regulations made under s.111B of the *Family Law Act* to give effect to Australia's obligations under the Hague Convention on the Civil Aspects of International Child Abduction. Thus we are of the view that a Family Report prepared under s.62G(2) for the purposes of residence proceedings could, subject of course to relevance, be received in evidence in proceedings under the Convention Regulations for the return of the child.

We note in this regard that the Convention Regulations contain their own provision in Regulation 26 for the preparation of a Court Counsellor's Report (or Family Report) for purposes of proceedings under those Regulations in language virtually identical to s.62G of the Act. However, in our view, the existence of Regulation 26 and its provision for the preparation of such reports, does not prevent the use in such proceedings of a report prepared under s.62G of the Act. As we have earlier said, s.62G(8) provides for a report prepared under that section to be used in any proceedings under the Act, Regulations or Rules (subject to its content being relevant to the issues to be determined in the proceedings).

We are not persuaded that what was said by the majority of the High Court in *De L* (see paragraph 24 above) should be interpreted as meaning that a Family Report, or other independent expert report, can be relied on in proceedings under the Convention Regulations only if it has been prepared specifically for use in those proceedings. If such a report contains evidence relevant to a specific matter which the Court has to determine under those Regulations, we see no reason why that evidence cannot be relied upon. The problem with the Counsellor's Report in *De L* was that it was directed to the purpose of ascertaining the wishes of the subject children and maturity to express those wishes; it was not directed to the crucial issue in that case of whether the children objected "to being returned".

Thus, we are of the view that provided it has relevance to the matters to be decided by the Court in proceedings under the Convention Regulations, a Family Report prepared for the

purpose of proceedings for parenting orders under Part 7 of the *Family Law Act* 1975, can be received into evidence in proceedings under the Convention Regulations.

We are also of the view that in this case the Family Report, which had been prepared for the residence order proceedings, had some relevance to the matters which his Honour had to address in determining the application under the Convention Regulations for the return of the child, being principally whether the child was settled in his new environment.

For these reasons we consider that there is no substance in Ground 1(a).

As to the ground (Ground 3) which challenges the weight which his Honour accorded to the Family Report, we are not satisfied that this ground has substance. In support of this ground, particular reliance was placed on the fact that the mother and her parents had apparently not revealed to the Counsellor their roles in the removal of the child and/or the deception of the father. However, even if the Counsellor was ignorant of these matters, the trial Judge would have been well aware of these matters given the substantial material before him from the father provided by the Central Authority. It is clear, in our view, that what his Honour relied on in the Counsellor's report was the conclusion that the mother "had been able to establish a stable environment for herself and her son". It is difficult to see how this conclusion would be affected by the circumstances of the child's departure from the United States.

<u>The Ascertainment Report and the Progress Report</u>

As to the grounds of appeal directed to the admission of, and weight placed on the "Ascertainment Report" and "Progress Report", it is necessary at the outset of any discussion of these grounds to give some explanation of the two reports which are the subject of these grounds. Both reports were written by the Teacher in Charge of the Kawungan Special Education Developmental Centre, and each was attached to an affidavit of the mother, and not, it must be emphasised, to an affidavit of the author, the Teacher in Charge.

The first report, being the "Ascertainment Report", is dated 9 November 1997. It would seem to be in effect an assessment of the child's fine and gross motor skills, cognitive skills, self-help skills, language, and social skills, carried out after he had been attending the Centre for two sessions per week since May 1997. This report was annexed (as Annexure H) without comment to the mother's affidavit sworn 2 October 1998.

The second report, the "Progress Report", is dated 11 October 1998. As its name indicates, it appears to be a report on the child's progress in the various areas which were the subject of the first report. This second report was annexed as Annexure D to the mother's affidavit sworn 15 October 1998, and is stated by the mother in that affidavit (paragraph 6) to be a "current" report "reflecting his current positive progress". It is important to note that this second report commences with a statement by its author that the mother had requested that the author "write a report on [K]'s progress and abilities at this point in time". It can be inferred from this statement that this report was written for the purpose of the proceedings before Warnick J.

