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[31/03/1999; Full Court of the Family Court of Australia at Brisbane; Appellate Court]
Townsend & Director-General, Department of Families, Youth and Community
(1999) 24 Fam LR 495

FAMILY LAW ACT 1975

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

BEFORE: Ellis, ACJ, Kay and Chisholm JJ.

HEARD: 16 February 1999

JUDGMENT: 31 March 1999

Appeal No. NA4 of 1999

File No. BR10024 of 1998

IN THE MATTER OF:

ALANA SUE TOWNSEND

Appellant/Wife

- and -

DIRECTOR-GENERAL, DEPARTMENT OF FAMILIES YOUTH AND COMMUNITY

Respondent

REASONS FOR JUDGMENT OF THE FULL COURT OF THE HONOURABLE ACTING CHIEF JUSTICE ELLIS AND JUSTICE CHISHOLM

APPEARANCES: Mr Page of Senior Counsel, instructed by, Hartley Family Law Services, GPO Box 678, Brisbane QLD 4001 appeared on behalf of the Appellant Wife.

Mr Parrott, Solicitor, instructed by Crown Law, GPO Box 149, Brisbane QLD 4001 appeared on behalf of the Respondent.

JUDGMENT:

INTRODUCTION

1. This is an appeal by the mother against orders made by Warnick J on 21 January 1999 in proceedings under the Family Law (Child Abduction Convention) Regulations. In those proceedings the Central Authority sought the return of the two children concerned to the United States. The children are TDK, born 3 April 1993 and ALK, born 22 June 1994. The application was opposed by the mother, who was the respondent to the proceedings. His Honour granted the application, making orders requiring that the children be forthwith returned to the United States. [FN1] The mother has appealed against these orders.

2. The grounds of appeal are stated in full below. In summary, the grounds are as follows:-

*** That the trial Judge erred in finding that the children were not settled in their new environment (Ground 1).**

*** That the trial Judge erred in law in holding that he had a discretion to order the children's return notwithstanding that they were settled in their new environment (Ground 2).**

*** That the trial Judge erred in exercising his discretion to order the children's return (Ground 3).**

*** That the trial Judge erred in relation to the undertakings required from the father (Ground 4).**

3. **It can be seen that Ground 2 arises for determination only if the appeal succeeds on Ground 1.**

4. **The orders sought by the appellant, as stated in a handwritten note provided to us by counsel during the hearing, are that the appeal be allowed and that the application be dismissed. In the alternative, the appellant seeks orders that the appeal be allowed in part and that certain conditions be imposed on the return of the children to the United States. Since these alternative orders relate to Ground 4, they will be considered in connection with that Ground.**

THE BACKGROUND FACTS

5. **There was no challenge to the trial Judge's general findings of fact, as set out on pages 9-19 of the Appeal Book. For present purposes, the facts may be summarised as follows.**

6. **The father is a United States citizen, and the mother an Australian citizen. The children have dual citizenship. The parties met in Australia in 1992.**

7. **The father's evidence was that the mother agreed to move to the United States to cohabit with him. However they agreed to delay plans to move to the United States because the mother was pregnant. The father continued to operate his business interests in the United States. After TDK's birth on 3 April 1993 the parties arranged for her to become a United States citizen, and there were discussions about relocating to the United States. On 12 September 1993 the mother and TDK travelled to the United States to join the father, who was already there. She again became pregnant. She and the father travelled to Australia on 13 January, so that the pregnancy could be completed here. The child ALK was born in Australia on 22 June 1994.**

8. **Arrangements were again made to relocate the family to the United States, and the father returned there shortly after ALK's birth. The mother travelled to the United States for a brief time and the parties returned to Australia shortly before Christmas 1994. On 2 February 1995 the parties relocated to the United States, accompanied by a nanny.**

9. **The mother's version of events was that until the end of 1994 the parties had no intention to live in the United States. They were living in a settled relationship in Brisbane. However because the father frequently had to travel because of his business interests, the parties agreed to live in the United States for a time so that the father could "get on top" of his business affairs. They intended to return to Australia some time in the future, and intended to raise the children in Australia during their school years.**

10. **The parties lived in rented premises in the United States. They married on 31 December 1995 in the United States. There is conflicting evidence as to the parties intentions during the ensuing period, but they remained in the United States. His Honour found that the parties agreed that during times when there were difficulties and the mother indicated a desire to return to Australia, the father indicated he would not oppose her doing so, but would oppose her taking the children from the United States.**

11. **On 1 May 1997, without notice to the father and under subterfuge, the mother and the children departed from the United States and returned to Australia. The father ascertained that they had gone to the mother's father's residence in Queensland. He made contact with her, and there were**

discussions about the possible relocation of the mother and the children to the United States. The mother and children stayed with the mother's father for a few weeks and then went to stay with friends.

