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http://www.incadat.com/ ref.: HC/E/AU 280
[02/08/1995; Family Court of Australia at Brisbane; First Instance]
Emmett and Emmett and Director-General, Department of Family Services and Aboriginal and Islander Affairs Central Authority and Attorney-General of the Commonwealth of Australia (Intervener) (1996) 92-645

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Jordan J.

2 August 1995

No. BR6893 of 1983 (1996) FLC 92-645

BETWEEN:

Darryl Emmett

Husband

-and-

Penelope Anne Perry

Wife

-and-

Director-General Department of Family Services and

Aboriginal and Islander Affairs

Central Authority

-and-

Attorney-General of the Commonwealth of Australia

Intervener

REASONS FOR JUDGMENT

APPEARANCES:

There being no appearance for the Husband

Mr Hodges of Counsel, instructed by Andersons Solicitors, as Town Agents for Egan Simpson Eyers, appearing for the Wife

Miss Tynan, instructed by Dooley Solicitors, appearing as Counsel for the Separate Representative

Mr Vitali of the Crown Solicitor's Office, appearing for the Central Authority

Mr Logan of Counsel, instructed by the Australian Government Solicitor, appearing for the Attorney-General of the Commonwealth

JUDGMENT: Jordan J.: In this matter the Director-General of the Department of Family Services and Aboriginal and Islander Affairs, acting as the Central Authority for the State of Queensland, seeks orders for the return of three children to their father, D.E., in California in the United States of America. Other consequential and related orders are also sought.

The children in issue are N born on 28th October 1981, K born on the 31st July 1982 and T born on the 11th March 1989. Those children are the product of a marriage between the Father and the Respondent Mother to these proceedings, P.P.

The parties were married in January of 1975 and finally separated in May of 1991. During the period of the marriage the parties resided in a number of countries from time to time including Australia and the United States. The Wife returned to Australia with the children in May of 1991 and by order of the Family Court at Dandenong on the 24th July 1991 the Wife was granted custody of the three children. However, it would appear on the material that the Wife had some health problems which resulted in her seeking the Husband's assistance with the care of the children culminating in the making of orders by consent in the Family Court at Brisbane on the 8th October 1992 discharging the earlier custody order in favour of the Wife. It was further ordered at that time that the Husband be at liberty to take the children of the marriage out of Australia. The notation contained on that order evidenced the intention of each of the parties to have the Husband collect the children from the Wife on the 8th October 1992 to return to America with the children on or about the 15th October 1992.

The Wife travelled to the United States in July of 1993 to exercise access to the children. Difficulties were experienced between the parties at that time and the Husband subsequently filed an application for custody in August of 1993. That application was served upon the Wife upon her return to Australia. The Wife apparently elected not to contest the Husband's application. In any event, on the 1st December 1993, the Superior Court of California made an order awarding the Husband sole physical custody of the three children. Quite specific orders were made providing the Wife with access to the children.

In or about October of 1994, the Wife made a request of the Husband to provide her with access to the children in Australia. The Husband apparently was agreeable to such access upon the precondition that the Wife agreed to seek registration of the custody order of the Supreme Court of California as an Overseas Custody Order. The clear purpose of that exercise was to provide the Husband with additional security for the return of the children. The Wife agreed to that precondition and in fact sought registration of the Overseas Custody Order in the Family Court at Brisbane and on the 13th January 1995 the Order was so registered.

As a consequence, the children subsequently arrived in Australia on the 8th February 1995 with the intention that they be returned to the Husband on the 22nd March 1995.

Prior to the expiration of that period, the Wife evidenced to the Husband an intention not to return the children and she has acted upon that stated intention. On the 8th March 1995, the Husband lodged an application for return of the children with the Central Authority in the United States of America and on the 6th April 1995 an application was filed in this Court. Orders were made on that day by Judicial Registrar Smith appointing a Separate Representative and adjourning the matter to the 30th May 1995. Mr Logan of Counsel appeared on that day and was granted leave to intervene on behalf of the Attorney General of the Commonwealth. Further orders were made listing the matter for hearing as a short cause with some apparent priority. The case proceeded before me on the 2nd August.

I share the concerns expressed on behalf of the Commonwealth Attorney General about the delays occasioned in this matter. Article 2 of the Convention on the Civil Aspects of International Child Abduction casts an onus upon Convention Countries to secure the prompt return of children wrongfully removed. Article 2 of the Convention demands that the Convention Countries shall use the most expeditious procedures available. There is nothing about this case which would justify a delay of five months from the date the Husband first approached a Central Authority to the date of Judgment. It may be that the Court has unwittingly aided and abetted any wrongful detention by failing to determine the matter either on the 6th April or the 30th May. I suspect there may well have been weighty practical reasons preventing a determination on those days but, in the end result the matter has been unnecessarily complicated and the interests of the children and the Husband have been compromised by these delays.