No objection to the admission of either of these reports was contained in the list of objections provided by Counsel for the Central Authority to his Honour on the day prior to the hearing (see Appeal Book 255). Nor was any objection made to the reports at the outset of the hearing at the time when objection was taken to the Family Report. However, later in the hearing in the course of making his oral submissions in relation to the question of whether the child was settled in his new environment, Counsel for the Authority (Mr Parrott) submitted (see Transcript at Appeal Book 316-318):

"Your Honour, in relation to the issue of whether the child is settled in its new environment, on the face of the evidence before you, including the Family Welfare Report, I will first of all start with the evidence of the mother. That includes the Ascertainment Report annexed to her affidavit in relation to the…proceedings… Your Honour, that simply, in my submission, does not assist you at all in any way, shape or form. It seems to provide you with an Ascertainment Report in which we have no idea what an Ascertainment Report is, why it was received, why it was commissioned.

On the face of it, it seems to be an Ascertainment Report used for the purposes of determining where the child should be placed in school and how his educational programme might be structured. It does nothing more than that. Indeed, towards the end of the report, I have referred your Honour and set out some various quotes from the report in my submissions, and in my submission it simply does not – this report – you will see these quotes on page 14, your Honour, these are quotes from pages 2, 3, 4 and 5. Now, they indicate that the child seems to have some difficulties with his education; he seems – obviously he gets his message across at times by using a lot of gesture if he is talking; the children also find it difficult to understand [K].

Now, you would have to question whether or not a child who has these difficulties because of his natural hearing problem, in my submission it would be much more difficult for him to become settled in a new environment; to become as aware of that environment as he should and, in any event, there is no independent evidence which relates to the statements made in this Ascertainment Report. And the comments are, "It is very difficult to understand him and for him to get his message across".

Now, we do not know, on the face of this report, whether he is having these difficulties because he has been uprooted and brought to a new environment, or because they are a part of his natural hearing difficulties. The evidence simply is not there. Your Honour simply is not aware of what the cause of his problems is. And it would be drawing a very long bow to suggest that these are all purely organic, they have got nothing to do with his inability to settle in his new environment. So, in my submission, your Honour, the evidence that you have before you simply does not go far enough to establish that he has settled in the new environment.

Which gets back to the most recent report which is annexed to the affidavit of 15 October. The comment which is particularly interesting, in my view, is on – this is exhibit D to the affidavit filed yesterday – on the second page and this was repeated, actually, in the first report:

> ***The tantrums have usually been when his mother…(reads)…staff have also been able to calm him down.***

…

Now, in my submission, and this is repeated by my learned friend in her submissions – this is on top of page 5 – where she says:

> ***The child is turning five years old…(reads)…never been separated from living with the respondent mother.***

> ***Your Honour, that is the child's environment. That is the only constant in the child's life…he has not at this point; not sufficiently so that your Honour could find that he is now well settled in a new environment."***

We do not read these submissions as containing any objection to the admission of either the Progress or the Ascertainment Report. Rather to the contrary, Counsel for the Central Authority seemed to place some reliance on the Ascertainment Report to establish that because of the child's difficulties, he would not easily settle into a new environment, and also on the Progress Report to establish that the child was not settled.

The only reference in his Honour's reasons for judgment to either the Ascertainment Report or the Progress Report is as follows (at Appeal Book 13-14):

> ***"Annexed to an affidavit of the mother is a report from the Special Education Development Centre attended by [K]. [K] has been attending the Centre since April 1997, two sessions per week. [K]'s hearing loss is due to be reviewed in the current school term and reports are being compiled for that ascertainment review. An individual education plan for [K] has been developed by the team at the Centre. It has been reviewed and changed each semester. The purpose is to provide a co-ordinated approach between the Special Education Development Centre, Pre-school and home.***
>
> ***The report says that [K] has been consistently improving over the last 18 months. The Speech Pathologist is currently undertaking a new assessment of [K]'s skills, but the report is not yet available. However, [K] has made significant gains with his languages and this is shown in improvement in his social skills over the last 12 months."***

It will be noted from this passage that his Honour only refers to one report, being, it would seem from his description of its contents, the more recent "Progress Report". It was apparently on the basis of this report that his Honour concluded that "[K] has made significant gains with his languages (sic) and this is shown in improvement in his social skills over the last twelve months" – although this conclusion suggests that his Honour must have taken into account the content of the first report.

