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[21/12/1994; Family Court of Australia at Melbourne; First Instance]
State Central Authority and McCall (1995) FLC 92-552

THE FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986

IN THE FAMILY COURT OF AUSTRALIA, Melbourne

BEFORE: Treyvaud J.

21 December 1994

No. ML7522/94; (1995) FLC 92-552

BETWEEN:

State Central Authority

Applicant

-and-

Rebecca Anne McCall

Wife

REASONS FOR JUDGMENT

APPEARANCES:

Ms. Bennett of Counsel, instructed by Ronald C. Beazley, Victorian Government Solicitor, appeared for the applicant State Central Authority.

Mr. Rosen of Counsel, instructed by Nedovic and Co., Solicitors, appeared for the respondent wife.

JUDGMENT:

INTRODUCTION

The proceedings herein are an application by the State Central Authority for Victoria, instituted pursuant to Regulation 15 of the Family Law (Child Abduction Convention) Regulations 1986 ("The Regulations"). The Regulations are made pursuant to Section 111B of the Family Law Act, which empowers regulations to be made to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the

Convention on the Civil Aspects of International Child Abduction, signed at The Hague on the 25th of October 1980. ("The Convention".)

THE AMENDED APPLICATION

The application was issued initially on the 21st day of July 1994. Initially the application asserted that the wife had wrongfully removed the child C from the United Kingdom, and taken him to Australia, contrary to the provisions of the Convention and the Regulations. On the 11th day of October 1994 the applicant sought leave to amend the application by asserting an alternative claim, namely that the wife had wrongfully removed the child from the United Kingdom to New Zealand, and retained him in that country, again contrary to the Convention. When counsel for the applicant sought leave to make the amendment, no objection of substance was raised, and leave was granted.

The Amended Application was filed on the 17th of October 1994. It set out in detail the alternative assertions to which I have made reference. By Answer to the Amended Application filed on the 31st of October 1994, the wife set out a number of reasons why leave to file the Amended Application ought not to have been granted. Should those assertions, or any of them, have been argued when leave was sought initially, leave may well not have been granted.

It is unnecessary to speculate on what might have occurred, for the simple fact is that the evidence of the husband and wife, which I shall summarize hereafter, makes it abundantly clear that the alternative claim is wrongly based factually, and that there was no removal or retention to New Zealand to or in which the husband did not consent or acquiesce. Accordingly, I do not deal hereafter with any basis for relief sought by the amended application.

THE VALIDITY OF THE REGULATIONS

When the proceedings initially were before me both the husband and the wife were physically present in court; each gave evidence and was cross-examined by counsel on behalf of the other party. Thereafter counsel for the wife submitted that the Regulations were invalid. Because of the significance of the Regulations in the context of international child abduction, I stated a case for the Full Court, asking that that court determine the question of validity of the Regulations. The Full Court determined that the Regulations were valid. Thereafter the wife applied to the High Court of Australia for special leave to appeal against the decision of the Full Court. On the 6th of December 1994 the High Court refused special leave to appeal, on the basis or premise that the Regulations are valid, and accordingly that the application herein is properly instituted pursuant to valid Regulations. I now conclude the hearing of the application.

THE FACTS:

FAMILY BACKGROUND

The child the subject of the application is C, who was born on 13th April 1992, in the United Kingdom. The mother, aged 26, is a citizen of the United Kingdom and of New Zealand. The father, aged 33, is a citizen of the United Kingdom. The father and the mother first lived together in the United Kingdom in January 1991. Thereafter the wife became pregnant; the parties intermarried in the United Kingdom on the 30th of November 1991.

NEW ZEALAND

In about June 1993 the husband and wife discussed travelling to New Zealand, with C, for a working holiday of some 18 months duration. They paid a deposit for airline tickets for that purpose. However, thereafter, the husband decided not to go to New Zealand. In discussions between husband and wife it was agreed that the wife and C would travel to New Zealand. The husband's affidavit and evidence is that this was to be a visit to the wife's family for some four months or so. The wife's affidavit and evidence is that the parties agreed to separate, and that the wife would be staying in New Zealand permanently.

On the 2nd of November 1993 the wife and C travelled by plane from the United Kingdom to New Zealand. Promptly upon her arrival in New Zealand the wife applied for social security; the application form annexed to an affidavit asserts separation on the 2nd of November 1993. However, the wife took none of her personal effects other than clothing, and indeed, until she departed for New Zealand she continued living with the husband, and improving their home, by painting, renovations and the like. On this issue, namely either a consensual final separation (as the wife asserts) or a consensual visit for some months (as the husband asserts), I prefer and accept the evidence of the husband.