12. **The father arrived in Australia on 22 June 1997. Reconciliation was discussed but not achieved. The father returned to the United States, and remained in frequent contact with the mother and the children.**

13. **The father returned to Australia in September 1997. Arrangements were made relating to the mother's return to live in the United States, but discussions broke down. The father again returned to the United States on 25 September 1997. The mother advised that she needed more time to work through issues before returning to the United States, and pleaded with the father not to take action against her for the children to be returned. The father's evidence is that he agreed to give her the time she needed. In October, the mother and children relocated to a leased unit in Noosaville, Queensland.**

14. **The father returned to Australia in December 1997, and the parties cohabited at the Noosaville premises. In early 1998 they continued to discuss a return of the family to the United States. The father left for the United States on 19 March 1998, and he and the mother continued to communicate by telephone.**

15. **The parties gave different and somewhat conflicting evidence about a range of matters, in particular relating to their intentions for future residence. His Honour canvassed this evidence, which it is not necessary to repeat because it is not relevant to this appeal.**

16. **On 4 June 1998, the mother filed an application for parenting orders and the documents were served on the father on 26 June 1998. He contacted counsel and was informed of the possibility of proceedings under the Hague Convention. On 24 August 1998 he filed a suit in Houston, Texas, seeking interim custody and co-guardianship of the affairs of the children, and on the same date made an application for assistance under the Convention.**

17. **His Honour continued:-**

The father says that, in the event of return of the children, and particularly in the event the mother declines to return to the USA, he will be the children's primary carer, while employing a "nanny". The father has indicated that he will make arrangements to assist the mother with independent living in America and transportation to the USA. He will supply economic support for an interim period.

The mother says that, since the return to Australia in May 1997, the children have become very well established and settled in their routine. She says that she has been the sole carer of the children and has provided constant physical and emotional support.

The children have resided at the same residence since October 1997.

[TDK] attended local kindergarten and is due to go into Grade 1 this year at the school at which she attended pre-school. [ALK] attended kindergarten and is due to commence going to the pre-school at which [TDK] attended.

Both the children have been enrolled in swimming classes during the summer months and ballet now for approximately the last 12 months. The mother says that both children have benefited greatly from the regular interaction with other children of their own age at pre-school and kindergarten and their extracurricular activities, and have formed friendships with other children of their own ages.

The mother says that the children have also benefited from regular contact with significant other adults in their lives, and in particular their maternal grandparents. There are other relatives in South East Queensland with whom the children associate, particularly on special occasions.

The mother says she holds grave concerns about the children being returned to the USA. These concerns essentially revolve around the mother's suggestion or apprehension that she will not be able to return to the USA to be with them. I am not satisfied on the evidence that this is so.

The mother also says that she has grave concerns about the children being in the fulltime care of the applicant. Essentially her reasons are that he has never cared for the children for any extended period of time by himself, and he has business commitments that take him away from the home. The children have been in her constant care and supervision since birth and are strongly attached to her. The children would be removed from their current environment. She also suggests that the father may not have proper accommodation for the children and finally, that he is under investigation by the FBI.