By Grounds 1(b) and (c) it was asserted on behalf of the Central Authority that his Honour had "wrongly admitted (into) evidence over objection" both the Ascertainment Report and the Progress Report. In the written submissions in support of these grounds (see paragraphs 8 and 9) it was asserted that both these reports, being annexed to affidavits of the mother and not deposed to by their author, were hearsay only; that the author did not have in mind the purpose of the Convention when preparing the reports, nor the prospect that the reports would be used for such a purpose; and that the reports had little probative value in relation to the issues to be determined by the court.

As we understood the oral submissions of Counsel for the Central Authority, the submission concerning the author's lack of awareness that the reports would be used for purposes of proceedings under the Convention Regulations, also seemed to be founded on the statement by the majority of the High Court in *De L* (see paragraph 24 above). However, as we have already said in our earlier discussion of the use of the Family Report in this case (see paragraphs 33 – 34 above), we do not read the High Court as saying that no independent, expert report is admissible in proceedings under the Convention Regulations unless it is prepared specifically for the purpose of those proceedings. Rather as we indicated above, the test of admissibility of such a report must be relevance to the actual issue to be determined by the court. In this case we consider that the two reports written about twelve months apart

concerning among other things the child's language and social skills, could well have been relevant to the question of whether he was settled in his new environment, particularly given the child's disabilities to which both reports refer.

There is however much greater force, in our opinion, in the submission made on behalf of the Central Authority to the effect that both reports were inadmissible on the basis that, not being deposed to by their author, they were hearsay. (See paragraphs 8.2 and 9.2 of the written submissions on behalf of the Central Authority.)

Clearly the two reports, being only attached to the mother's affidavits and not sworn by their author, were hearsay, and therefore *prima facie* inadmissible according to s.59 of the *Evidence Act* 1995. Further, the exceptions to the hearsay rule contained in s.60 of the *Evidence Act* concerning admission of the hearsay material for another purpose, and in s.63 concerning the unavailability of the author of the material (see also Cl. 4 of Part 2 of the Dictionary in the *Evidence Act*) have no application in this case.

Similarly, the exception to the hearsay rule in relation to business records contained in s.69 of the *Evidence Act* would appear not to apply in this case at least in relation to the second report, the Progress Report, which was the report on which his Honour seems to have particularly relied. This is because, as we mentioned in paragraph 40 above, it can be inferred that this second report seems to have been written for the purposes of the proceedings before Warnick J. (see in this regard s.69(3)(a) of the *Evidence Act*).

Furthermore, there is no material before us which indicates that any attempt was made in this case to rely, by the giving of the required notice under s.67(1) of the *Evidence Act,* on the exception to the hearsay rule contained in s.64(2) of that Act and which concerns the expense, delay or practicability of calling the author of the reports. Nor does the transcript of the hearing reveal that any direction was given by Warnick J. (pursuant to the provisions of s.67(4)) that the exception in s.64(2) was to apply.

Nor was any order made by Warnick J. under s.190 of the *Evidence Act* waiving or dispensing with the application of Part 3.2 of that Act (that is, the rule against hearsay and the exceptions to that rule).

However, the difficulty that the Central Authority has to face in this appeal is that, as we pointed out in paragraphs 41 and 42 above, it did not object before the trial Judge to the admission of the Ascertainment Report or of the Progress Report, and indeed seemed to endeavour to place some reliance on both reports to support its own case. Accordingly, on the basis of the principle that parties are normally bound by the course taken by them at trial, particularly where (as in this case) the objection sought to be raised on appeal could have been met with evidence at trial, we would not be disposed to uphold the ground of appeal directed to the inadmissibility of the Ascertainment Report and the Progress Report. As we have indicated, had the Central Authority raised objection to the admissibility of the two reports at trial, it is likely that their author could have been called or have provided an affidavit, thus avoiding the "hearsay" problem which has arisen. (See in this regard: *Suttor v. Gundowda* (1950) 81 CLR 418; *Water Board v. Moustakas* (1988) 62 ALJR 209).