In December 1993 the husband flew to New Zealand to join the wife and C for some two to three weeks. The husband asserts that while he was in New Zealand the physical aspects of the marriage continued unabated. The evidence, particularly of the husband, satisfies me that while the husband was in New Zealand the parties had many discussions concerning their future, concerning the wife's desire to live either in Australia or New Zealand, and concerning the husband's desire that she return to the United Kingdom. I accept that on the night before the husband left New Zealand to return to the United Kingdom, in discussion, the wife told the husband that she was not happy with the thought of going back to Britain, that she wanted to live in either New Zealand or Melbourne. The parties agreed that the wife would travel to the United Kingdom for a visit, with C, at the time of C's second birthday. They discussed the husband forwarding to the wife money for the purchase of air tickets for that visit.

After the husband returned to England he forwarded to the wife some pounds 550, sufficient to buy a one-way ticket for the wife and C to travel from New Zealand to the United Kingdom. In fact, the wife purchased return tickets, making up the difference between what was advanced by the husband, and what was required, from her own earnings while in New Zealand.

<u>THE RETURN TO THE UNITED KINGDOM</u>

The wife and C arrived in the United Kingdom on the 12th of April 1994. The evidence establishes that the husband hoped that he could persuade the wife to stay in the United Kingdom, whereas the wife was determined that she would return to Australia, rather than New Zealand, always assuming she could find work in Australia.

Very shortly after the wife's return to the United Kingdom she told the husband that she had return tickets for Australia, departing on 28th of April. The husband expressed anger, indicating that he wished to take C to visit his parents in Scotland during the period of the May Bank Holiday, which is in early May. Accordingly, the wife changed the date of the reservation, but did not tell the husband of the altered date.

While in London the wife obtained employment; I am satisfied that she obtained this employment to provide for her needs when she returned to Australia. Her evidence is that the husband agreed to her return to Australia, on the basis that she was there, in effect, financially secure. The husband denies this assertion. Bearing in mind the husband's attitude

and behaviour both before, during and after the wife's stay in the United Kingdom in April-May 1994, I do not accept the wife's evidence.

The wife's employment in London ceased on the 11th of May 1994. The following day she obtained a reservation for a flight to Melbourne for herself and C, for the 26th of May. She did not inform the husband of the new departure date.

THE DEPARTURE FROM THE UNITED KINGDOM

On the 26th of May, while the husband was at work, the wife departed the United Kingdom for Melbourne, with C, leaving behind a note which is annexed to one of the husband's affidavits. The husband immediately contacted the Lord Chancellor's Department and these proceedings commenced.

THE LAW:

GENERAL

It is necessary at the outset to turn to the relevant Articles of the Convention, to which Australia and the United Kingdom are each a party. By reason of Article 4, the Convention applies to any child under 16 habitually resident in a contracting State. The United Kingdom and Australia are contracting States.

By Article 5(a) of the Convention, "rights of custody shall include rights relevant to the care of the person of the child and in particular, the right to determine the child's place of residence". Article 3 of the Convention makes clear that the rights of custody attributed to a parent, either jointly or alone, may arise by operation of law or by reason of a judicial or administrative decision.

Article 3 of the Hague Convention provides:

"the removal or retention of a child is to be considered wrongful where:

> **(a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and**
>
> **(b) At the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."**

RIGHTS OF CUSTODY

There are no orders concerning C made either in the United Kingdom or in New Zealand. Accordingly, by law, C was, at least until he travelled to New Zealand in November 1993, habitually resident in the United Kingdom, and his parents had the rights, responsibilities and obligations specified under the Children Act (1989). They exercised, jointly, parental responsibility in relation to C. If, in fact, after following his four and one half months stay in New Zealand, and during his 1994 stay in the United Kingdom, C were to be regarded as habitually resident in New Zealand, (I shall not so find), and therefore subject to the New Zealand Guardianship Act, then by that Act the husband and wife were his joint guardians. I will return to the issue of C's habitual residence later in this judgment.

In any event at the time when C left the United Kingdom with the wife on the 26th of May 1994 each parent was exercising rights of custody in respect of C.