THE TRIAL JUDGMENT

18. **After an introduction and a statement of the background facts (summarised above), the trial judgment deals with the various issues as follows (using his Honour's headings).**

Habitual residence

19. **His Honour found that the children, and the mother and father, were habitually resident in the United States at the date of the removal of the children from the United States by the mother.**

Removal

20. **His Honour found that the United States is a Convention country, and that at the time of the removal the father had rights of custody which he was actually exercising. The removal was in breach of those rights.**

Acquiescence

21. **After referring to the facts and citing authority, his Honour held, in substance, that the father had, at 25 December 1997 and in the months that followed, acquiesced in the children living in Queensland.**

Grave risk

22. **His Honour was not satisfied that there was a grave risk that returning the children to the United States would expose them to physical or psychological harm or otherwise place them in an intolerable situation.**

Settled in environment

23. **His Honour then addressed the question whether the children were settled in their new environment as follows:-**

Children Settled in New Environment

The application of the Central Authority was filed on 22 September 1998, that is, well after one year from the date upon which the children were removed from the USA. The provisions of Regulation 16(1)(b) therefore become operative. That sub-regulation provides, subject to sub-regulations (2) and (3):

"On application under Regulation 14, a Court must make an order for the return of a child:

....

(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."

The onus of establishing that the children are settled in their new environment falls upon the mother.

In my view, the relevant time for consideration of the question is the date of hearing.

The children have lived in the same premises for over a year.

Though the mother has deposed to the children's attendance at kindergarten and pre-school, and the formation of friendships with other children, she has also been at pains to depose that she has been very much the provider of the care, supervision and attention in the children's lives. Moreover, the children's "new" environment, for a number of months, included the cohabitation of their parents, and then that changed. While the children could be regarded as secure and adjusted to their surrounding circumstances, there must be some question over the emotional constituent necessary before the children can be regarded as settled. I am not satisfied that the children ought be regarded as settled in their new environment.

24. **Having found that the children had not settled in their new environment in Australia, his Honour then considered whether in the exercise of his discretion, he should nevertheless refrain from ordering their return. He held, correctly, that he had a discretion in the matter because of his finding that the husband had acquiesced in the retention of the children in Australia (a finding which is not challenged in this appeal). He concluded that the children should be returned to the United States. We set out the relevant passage below, under Ground 3.**

25. **Finally, His Honour considered and determined the question of conditions to be imposed on the return of the children. This question was determined in separate judgment, delivered on 21 January. We will discuss this aspect of the judgment, and set out the precise orders made by his Honour, in connection with Ground 4, since that Ground requires consideration of the terms on which the children are to be returned.**

GROUND ONE: WHETHER CHILDREN SETTLED IN NEW ENVIRONMENT

26. **Ground 1 is as follows:-**

1. That in the finding that the children ought not be regarded as settled in their new environment the Trial Judge erred in that he:

(a) Failed to have any or any proper regard to the evidence that was before him relating to the situation in Australia;

(b) failed to have any or any proper regard to the ages of the children in considering any onus upon the respondent to show that the children were settled emotionally; and

(c) failed to apply the ordinary natural meaning to the word "settled".

27. **Consideration of this Ground requires a determination of what is meant by the words "settled in his or her new environment" in reg 16(1)(b).**

28. **It is accepted by the appellant that she bore the burden of proof of this aspect. It is submitted by the appellant that his Honour accepted the view expressed in *Graziano* as to what these words required. However it is further submitted that the test is defective in that it imposes an unwarranted "gloss" on the ordinary meaning of the words, and in that respect should not be following in the light of the High Court's judgment in *De L; The Director-General NSW Department of Community Services*. [FN2] It is said that his Honour applied the "gloss" in finding that "there must be some question over the emotional constituent necessary". The argument goes on to say that his Honour should have had regard to the ages of the children (4 and 5), and that his Honour did not take into account any of the evidence of witnesses other than the mother in considering whether the children were settled. It concludes that nothing in the husband's affidavit "derogates from a determination derived from the ordinary meaning of the word `settled' that the children are established in their new environment." We understand this to mean that it was not open on the evidence for his Honour to find that the children were not so settled.**

"Settled in his or her new environment": the test in Graziano and Daniels

29. **In *Graziano and Daniels* [FN3] the Full Court of this court (Baker, Nygh and Gunn JJ.) considered the requirement that the child be settled in his or her new environment. The Full Court held:-**

"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."

30. **However in *Director-General, Department of Community Services v. M and C and the Child Representative* [FN4] the Full Court (Nicholson CJ, Holden and Dessau JJ) cast doubt on the correctness of the test in *Graziano v. Daniels*, saying:-**

"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.