There is no issue in this case that the preconditions to the exercise of the authority vested in this Court under the Family Law (Child Abduction Convention) Regulations have been met on the facts. The children were habitually resident in California in the United States of America prior to travelling to Australia in February of 1995 for an access visit to the Wife. The United States is a Convention Country. The Husband clearly had a right of custody as a consequence of the orders made in the Superior Court of California on the 1st December 1993. It is also clear that the retention of the children by the Wife in Australia is a wrongful retention under Article 3 of the Child Abduction Convention.

<u>Principles Behind the Convention</u>

The purpose of the Conventions is to protect children from the harmful effects of wrongful removal from their habitual residence. Having become a signatory to the Convention, Australia has undertaken to preserve international comity and recognise the authority of the systems of law of other convention countries. The Family Law (Child Abduction Convention) Regulations impose upon the Court a primary obligation to promptly return children wrongfully removed or retained. Matters coming before this Court are not to be treated as competing claims for interim custody. Proceedings under the Regulations are to be heard in a prompt and summary way and it is only in exceptional circumstances that a Court would give consideration to refusing the application of the Central Authority for the return of the children.

Regulation 16 does vest in the Court a discretion to refuse to return children if certain conditions are established. The onus of establishing those preconditions rests upon the party resisting the order for return of the children and that onus must necessarily be a heavy one.

Regulation 16(3) provides as follows:

> **(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that -**
>
> > **(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;**
> >
> > **(b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;**
> >
> > **(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or**
> >
> > **(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.**

The Wife contends that, on the facts of this case, she is able to satisfy the Court that the discretion to refuse to return the children under each one of the aforementioned subparagraphs is enlivened. The Separate Representative argues that the grounds made out in subparagraphs (a) relating to acquiescence and (b) relating to the children's wishes are made out on the facts. Both the Wife and the Separate Representative argue that, having met the threshold requirements which would give rise to such a discretion, I should exercise my discretion to refuse the application for the return of the children. The Central Authority and the Attorney General argue that the facts in this case do not disclose the necessarily exceptional circumstances giving rise to any discretion or, in the alternative, if such discretion is enlivened, it should not be exercised in favour of the Respondent Wife. I should examine each claim individually.

Acquiescence

The evidence relied upon by the Wife primarily appears in a letter written by the Husband to the children on the 7th April 1995. I highlight some of the relevant extracts of that letter:

> **"I have been considering your request to stay there in Australia with Marta and your friends and you will be happy to know that I am agreeable to this. I certainly do not want to make you do something which you are not comfortable with and as you ask me; no I would not force you to come back here if you didn't want to. So I am sure you will be relieved to know this. I think you also understand that your happiness in life and your welfare and protection, is the single most important factor in my life..... So I can see that it is Krsna's plan to let you stay there for the moment; that is why I will agree to it; and because you want it."**

It is clear that in all other respects, the Husband's conduct has been inconsistent with any notion of acquiescence. As soon as he became aware of the Wife's intended refusal to return the children, he located the appropriate Central Authority. He has continued to give instructions to proceed with the application and has provided material in support of the

application both before and after the letter in question. In an affidavit filed on behalf of the Husband on the 27th July 1995 the Husband said as follows:

> **"I have never acquiesced in Mrs P.'s decision to retain the children in Australia. I wrote a letter to the children on 7 April 1995 saying I was agreeable to them remaining in Australia. I wrote that letter only because I was told that on 6 April 1995 that the Family Court in Brisbane had rejected my application and would be giving Mrs P. custody of the children. I believed that the court decision meant that it was Krsna's plan that the children should remain in Australia and because I knew that the children were upset that Mrs P. and I had been fighting in court. I still believe that it is in the children's best interests that they return to California."**

I accept the propositions advanced by Murray J in Police Commissioner of South Australia v. Temple(1993) FLC 92-365 wherein the following observations were made at p 79,828

> **"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."**

In my view the key component to a resolution of this issue in this case is a focus upon the proper level of communication of the acquiescence.

In all correspondence before the children were sent on access and when it became apparent the Wife was not intending to return the children, the Husband had continually insisted upon the Wife giving effect to his rights to custody. Indeed, he had made the Wife's access conditional upon her registration in Australia of his custody order thus reinforcing his rights. He has consistently reasserted his right to have the children returned through all formal and legal channels.