In the circumstances of this case, where the husband, wife and child were in March to April and May 1994 living in the parties' matrimonial home in London, albeit in strained circumstances, in a situation where each played a part in C's care and upbringing, I am satisfied that when the wife removed C from the United Kingdom the husband was actually exercising rights of custody.

HABITUAL RESIDENCE

The applicant must establish, not only that when C was removed, that the husband was actually exercising rights of custody, but also that those rights arose under the law of the State where C was habitually resident, that is it is here asserted, under the law of the United Kingdom. To resolve that issue it is necessary to determine where C was habitually resident on the 26th of May 1994.

In my view little assistance is gained from authorities concerning taxation and revenue law, where the issue of the ordinary or habitual residence of a person from whom the State seeks to levy tax often arises. Again, I regard the many and different pronouncements of courts in many countries as to what does and what does not constitute habitual residence of a child in Convention cases, as merely pointing to the possible general approach, which, I believe, ought to be adopted.

Habitual residence is a question of fact; there are two elements - the fact of residence, and the intention to reside habitually. The first element is here clearly established - residence in the United Kingdom from his birth until 2nd November 1993 and from 12th of April 1994 to the 26th of May 1994. The second element requires careful analysis.

C was born in April 1992; he has never to this day, nor for some years yet to come, been of an age where in his own right he has formed, or could form, an intention as to where he will reside. C's parents, having parental responsibility for him under the law of the United Kingdom, and being his joint guardians if New Zealand law applies, are the persons who may jointly form the intention of terminating C's habitual residence by removing him to another jurisdiction. I agree with the comment of Lord Donaldson M.R. in C. v. S. (A Minor) (Abduction) 1990 2 FLR 442 at 449 that, in the ordinary case of a married couple, it would not be possible for one parent unilaterally to terminate their child's residence by removing the child from the jurisdiction in breach of the other's parental rights. See also per Lord Brandon of Oakbank at 454. This authority is also reported as re. J. (1990) 2AC 562. See also A. v. A. (Child Abduction) 1993 2 FLR 225 per Rattee J.

Accordingly, I here find that C's habitual residence is, and always has been, the United Kingdom.

WRONGFUL REMOVAL

I find, therefore, that the removal of C from the United Kingdom was wrongful within the meaning of Article 3 of the Hague Convention, and Regulation 2(1).

THE COURT'S ROLE IN APPLYING THE CONVENTION AND REGULATIONS

Having found that the wife's removal of C from the United Kingdom was wrongful, I am required to order his return to the United Kingdom unless the wife establishes a basis upon which I may judicially decline so to order. In considering whether such a basis exists, it is

most important to bear in mind the intent and purpose of the Convention and the Regulations which implement it in Australia. A helpful here relevant statement was made by Nygh J on behalf of the Full Court in Director-General of Family and Community Services v. Davis 1990 FLC 92-182 at page 78,226:

> **It is the intent and purpose of the Convention that states signatories to the Convention, and they include both Australia and the United Kingdom, should take all necessary steps to protect children internationally from the harmful effects of their wrongful removal or retention, and to secure the prompt return of children wrongfully removed to, or retained in, any contracting state.**
>
> **Without going through the details of the Convention, it is clear that once an applicant who complains that his or her rights have been infringed through a wrongful removal establishes that a child has been wrongly removed in breach of his or her rights, there is an obligation on the Court hearing that application to order the prompt return of the child to the jurisdiction of habitual residence.**
>
> **On such an application, the question of the welfare of the child as the paramount consideration does not apply. For the Convention is not directed to that question. It is directed to, in my view, two main issues: firstly, to discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal.**
>
> **It is, therefore, the intention of the Convention and the Regulations which implement it to limit the discretion of the court in the country to which the children have been taken quite severely and stringently. To that obligation, which the Convention and the Regulations impose upon the court of the country to which the children have been taken, there is an exception and that exception is found in Art. 13 of the Convention which is adumbrated and further defined in reg. 16(3) of the Regulations.**
>
> **It must be remarked that it flows from the framework of Art. 13 and reg. 16(3), which uses similar wording, that the onus of establishing whether or not the ground set out in para. (b) is established rests upon the person opposing the return of the child, which, of course, would in most circumstances, be the person responsible for the wrongful removal or retention of the child, in this case the wife.**

REGULATION 16(3)(a)

The basis or exception relied upon by the wife is that contained in Regulation 16(3)(a). That Regulation provides in substance that a court may refuse to make an order for the return to the child's place of habitual residence, of a child wrongfully removed or retained, if the aggrieved parent in the country from which the child was removed was not exercising rights of custody at the time of removal, or had consented to or acquiesced in, the child's removal.