31. **In the present appeal, both parties accepted that the word "settled" should be given its ordinary meaning. The issue was whether in the quoted passage the Full Court in *Graziano* did indeed put an impermissible gloss on the phrase, and whether his Honour, in following it, fell into error.**

32. **In *M and C* the trial Judge had found that the children were settled in their new environment, and the Full Court had no difficulty upholding this finding in the light of the evidence. For this reason, it was not necessary for the Full Court to consider the extent to which the quoted passage in *Graziano* departed from the correct test, namely that the children are settled in their new environment. It is necessary to consider this issue in the present case, however, since the appellant argues, in substance, that in following *Graziano* the trial Judge applied too rigorous a test, and that an application of the correct test would have led to the conclusion that the children were settled in their new environment.**

33. **In our view, while the above-quoted passage from *Graziano* draws attention to some relevant matters, it has the potential to mislead, in two respects. Firstly, the notion that the abductor "must establish the degree of settlement which is more than mere adjustment to surroundings" suggests that there are *degrees* of settlement, only some of which satisfy the legislative requirement. It thereby suggests a more exacting test than the regulation actually requires. It may also be taken to imply that matters which would demonstrate adjustment to the environment are somehow irrelevant or to be discounted. The suggested contrast with "mere adjustment to surroundings" thus tends in our view to complicate the issue and distract the court from the task of determining whether the child is settled in his or her new environment.**

34. **Secondly, it could be misleading to say that "settled" has two constituent elements, one physical and one emotional. While the various matters mentioned in the quoted passages are undoubtedly relevant, the analysis of the term into those two distinct components is unhelpful in our view. There are numerous ways in which the various relevant matters could be categorised. One might, for**

example, include "educational" as a separate category. The two-component categorisation adopted in *Graziano* might lead trial judges to approach the task in a way different from that required by the words of the Act. It could, especially in finely-balanced cases, affect the weight to be attached to various matters.

35. **In our view, therefore, insofar as *Graziano* suggests that the test for whether a child is "settled in his or her new environment" requires a degree of settlement which is more than mere adjustment to surroundings, or that the word "settled" has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law. We agree with the Full Court in *M and C* (the correctness of which was not challenged before us) that "The test, and the only test to be applied, is whether the children have settled in their new environment". [FN5]**

The trial Judge's determination

36. **The passage of the judgment in which his Honour deals with the evidence on this question is as follows:-**

"The children have lived in the same premises for over a year.

Though the mother has deposed to the children's attendance at kindergarten and pre-school, and the formation of friendships with other children, she also been at pains to depose that she has been very much the provider of the care, supervision and attention in the children's lives moreover, the children's "new" environment, for a number of months, included the cohabitation of their parents and then that changed. While the children could be regarded as secure and adjusted to their circumstances, their must be some question over the emotional constituent necessary before the children can be regarded as settled. I am not satisfied that the children ought to be regarded as settled in their new environment."

37. **It is apparent that his Honour followed the formulation in *Graziano* in determining whether the children were settled in their new environment. While we do not suggest that any of the matters referred to in these succinct paragraphs are irrelevant, having regard to our conclusion that the test as formulated in *Graziano* does not represent the law, it follows that his Honour applied a wrong principle, and thus fell into error in the appellate sense. Accordingly, it is appropriate for us in the circumstances of this case to consider the evidence for ourselves. [FN6] In fairness to his Honour, we would point out that the judgment in *M and C* was delivered only three weeks before his Honour's judgment.**

Whether the children were settled in their new environment

38. **The significant evidence relating to the question whether the children are settled in their new environment may be summarised as follows.**

39. **The mother's affidavit evidence states that the children and the mother are Australian citizens and the children have lived for the majority of their lives in Australia. She has always been the primary carer and because of the father's long absences from the home due to work commitments she has "been almost solely involved in their day to day care, nurturing and up bringing". Due to their young age the children "have a very close bonding and attachment to her" and have never been away from her for any substantial period of time. In paragraph 81, the mother's evidence is**

81. Since returning to Australia in May 1997 the children have become very well established and settled in their routine. Particulars of which are as follows:

(a) I have been the sole carer of the children and have provided constant physical and emotional support for the children since their return to Australia on 3 May 1997;

(b) I am responsible for ensuring and attending to the children's daily routine and tasks, including clothing, feeding, supervising, transporting them to and from kindergarten, preschool and all their extra-curricular activities;