According to the Husband, the letter was written in the context of some apparent misunderstanding about the legal consequences of the Court's failure to return the children when the matter was first before the Court on the 6th April 1995. The Husband's suggestion in that regard is not so fanciful as to enable me to reject it out of hand. The Husband might not therefore have had the requisite knowledge and understanding of his rights at the time he wrote that letter.

In any event, I am not satisfied that a letter written by a parent to his children agreeing to continued absence for the moment, can be construed as acquiescence at law. In my view, essential components of any relevant acquiescence must include, firstly, an acceptance of the course of conduct of the other party and, secondly, such acceptance must be communicated to the other party. The acquiescence must also be unequivocal. Whilst it might be argued at one level that the letter is inconsistent with ongoing opposition to the retention of the children, it is equally apparent that at all other levels, including formal proceedings, the Husband was maintaining his opposition to the Wife's conduct. In this case the letter does not constitute acquiescence to the wrongful detention. The agreement itself is qualified as to duration and it was not contained in communication between the parties.

On this issue, another matter warrants consideration. As a matter of policy, it would be an unsatisfactory state of affairs if, pending a decision of this Court, a parent was to be deprived of the opportunity to perhaps relieve the children of some anxiety by writing to them a letter of reassurance. In all other spheres of litigation binding obligations can only be established or waived by the parties to the cause or their legal representatives or other

authorised agents. Children are not the agents of their parents and this Court is required to be proactive in sparing children from direct involvement in proceedings before the Court. It would be contrary to that philosophy to receive evidence of private and conciliatory communications between children and their parents as evidence of acquiesce at law.

For the above reasons, I am not satisfied that the Husband has in fact acquiesced in the Wife's wrongful retention of the subject children.

Grave Risk of Physical or Psychological Harm

The Wife's evidence upon this point is twofold. At one level, she says that the Husband's treatment of the children exposes them to the prospect of such harm. She contends that the material discloses that the Husband is religiously fanatical, obsessive, anti-social and domineering. The Husband apparently follows a fairly rigid adaptation of the beliefs and lifestyles of the Hari Krsna and the children have been raised in that fashion. Depending upon one's point of view, they are either deprived of or shielded from many of the materialistic and permissive aspects of some of the western cultures which follow lifestyles similar to those enjoyed by Australians. The children reside in Berkeley, California, in a one bedroom unit. Through correspondence written whilst the children have been in the mother's care, the children assert that they are deprived of the opportunity of socialising with other children and enjoying traditional western activities. Further, it is contended that the children may move to India or spend significant portions of their lives in India and, more importantly, that the Husband is contemplating marrying-off his teenage daughters to older men. There is also a suggestion that the Husband may have engaged in some inappropriate touching of his second daughter The evidence on this point is quite vague and, to the best I can gauge these matters, it appears to be related to a tradition of massage which has formed part of the family routine in this household including during the period when the Wife was cohabiting with the Husband. Given the quality of the evidence on this point and the nature of these proceedings, I expressly decline to be drawn into that particular issue.

It is pertinent to observe on these points that the Wife is also of the Hari Krsna faith. She apparently participated in the lifestyle adopted by the Husband and the children during the period of the marriage.

I should record that the Husband denies the Wife's allegations and particularly those related to any sexual impropriety. On the allegation which is potentially of most significance, he denies that it is his intention to have the children married off but rather he is contemplating proceeding with a program of "betrothal" for his daughters in accordance with the beliefs practiced by him and his daughters. I gather this is a form of commitment to marriage at some time in the future. It should be noted that, whilst the Wife now relies upon this as a ground supporting a claim that the return of the children would be to expose them to grave risk, it is clear from correspondence between the parties that the prospect of betrothal had been the subject of written consultation between the parties for some time.

In any event, these matters need to be considered in the context of the proper application of the principles applicable to these cases. In the case of In the Marriage of Gsponer (1988) 94 FLR 164, the Full Court makes reference to the decision of Latey J of the High Court of Justice in the unreported case of Re Corrie (A Minor) at p 175 as follows:

> **"I remind myself that under the Act and Convention the welfare of the child is not the primary consideration or indeed a consideration at all, save to the extent that it may properly influence a decision under Article 13."**

At p. 176 of that judgment reference is made to the unreported decision of Lincoln J in Re Evans in which the following observations were made:

> **"In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child in bringing himself or herself within the provisions of Article 13 and the Court should hesitate very long before it grants what is in effect an exemption from the urgency which is a characteristic of this Convention and the Act incorporating it."**

The Judges of the Full Court were at pains to emphasise that the grave risk referred to in subparagraph (b) was to provide a focus upon the nature of the harm. At p. 177 the Court observed "that is, it is not the grave risk of any physical or psychological harm which would satisfy the first two aspects of this paragraph. The physical or psychological harm in question must be of a substantial or weighty kind."