I note that Article 13 of the Convention, upon which Regulation 16(3)(a) is based, uses the phrase "subsequently acquiesced". I do not know why the word "subsequently" was omitted in the Regulation.

I have already dealt with the issue of the exercise by the husband of rights of custody. Accordingly, this portion of the judgment deals with the husband's alleged consent to, or acquiescence in, C's removal.

CONSENT TO REMOVAL

First - consent to C's removal from the United Kingdom. Counsel for the wife submitted that the husband had so consented. That submission is contrary to the evidence. I refer to the husband's affidavit sworn the 11th of August 1994. paragraph 7.2, and to the transcript of the husband's evidence given before me on 21st September 1994, pages 5 and 6. I set out the relevant passages of that transcript. I accept and act upon that evidence.

> **MS. BENNETT: ... In paragraph 7 point 2 of your affidavit, same one, you say:**
>
> > **My wife and I agreed that she would make an effort to enjoy herself in the United Kingdom and give it a fair chance and that we would review the situation at the end of summer whereupon we would discuss whether it would be viable for all of us to uproot and move to Australia.**
>
> **What did you actually think would happen - the end of summer is the English summer, is that correct? -- That is right.**

And when approximately is that?

HIS HONOUR: Today? -- Today.

> **MS. BENNETT: Thank you. So what did you think would happen at the end of the English summer or today? -- Well, firstly I thought we would reach some agreement whereby we would stay together in England as a family.**
>
> **What if you had not stayed together in England as a family, that is, what if the marriage was not continued? -- Well, I would have put a restraining order on C.**

With a view to? -- With a view to keeping him in the United Kingdom.

> **When Mrs. M. left England on 26 May, was there anything immediately prior to 26 May which would have indicated to you that she was going to leave? -- Not on the 26 May. I had no idea that my wife was leaving on 26 May.**
>
> **Did you have any idea that she was leaving on any other date? -- No, I understood she had a desire to leave.**
>
> **And how had you thought that you had dealt with that desire? -- By trying to function as a family again.**
>
> **I find that the husband did not consent to C's removal from the United Kingdom.**

ACQUIESCENCE AND REMOVAL

Secondly - acquiescence in C's removal. Because the United Kingdom courts apply the wording of Article 13 of the Convention, as distinguished from the wording of Regulation 16 (3)(a), they treat acquiescence as occurring subsequent to removal, or retention. Accordingly, in that respect those authorities are not necessarily helpful in the Australian situation. Nevertheless, despite that fact, recent pronouncements of United Kingdom courts

as to what constitutes acquiescence have been applied in Australia. The decision of the Court of Appeal in re. A. (Minors) (Abduction: Acquiescence) 1992 2 FLR. 14 and of the Court of Appeal in re. A.Z. (A Minor) (Abduction: Acquiescence) 1993 1 FLR. 682, have been cited with approval by Murray J in Police Commissioner of South Australia v. Temple 1993 FLC 92-365. I cite the principles of those United Kingdom authorities which her Honour summarized in the course of her judgment in Temple's case, at page 79,828:

> **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, an 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.**

I agree that what her Honour there cited sets out the law of Australia concerning acquiescence as defined in Regulation 16(3)(a).

It is not here submitted that the husband acquiesced in C's removal from the United Kingdom after he had been so removed by the wife. Indeed, all the evidence is to the contrary. Submissions by counsel for the wife that the husband had acquiesced in C's

removal from the United Kingdom before the removal took place were based upon counsel's assertions that the husband knew that the wife did not wish to live permanently in the United Kingdom, that the wife had in her possession air tickets for herself and C for travel from the United Kingdom to Australia, together with a passport for herself and C, and that the husband had declined his brother's suggestion that he take steps to prevent the wife from taking C from the United Kingdom.

Those submissions take no account of the passage from the husband's evidence contained in the transcript which I cited earlier in this judgment, and which I accept as factually correct. A further passage of the transcript of the husband's evidence (which again I accept as factually accurate) is to the same effect. I set out the following passage from page 45 of the transcript.

> **we were discussing her return to Australia and there was what I considered to be a verbal agreement that she would give it until the end of the summer.**

Was that the first time that had been agreed? -- Yes.