In connection with this matter and given the practically irreversible effect for the parents and the subject child of a trial judge's decision in a Hague Convention case, we have closely considered the question of whether it is appropriate in such a case to permit a trial judge's decision which has been reached taking into account inadmissible evidence, to stand for the reason that objection was not taken at trial to the admission of that evidence. However, in light of the discussion in *Cross on Evidence* (Fifth Australian Edition at paragraphs 1645 – 1680), of the subsequent status of evidence to which objection could successfully have been

taken, but was not in fact taken, and of the authorities referred to in that discussion (particularly *Re Lilley (deceased)* [1953] VLR 98 at 101 – 102), we are satisfied that we should not interfere with the trial Judge's decision, notwithstanding that it was reached taking into account the contents of the two inadmissible reports.

But we would also say that we are satisfied that had we upheld the grounds of appeal directed to the admissibility of the Ascertainment and Progress Reports and then proceeded to re-determine the matter ourselves (as we would have been able to do given that the matter was decided at trial on the papers), we would have reached the same decision as the trial Judge – although as we will explain later, we would have resolved the question of whether the child was settled in Australia according to a less rigorous test than that applied by the trial Judge.

As to the grounds (being Grounds 4 and 5) which assert that his Honour gave undue weight to the Ascertainment Report and to the Progress Report, we are not satisfied that those grounds have substance. Again, in support of those grounds, reliance was placed on the fact that the reports were not prepared for the purposes of a Hague Convention application. This is an issue which we have already discussed and disposed of in paragraphs 33 and 34 above.

It was further submitted in support of these grounds that the reports did not establish that the child was settled in his new environment but rather that he continued to have difficulties in it. However, it is clear to us from the passage from his judgment quoted in paragraph 43 above, that his Honour only used the two reports in question to make findings regarding education programmes for the child, and the improvement in his language and social skills. It is true that his Honour then took into account these particular matters in arriving at his overall conclusion that the child was settled in his environment (see paragraph 16 above), but we do not consider that there is any substance in the complaint that his Honour placed undue weight on those reports.

<u>Warnick J.'s conclusion that the child was settled (Grounds 6 – 13)</u>

> **By Ground 6 it was asserted that his Honour "gave insufficient reasons to justify the orders made". However, as no submission, either written or oral, was put in support of this ground, we do not propose to consider it further. In any event, it appears to us to have no substance.**
>
> **By Grounds 7 and 8 it was asserted that his Honour was in error in finding that the following matters were relevant factors "for the purposes of finding that the child was settled in its new environment" under Regulation 16(1)(b):**
>
> > **that "the child was established in a close relationship with the maternal grandparents with whom he lived up until earlier in 1998"; and**
> >
> > **that "the child has now lived for some six months or thereabouts in the premises to which he and the mother have moved".**
>
> **Then by Grounds 9, 10 and 11 it was asserted that there was not sufficient evidence to support the following findings:**
>
> > **that "the child had made friends in the community and at school";**
> >
> > **that the child was "involved in a number of activities and has been for some time"; and**

that the child "has made advances in his emotional and social development".

Then by Ground 12 it was asserted that his Honour erred in finding that "the involvement of persons attending to his special needs" was relevant to the determination of the issues before him, or in the alternative, that there was sufficient evidence to support such a finding.