It is contended by the Commonwealth Attorney General that Regulation 16(3)(b) is likely to have almost no operation in the Family Court. The basis for this submission may again be found in the judgment of the Full Court aforesaid at p. 178 where the following remarks were made:

> **"So understood, regulation 16(3)(b) has a narrow interpretation. It is confined to the "grave risk" of harm to the child arising from his or her return to the country which Australia has entered into this convention with. There is no reason why this Court should not (sic) assume that once the child is returned, the Courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed, the entry by Australia into this convention with other countries may justify the assumption that the Australian Government is satisfied to that effect."**

I must proceed on the basis that there are available in other convention countries such as the United States of America welfare authorities available to provide adequate protection for children.

In my view, the matters raised by the Wife are lifestyle issues. They involve value judgments about different lifestyle choices and different cultural and religious beliefs. These matters may or may not be relevant to a contested application for custody. In my view they cannot be raised as a basis for refusing to apply the objects of the Convention. The Wife has the capacity to argue those matters in a Californian Court.

In any event, the Husband disputes the allegations raised by the Wife. If those matters remain in issue, they must be determined by a Court. It is impossible to determine those matters in this Court at this time. The Husband has an order for custody. The allegations raised against him relate to the circumstances of the Husband and the children in California. Evidence of those matters will be needed from people in California. California is obviously the proper and most appropriate forum to determine those issues of fact. To allow a litigant to rely upon contested matters of fact as a basis for denying the primary jurisdiction, save in exceptional circumstances, would be to undermine the efficacy of the whole Convention.

To the extent that the matters raised by the Wife might form a basis for concern that the children may be at some risk, I am simply unable to find that those risks cannot be adequately met by the welfare authorities of another signatory to the convention.

In all the circumstances I am not satisfied that the Wife has made out the second ground.

The Children's Wishes

There is evidence before me from the Wife and by reference to correspondence from the children that the two older children have a strong wish to remain with their mother. The children were referred to a Denise Britton, a registered psychologist engaged by the Separate Representative, to ascertain their wishes. She was requested by the Separate Representative to report "with specific reference to the psychological impact and/or trauma (if any) which the girls are likely to suffer should they be required to return to live with their father in the US against their wishes".

In my view, the validity of the exercise undertaken by the psychologist and the weight to be placed upon her report might well be affected by such a leading direction. The weight to be placed upon the report is necessarily affected by the fact that Ms Britton did not have access to the father or see the children in the Husband's presence.

In any event, however, Ms Britton reported that the two older children expressed very strong wishes not to be returned to their father. She described those wishes in terms such as "clear", "definite" and "absolutely adamant".

The psychologist concluded as follows:

> **"... (the older children)... have attained an age and degree of maturity at which it is appropriate to take account of their views. It is also my opinion that, based upon accepted Australian norms in relation to basic rights of children, return to the care of their father would probably expose these girls and their younger sister… to unacceptable psychological harm and would almost certainly place them in an intolerable situation."**

It is clear that the reporter's attention was drawn to the provisions of Regulation 16(3) and the reporter has sought to bring this case directly in line with the provisions of subparagraphs (b) and (c) thereof by even adopting the precise words of the subparagrahs and then proceeding to swear the issue before me. In my view she has exceeded her charter in so doing. In the process she has largely invalidated her own conclusions by misconstruing the provisions of subparagraph (d) of Regulation 16(3).

Notwithstanding my reservations, I accept that the children are currently expressing a strong wish to remain in Australia. In considering what weight should be placed upon those expressions, I need to have regard to the age and maturity of the children and on that account I do accept the assessment of the psychologist that they are of a sufficient age and maturity to take account of their views.

On the question of the evaluation of the evidence on wishes, a number of observations need to be made. Firstly, there is no objective evidence that the children were unhappy in the United States of America. Indeed, the evidence from the children's schools in America suggested that the children were delightful, well adjusted young girls who were performing well in all respects. There is no evidence of any communications between the children and their mother, whether written or otherwise, evidencing discontent prior to their arrival in Australia. Through his material the Husband postulates that any change in the children's' attitude may be as a result of a number of factors including the manipulation of the children, reduced discipline and a more privileged lifestyle.