Was it the first time that had been suggested by either of you? --

> **It was the first time that a date or a period of time had been suggested although at all times during her stay in the United Kingdom I was trying to get her to stay obviously indefinitely. But it was the first time that a time limit was put on it.**
>
> **Do you resile or go back on your evidence however that it was a matter to be considered at the end of summer? -- No, I don't go back on that.**
>
> **Now it was put to you that you could have hidden Mrs. M.'s passport and the tickets. Can you tell his Honour what if anything you thought would flow if you did so? -- Well the thing that I was trying to build was our relationship again I suppose. And if I had attempted to or succeeded in taking, hiding or stealing the passports that would have been destructive in the extreme and I don't think there would have been any way back. It was something that I just wouldn't have even considered anyway because you don't or you shouldn't have to go around doing that, it's ridiculous.**

The note or card which the wife left for the husband when she took C from the United Kingdom, while the husband was at work, lends further support to the view that C's departure was neither consented to nor acquiesced in by the husband.

Consideration of the evidence as a whole, including but not limited to the cited passages, fails to satisfy me that the husband acquiesced in C's removal from the United Kingdom on 26th May last.

<u>CONCLUSION</u>

Even if the evidence did establish that, by word or deed, the husband in advance acquiesced in C's removal from the United Kingdom, nevertheless in the circumstances of this case, I decline to exercise my discretion in favour of C remaining in Australia. In this case, as in almost all cases, the courts of the country from which a child was wrongfully removed, are the proper forum to determine the child's future residence and placement. Accordingly, C shall be returned from whence he was removed by the wife, as soon as is reasonably possible.

I have discussed with counsel the formal orders which I will now pronounce and which are made for the reasons set out in this judgment.

1. I am satisfied that the child C., born on 13th April 1992, has been wrongfully removed from the United Kingdom to Australia.

2. I order that the wife forthwith do all acts and things necessary to return C to the United Kingdom. The wife, by her counsel, advising the court that she will accompany C to the United Kingdom, I order that the wife notify the Central Authority for England and Wales promptly upon her and C's return to the United Kingdom, of their address in that country.

3. I order that on or before the 27th day of December 1994 the husband pay for one-way Economy Class air travel for C and the wife on Qantas Flight QF1 departing on the 2nd day of January 1995, at 3.30 p.m. from Tullamarine, Melbourne, to Heathrow, London. It is requested that the airline advise the Victorian Government Solicitor of the payment of the fares, upon request.

4. I order that the travel arrangements for C be as follows:

(a) On the flight specified in paragraph 3 of these orders.

(b) Save for compulsory or unavoidable stopovers or disembarkations, the wife shall not leave the aircraft or cause C to leave the aircraft until the journey to London is completed.

(c) In the event that the husband is a passenger on the said flight, the husband shall have possession of C during any period of disembarkation, but shall not restrict contact between the wife and C during the flight.

5. I order that the wife be at liberty to collect her and C's passports from the Registrar of this Registry on or after the 30th day of December 1994.

6. I order that save for the purposes of paragraph 4(c) of this order, the wife have continuous access to C from this day until such time as the flight specified in paragraph 3 of these orders arrives in London.

7. I order that as from the departure from Australia of the flight specified in paragraph 3 of these orders, then paragraphs 4 and 5 of the orders made on 25th July 1994, and paragraph 2 of the orders made on 26th August 1994 (as varied) be and are hereby discharged.

8. I order that not less than two and a half hours before the scheduled departure of the flight described in paragraph 3 of these orders, the wife present herself and C to the office of the Australian Federal Police at Tullamarine Airport, International Departures.

9. I order that the wife pay the husband his reasonable costs of these proceedings, being his travelling and accommodation costs in relation to his attendance in Australia, and costs of the return of the wife and C to the United Kingdom.

10. I order that all extant applications concerning the Hague Convention Regulations be dismissed and that the wife's application filed on 8th September last, seeking custody of C, be adjourned to the High Court of Justice, The Strand, London. I order that the hearing in the Duty List herein fixed on 23rd January 1995 be vacated.

11. I order that the solicitors for the applicant serve a copy of these orders on the Australian Federal Police as soon as practicable.

12. I reserve to the applicant and the wife liberty to apply on short notice to the other.

13. I order that these proceedings be removed from the Active Pending Cases List.

14. I certify that this was a matter proper for the attendance of Counsel.

AND IT IS NOTED that the booking reference for the tickets is J8FL8 and that the fare for C is $1,006.00.

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