All of the findings which are the subject of Grounds 7 to 12 form part of the reasons for his Honour's ultimate conclusion that the child was settled in his new environment, which we quoted earlier, but which it is convenient to repeat here:

> ***"I am satisfied on the evidence in the mother's case that the child is settled in his new environment. In making such a finding I accept that the test requires more than evidence of a child who is happy, secure and adjusted to surrounding circumstances, and that it involves findings as to a physical element of relating to and being established in a community and an environment, as well as an emotional constituent denoting security and stability.***
>
> ***I accept that it does not relate to, "per se", the relationship with the mother.***
>
> ***Features of the child's settled state in his new environment are:***
>
> ***The child is established in a close relationship with the maternal grandparents with whom he lived up until earlier in 1998.***
>
> ***The child has now lived for some six months or thereabouts in the premises to which he and the mother moved.***
>
> ***It is apparent that the child has made friends in the community and at school.***
>
> ***He is involved in a number of activities and has been for some time.***
>
> ***He has made advances in his emotional and social development.***
>
> ***[K]'s environment includes the involvement of persons attending to his special needs arising from his hearing and related difficulties. He is part of a program specifically planned for him. Medical intervention is under serious consideration.***
>
> ***I conclude that [K]'s environment has attained considerable significance for him."***

It is unnecessary for us to consider further the challenges to the findings of fact in the above-quoted passage for the reason that before us, Counsel for the Central Authority conceded that there was in fact evidence to support all those findings.

By Ground 13 it is then asserted that "even if there was evidence to justify His Honour's findings (in the above quoted passage) which is denied, then that evidence falls short of establishing that the child was settled in his environment" for the purposes of Regulation 16 (1)(b). This ground therefore raises the important issue of what is the appropriate test to satisfy the requirement in Regulation 16(1)(b) "that the child is settled in his or her new environment".

<u>The test of "settled in a new environment" under Regulation 16(1)(b)</u>

In *Graziano and Daniels* (1991) FLC 92-212 the Full Court of this Court (Baker, Nygh and Gun JJ.) held, following decisions of single judges of the English High Court in *Re Mahaffey*

(a Minor) **(Unreported High Court of Justice England 8 October 1990 CA910/90) and *Re N (Minors) (Abduction)* (1991) 1 FLR 413, that the test of whether the child is settled in his or her new environment for purposes of Regulation 16(1)(b) must be more exacting than that the child is happy, secure and adjusted to his or her surroundings, and that the word "settled" has two constituent elements, being first, a physical element of being established in a community and an environment, and secondly an emotional constituent denoting security and stability. Furthermore, the Full Court held following *Re N* that the settlement must relate to a "new environment", with the word "new" being significant and encompassing place, home, school, people, friends, activities and opportunities and not *per se* the existing relationship with the abducting parent. What the Full Court actually said in following these English authorities, especially *Re N,* is as follows:**

> **"3.** ***The test must therefore be more exacting than that the child is happy, secure and adjusted to his surrounding circumstances: Mahaffey, ibid. We respectfully agree with the statement made by Bracewell J in Re Novak (Minors) unreported High Court of Justice England CA1219/90 4th December 1990, that the abductor must "establish the degree of settlement which is more than mere adjustment to surroundings". It is clear from the definition given by Dr M that he was primarily concerned with the question of adaptation and adjustment to the new surroundings.***
>
> ***As Bracewell J concluded, the word "settled" has two constituent elements:***
>
> > ***``Firstly, it involves a physical element of relating to, being established in a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.''***
>
> ***4. Furthermore, the settlement must relate to a "new environment" as Bracewell J said:***
>
> > ***``The word `new' is significant and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not per se the relationship with mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.''"***

It is convenient to comment at this point that although Warnick J. did not expressly refer to the Full Court authority of *Graziano v. Daniels,* it is clear from what he said in the passage from his judgment quoted in paragraph 61 above that he was applying the two-fold test laid down in that case. In so doing he was, of course, correct, given the state of Full Court authority at that time.

However, a week or so after Warnick J. gave his decision in this case, the Full Court (Nicholson CJ., Holden and Dessau JJ.) in *Director-General, Department of Community Services v. M and C and the Child Representative* (1998) FLC 92-829 cast doubt on the correctness of the test in *Graziano v. Daniels* at least in so far as it requires more than a finding that the child is happy, secure and adjusted to his or her surrounding circumstances, with the following statement:

> ***"51. Ms Hartstein for the Central Authority argued that the trial judge did not apply the appropriate test in determining this question and relied upon the view expressed in Graziano and Daniels (supra), which was followed by Kay J in State Central Authority and Ayob (1997) 21 Fam LR 567 that the test must be more exacting than that the child is happy, secure and adjusted to his surrounding circumstances.***