(c) I am solely responsible for entertaining, stimulating and nurturing the girls in their development;

(d) The children have resided at the same residence (with me) at Noosaville since October 1997. They both have their own bedroom. It is a unit that has all modern amenities and is a familiar and comforting environment for the children;

(e) The child [TDK] attended the local kindergarten "Jellybabies" in 1997 and attended the "Sunshine Beach" preschool in 1998. [TDK] is due to graduate to grade 1 at the end of January 1999 at the "Sunshine Beach" School, which is where she attended preschool;

(f) [ALK] attended the "Jellybabies" kindergarten in 1998 and is due to commence attending preschool in 1999 at the "Sunshine Beach" preschool;

(g) Both the children have been enrolled in swimming classes during the summer months and ballet now for approximately the last 12 months;

(h) Both the children have benefited greatly from their regular interaction with other children of their own age at preschool and kindergarten and their extra-curricular activities. They have formed friendships with other children of their own ages;

(i) I have also formed close friendships with some of the mother's of these children and the children on regular occasions have enjoyed attending their friends' home, birthday parties, going to the beach with them or just enjoying general outings together. On occasions the children have also slept over at their friends' homes and their friends have slept over at our home;

(j) I have observed that the children have benefited from this constant interaction with friends of their own ages and have enjoyed participating in ballet and swimming classes;

(k) They are both bright, intelligent and well-adjusted young girls;

(l) The children have also benefited (since their return to Australia) from regular contact with significant other adults in their lives and in particular their maternal grandmother and grandfather. The children have a very close relationship with my mother and father and I refer to their affidavits filed herein;

(m) My mother and father are involved regularly in the children's lives and visit regularly and also write and telephone regularly. Even whilst the children were in the US, my mother and father made the effort to travel over and visit myself and the children, and

(n) The children have also other significant relatives in South-East Queensland, including their aunts, uncles, cousins, etc. All these relatives live within approximately one hour's drive of our residence. Our family is closely bonded and the children enjoy celebrating special occasions in the family including birthdays, weddings, Christmases and regular family gatherings and outings.

40. **The mother's affidavit goes on to say that if the children are allowed to remain in Australia TDK will commence grade 1 at Sunshine Beach School and ALK will commence pre-school next year. TDK will be commencing school with many of her friends from pre-school and is "looking forward to this immensely". ALK will also be progressing from kindergarten to pre-school with many of her friends and is also looking forward to this. The mother intends to remain at the unit at Noosaville and will continue to be available full time for the children during their formative school years.**

41. **Mr AT is the maternal grandfather. He paid for airfares for the mother and children to return to Australia and was later reimbursed. The mother and children initially lived at his house for some weeks until she was able to secure the accommodation at a friend's place at Bundaberg. Since the children have returned to Australia he has "maintained close contact and involvement with them and the mother". He says he enjoys a close relationship with the children and they refer to him as "Pa". He sees the children on numerous occasions averaging twice a week and has provided financial assistance. He says the children are very closely attached to their mother and a very well cared for.**

He says that from his observations "both children are well settled and contented in their current environment with their mother, their relationships with their many friends and other relatives".

42. **Ms K. C. is a friend of the mother. She has three children aged 10, 5, and 2. She met the mother and children in June 1997 when they began attending a long day centre with Ms K. C.'s daughter T. She says that "the girls quickly became inseparable and enjoyed their time together". T went to the mother's home "on many occasions" to play with the children and "always came home with stories of the cooking they did, playing on the beach and at the park". Before the mother and children left in September 1997 "a very close relationship had developed between T and both TDK and ALK" and it had been maintained by letters, cards and regular phone calls. During 1998 there had been many visits by the children and the mother to Ms K. C.'s home, and visits to the movies, the beach, parks or to visit other friends. There were plans for T to spend two weeks over the Christmas holidays with TDK and ALK. Ms K. C. says the two children are well cared for, happy and contented, and have a close friendship with T.**

43. **C. S., a friend of the mother, provides similar evidence, saying that the children have developed a close relationship with her daughter O. They spend a lot of time together out of school hours as friends, often go to family picnics together and to the beach together and the girls often sleep over. She says she has "observed that they are settled and content and are in a very stable environment with a loving mother". She says she has observed that the children have a number of friends at pre-school and kindergarten and are very popular girls, and enjoy going to pre-school and ballet together. She says she is aware from attending functions and gatherings that the mother and children have the "the support and contact of many family members and other friends".**