Again, it must be observed that it is impossible to properly evaluate these matters in the current circumstances. In domestic custody cases, this Court often declines to receive so-called one-sided reports. That is the only objective evidence before me at this time. A

Californian Court has the capacity to evaluate these matters and would indeed be much better placed to properly consider the children's wishes if they were returned to their father and the Court had before it a balance to the unsatisfactory state of the evidence at this time.

Further, I accept the submission of the Commonwealth Attorney General that the most relevant time for consideration of this issue is to examine the circumstances at the time of wrongful retention (see Murray v. Director Family Services (ACT) (1993) FLC 92-416 at p 80,253). In my view, there would need to be cogent and telling evidence that the children's objection was so strong as to justify a wrongful retention of the children in March of 1995. The correspondence at that time discloses little evidence of any extreme reaction by the children. The tone of the correspondence appeared to have more to do with the parties disagreeing about aspects of the children's future care. It would be dangerous and unsatisfactory to place significant weight upon the subsequent development of the children's wishes in the background of one parent having made a unilateral decision in defiance of an existing custody order and with the children being under the sole influence of that combatant parent who would necessarily be in a position to engage in active or passive manipulation of the children wrongly retained.

In all the circumstances I am not satisfied that the Wife or the Separate Representative have made out this ground.

A Return of Children Against Fundamental Australian Principles

I need but only touch upon this point. In the course of submissions, Mr Hodges for the Wife suggested that a return of the children to the Husband with the attendant possibility that they may subsequently move to India and/or that the children may be betrothed, brought this case within the provisions of subparagraph (d) of regulation 16(3). I regard that submission as both flawed and inappropriate.

It is flawed because it does not address the orders sought by the Central Authority. The order sought is one returning the children to their father in California. The United States of America is a Convention Country.

It is also flawed because it misconstrues the intent of the provision being considered. What was clearly envisaged by such a provision was some likely violation of fundamental rights and freedoms. As was said in McCall v. McCall (1995) FLC 92-551 at p 81-518, this provision would have very limited application and would only arise on the "rare occasion that the return of the child would utterly shock the conscience of the Court or offend all notions of due process". A return to California, a move to India and the prospect of a betrothal do not fall within that category.

It is offensive in that it suggests that, in placing the children in a situation where they might inhabit India, would be to expose the children to the prospect that their human rights and fundamental freedoms would not be met. It involves value judgments on lifestyles and religious and cultural beliefs. To suggest that I might make such a finding in the absence of any evidence to that effect and on the bald assertion of Counsel from the bar table is, in my view, quite inappropriate.

Incidental Arguments

I should mention two other matters raised by Mr Hodges for the Wife in the course of his submissions.

Firstly, he suggested that, in considering his arguments in favour of an exercise of discretion to refuse the application for return of the children, I should take account of the fact that the Wife's financial circumstances were such that any order for return of the children would be likely to prevent the Wife from contesting claims for custody in California. He said that if I made the order sought by the Central Authority, I would effectively be determining the fate of these children once and for all. I regard that submission as inappropriate and ill conceived. It is ill conceived as it strikes at the very fabric of the object of the Convention. That it would be difficult to conduct a case in the place of habitual residence can hardly be used as a ground to justify wrongful detention. To do so would be to empower the supposedly impoverished to defy the law and then impose upon a person with the right to custody the onus of rectification in the country of the abductor's choosing. It is not a ground prescribed by the Regulations and it is not a matter to be taken into account by this Court.

Related to this, it was suggested that I should take account of the Husband's failure to appear at these proceedings in a number of ways. It was suggested that some adverse inference should be drawn against the Husband because he failed to avail himself of the opportunity to appear or, in the alternative, that I should place some additional weight upon the untested evidence of the children's wishes as they are expressed through correspondence, through the Wife and through the psychologist. I reject that submission on the same grounds. It fails to identify the purpose of the Convention and the fact that the onus rests upon the defaulting party. To draw adverse inferences against parties with a right to custody who fail to appear in the country of wrongful detention would be to defeat the object of the Convention to ensure the prompt return of children to the appropriate forum.

Conclusions

In the circumstances I am not satisfied that the evidence before me satisfies any of the preconditions necessary to give rise to the exercise of a discretion on my part to refuse to return the children. The facts of this case do not disclose exceptional circumstances which justify a departure from the objects and principles of the Convention to which this country has prescribed.

I should record that, in any event, should my discretion have been enlivened, I would not have exercised it in favour of the Respondent Wife. All issues raised by the Wife cannot only be adequately dealt with by an American Court but, indeed, such Court would be in a much better position to hear and determine those issues.

In the circumstances I propose to make the orders sought by the Central Authority returning the children to the Husband in California. I will hear submissions on the appropriate orders to be made at this time.

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