> ***52. As was pointed out in the course of argument, it is doubtful whether this is the correct test. In De L's case, the High Court pointed out that there was no warrant for reading more into the term "objects" appearing in the Regulations than its ordinary meaning. In our view similar considerations apply to the expression "settled" appearing in the Regulations. Graziano's case was decided before De L and we doubt whether the statement relied upon by the Appellant remains good law."***

Later in its reasons for judgment in *M and C* the Full Court went further, and held in the following passage that the only test to be applied was whether the child has settled in his or her new environment, and that accordingly *Graziano v. Daniels* no longer represented the law in this country:

> ***"88. It was put by Ms Hartstein that the statement of principle by Bracewell J in Re N, approved by the Full Court in Graziano's case, meant that in considering whether children are settled within the meaning of the Regulations, it is necessary to look not only at the past and the present situation, but also into the future. She said that if this were done it would not be possible to find that the children were settled in Australia because of their uncertain immigration status. She in fact went further and submitted that it was probable that the children would be required to leave Australia and that this meant that the grandmother had failed to discharge the onus upon her of establishing that the children were settled in Australia.***
>
> ***89. In that case her Ladyship said at 417-418 that the word "settled" should be given its ordinary natural meaning. She said that it involved both a physical element of being established in a community and an environment and also an emotional constituent denoting security and stability. She then referred to the decision of Purchas LJ in Re S and then continued: -***
>
> > ***"He (Purchas LJ) then referred to a 'long term settled position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance in Re S. The phrase 'long term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration of a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent."***
>
> ***90. Apart from Graziano, this passage was also cited with approval by Moss J in Director General of the Department of Community Services (Central Authority) and Apostolakis 21 Fam LR 1 at 8.***
>
> ***91. In our opinion this statement does not represent the law so far as the Australian Regulations are concerned. As the majority of the High Court pointed out in De L's case it is the Regulations that must be applied. Nowhere in the Regulations are the words 'long term' to be found and there is in our view no warrant for importing them. The test, and the only test to be applied, is whether the children have settled in their new environment. That test is to be applied either at the time of the application being made or at the time of trial. It is unnecessary to consider which date is the relevant one in the context of this case, given the short period between the two dates."***

It is not entirely clear to us that the Full Court in *Graziano* went so far as to adopt what Bracewell J. had said in *Re N* (following Purchas LJ. in *Re S (A Minor) (Abduction)* [1991] 2 FLR 1) regarding the need for a "long-term settled position" or for "a projection into the future". Nevertheless, having regard to what was said by the High Court majority in *De L* (at 655) concerning the need to apply the Convention Regulations without any "additional gloss", we agree with the statement of the Full Court in *M and C* that the only test to be applied under Regulation 16(1)(b) is whether the child has settled in his or her new environment.

It is also important to say that before us there was no challenge to the correctness of *M and C*.

Accordingly, it has to be concluded that in the present case Warnick J. may well have employed too stringent a test for determining whether the child was settled in Australia. But nothing would, of course, turn on his use of the more stringent test to determine that the child was in fact settled in his new environment. Contrary to the assertion contained in Ground 13, we are satisfied that the evidence (even without the admission of the Ascertainment and Progress Reports) was sufficient to establish that the child was settled in his new environment, and that this is certainly so, if the words "settled in his or her new environment" are given their ordinary meaning and without resort to any gloss.

<u>The exercise of discretion by Warnick J. (Ground 14)</u>

Having determined that the child was settled in his new environment, Warnick J. took the view that a discretion still existed in the court under Regulation 16(1)(b) to order the return of the child. However, his Honour refused to exercise that discretion, saying as follows (at Appeal Book 18-19):

> ***"The same circumstances which lead to the conclusion that [K] has become settled in his new environment carry much weight when considering whether, notwithstanding, he ought be returned.***
>
> ***I accept the submission that as the discretion is one invested in the court pursuant to the Regulations, it is appropriate to have regard to the purpose of the Convention in considering the exercise of the discretion. Nonetheless, the Convention itself contains the machinery allowing for the recognition of the very factors which I have taken into account above. In other words, it is <u>not</u> the Convention's policy that, <u>in all circumstances</u>, children must be returned once a wrongful removal is established.***
>
> ***The exceptions are obviously inserted to permit the circumstances of children to be taken into account in particular situations. It is not to the point, once such situations have been made out, that unless the child is returned, the "wrong-doer" will profit from that "wrong-doing", save in the sense that to discourage such "wrong-doing" is a purpose of the Convention. It is not a purpose which "overrides" the exceptions.***
>
> ***The passage of time that has enabled these circumstances to come about may be because, on possibly incorrect advice, or unwise advice, the father decided to litigate the question of [K]'s residence in Australia pursuant to the domestic law enshrined in the Family Law Act, but again, that is not really to the point, once an exception is made out."***

By Ground 14 the Central Authority asserts that his Honour "ought to have exercised his discretion in favour of ordering a return of the child". The arguments put in support of this ground were essentially that the purpose of the Convention is to secure the prompt return of children wrongfully removed or retained from the country of their habitual residence and to discourage the harmful practice of international child abduction. Accordingly, any exceptions to the principle of return should be read narrowly so as not to defeat the purposes of the Convention. Further, in support of an order for the return of this child, reliance was placed on the opportunities that were available to him if he was returned to the United States.

As we will shortly discuss, it is an open question whether there is in fact any discretion in the court to order the return of a child whom the court has found is settled in Australia within the meaning of Regulation 16(1)(b). However, on the assumption that such a discretion exists, we are not satisfied that Warnick J. erred in his exercise of it.

One of the difficulties with the arguments in favour of the existence of such a discretion is that unlike, for example, the discretion in Regulation 16(3) (which permits the court to refuse to make an order for the return of the child if a person opposing the return satisfies the court of certain specified matters), the Regulations do not specify any matters which are to be taken into account in the exercise of such a discretion (if it in fact exists). Accordingly, any such discretion must be a broad discretion, and if a primary judge exercises such discretion in the considered, reasoned and judicial manner in which Warnick J. did in this case, it would be difficult for an appellate court to interfere with that discretion, particularly bearing in mind established limitations on appellate interference with discretionary decisions. We would certainly not have been disposed to interfere with his Honour's exercise of the purported discretion in this case.

As to the important question of whether such a discretion exists at all, the present state of the law in Australia was usefully summarised by the Full Court in the recent decision of *M and C* where it was said (at 85,491):

> ***95. Before leaving this aspect of the appeal, we think it is necessary to draw attention to the obiter view taken by Kay J in Ayob's case as to whether in a case where one year has elapsed since the child's wrongful removal (or retention) and the filing of an application pursuant to the Hague Convention, a finding under reg 16(1) that a child is settled in a new environment, still leaves a discretion in the Court to order the return of a child.***
>
> ***96. At 84,072, his Honour respectfully differed from the approaches of Bracewell J in Re N at 417 and Purchas LJ in Re S (A Minor) (Abduction) (1991) 2 FLR 1 at 25 to the extent that those cases "within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment…". Although that set of circumstances was not found to be the case before his Honour, he said that had such facts been the case "that would be the end of the matter under the Hague Convention and under the Regulations." In his Honour's view, the matter would fall to be decided under common law or other statute.***
>
> ***97. While the factual aspects of the children's being "settled" was subject to a good deal of argument in this case, the consequences in respect of discretion under the Regulations was not. We therefore do not propose to deal with that issue which should await full legal argument.***

98. We should say however, that we are not necessarily persuaded that Kay J's view is correct."

In the present case, the Queensland Central Authority put substantial written submissions before Warnick J. (see Appeal Book 266-268) and also before us in support of the existence of such a discretion, with particular reliance being placed on the decision of Lindenmayer J. in *Director-General, Department of Families, Youth and Community Care v. Thorpe* (1997) FLC 92-785 and also on the Scottish appellate decision of *Soucie* (1995) SLT 414.

However, before us Counsel for the respondent mother chose to put no argument on this question of whether or not the alleged discretion exists. In these circumstances, given the very great importance of the question, we consider that it would be undesirable for us to express a concluded view on it without the benefit of full argument. We consider that the preferable course is for the matter eventually to be argued before a Full Bench of the Appeal Division of this court in a case in which the issue of the discretion squarely arises. Such a case would be where a judge had found the child settled in Australia within the meaning of Regulation 16(1)(b), but nevertheless has purported to exercise the discretion to order the return of the child to an overseas country. In a case such as the present, it is sufficient to assume the existence of the discretion. We also suggest that when this question is fully argued, the Commonwealth Central Authority (being the Secretary to the Attorney General's Department) or indeed the Attorney General himself, might be invited to make submissions to the court.

<u>The conclusion in the present case</u>

Therefore, for the reasons which we have given, we are not prepared to uphold any ground of the Central Authority's appeal and accordingly we will dismiss the appeal.

However, it important to say (as we earlier indicated in paragraph 54) that even had we upheld the grounds of appeal which assert that the trial Judge wrongly admitted the Ascertainment Report and the Progress Report, in which event we would have to have redetermined the matter ourselves, we would still have dismissed the appeal. We would have done so for the following reasons.

In re-determining this matter, we would apply the test laid down by the Full Court in *M and C,* being simply whether this five year old child is settled in his new environment. The mother in her affidavit sworn 2 October 1998 gave evidence of the child's weekly routine which includes special education classes at preschool, dancing classes, martial arts and gymnastics sessions. She also gave evidence of weekly visits by the child to her parents and other friends. Further, she gave evidence concerning the rented home which she and the child occupy, including details of the child's own room and equipment which he has for his own use such as a swing set and computer. It is clear from the Family Report that the mother and child have occupied their current home since April 1998 and that prior to that they had lived with the mother's parents in the same area.

We acknowledge that the onus of satisfying the court that a child is settled in a new environment, as required by the Full Court in *M and C,* may not be a difficult onus to discharge, at least where the child concerned is of the age and maturity of this child, and where he or she has been living in the same residence for a period of over six months and in the same geographic area for about eighteen months. It could perhaps be said that in such circumstances, and provided there is no evidence that the child is showing signs of particular distress, the conclusion will always be open that he or she is settled in his or her new environment.

However, the conclusion in this case that the child is settled is supported by the concluding observations of the Counsellor in paragraphs 30 and 31 of his Family Report, being that "(i)f the court were to order that K continue to reside with his mother he would be able to continue with what has been a stable and established environment for him in the last eighteen months", and "(t)o shift K to live with his father in the United States would raise issues of the disruption of a stable environment…".

In our view, these observations by the Counsellor regarding the stability of the child's current environment would carry particular weight given that they were apparently made for purposes other than a determination of whether the child was settled in his new environment. Thus we would be prepared to conclude that the child is settled in his new environment within the meaning of Regulation 16(1)(b).

For the reasons discussed earlier at paragraphs 74 – 77, we are prepared to assume for present purposes that having determined that the child was settled in his new environment, we would still have a discretion as to whether or not to order the return of the child. However, we would not be prepared to exercise the discretion to order the return of the child in this case for the same reasons Warnick J. gave for not exercising that discretion.

Therefore, were it necessary for us to re-determine the application of the Central Authority filed 22 September 1998 we would dismiss that application. Accordingly, the appeal must be dismissed.

Costs of the Appeal

At the conclusion of the hearing of the appeal we invited and received submissions in relation to the costs of the appeal. In the event that the appeal was unsuccessful, the mother sought an order for costs against the Central Authority. However, given the provisions of regulation 7 of the Convention Regulations, being to the effect that the Central Authority shall not be subject to any costs order in the performance of its functions, we would not propose to make a costs order against the Central Authority. (For a discussion of the operation of regulation 7 in proceedings before the High Court see *De L* (No. 2) (1997) 190 CLR 207).

Orders

1. That the appeal be dismissed

2. That there be no order as to the costs of the appeal.

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