44. **This represents the essential evidence presented by the mother on the question whether the children are settled in their new environment.**

45. **The Central Authority, however, relied on evidence contained in the affidavit of the father set out at pages 333 following of the Appeal Book. In that affidavit the father states:-**

Matters respecting daughters [TDK] and [ALK]

16. On January 7, 1999 I had a long telephone conversation with my daughters. My oldest daughter [TDK] explained "I cried for you in my sleep last night Daddy" and both girls expressed how they missed me, and what they would like to do when we are together again. [TDK] often expresses frights she has in her sleep from being apart from me.

17. On January 11, 1999 I spoke with my daughters, and [TDK] asked "why did mommy leave America?" and expressed how she missed places in the United States, things we would do together, and one of her nannies whom she was very fond of."

46. **In our view, in the present case the evidence in tending to show that the children were settled in their new environment was not conclusive, for the reasons pointed out by his Honour. [FN7] It is true that the material in paragraphs 16 and 17 of the husband's affidavit, taken on its own, is not necessarily inconsistent with the children having settled in their new environment. Nevertheless, while of course it is not decisive, it supports the view that the children are not so settled. Considering the whole of the evidence, while we have not found it an easy question, in the end we have come to the same conclusion as his Honour, that the appellant has not discharged the onus upon her of showing that the children have settled in their new environment.**

GROUND TWO

47. **Ground 2 is as follows:-**

2. That given that the Trial Judge erred in finding that the children ought not be regarded as settled in a new environment, the Trial Judge erred in find that in any event there remained a discretion in him to order the return of the children.

48. **Counsel for the mother agreed that Ground 2 might be more accurately expressed as stating that the trial Judge erred in holding that if the children were settled in their new environment, it was open to him to consider in his discretion whether nevertheless they should be returned to the United States.**

49. **It follows from out conclusions on Ground 1 that it is unnecessary to consider this question, and we would prefer to express no view on it. [FN8]**

GROUND THREE

50. **Ground 3 is as follows:-**

3. That in exercising his discretion to return the children to the United States of America, the Trial Judge erred in that:

(a) He failed to have any or any proper regard to the evidence that the children were settled in their new environment;

(b) he failed to have any or any proper regard to the fact that the husband had clearly and unequivocally failed to insist on the summary return of the children;

(c) he failed to have any or any proper regard to the fact that over one year had elapsed after the wrongful removal of the children prior to any application pursuant to the Regulations;

(d) he had regard to matters that bore upon the welfare and interests of the children contrary to the intent of the Hague Convention and in the absence of any evidence relating to the children's welfare and interests;

(e) he had regard to the evidence of the husband without any apparent regard to the evidence of the wife relating to the circumstances of the cohabitation of the parties in America and the circumstances of the removal of the children and their residence in Australia;

(f) he failed to have any or any prior regard to the provisions of Regulation 16(4) of the Family Law (Child Abduction Convention) Regulations;

(g) he failed to give adequate reasons for the exercise of his discretion.

51. **Ground 3 involves the submission that his Honour erred in the exercise of his discretion whether to order the children's return, this discretion arising as a result of his unchallenged finding that the father had acquiesced in the children's retention in Australia. The principles which govern the power of an appellate court to review an exercise of judicial discretion by a trial Judge are well known, and need not be repeated in the context of this case. It will suffice to refer to the well known statement of those principles by Dixon, Evatt and McTiernan JJ in *House v. The King*, [FN9] and to the statement of Stephen J in *Gronow v. Gronow*, [FN10] with particular reference to the question of alleged error in the weight to be given to relevant matters.**

52. **His Honour's consideration of this issue in the judgment is as follows:-**

The Discretion to Return

Notwithstanding that I have found that the father acquiesced in the retention of the children in Australia, sub-regulation (5) makes it clear that the Court is not precluded from making an order for the return of the children only because a matter mentioned in sub-regulation (3) of Regulation 16 is established.

In considering the exercise of this discretion, all pertinent matters must be addressed and balanced. These include the history of residence in the USA prior to the removal; the removal itself; the policy of the Convention; and the events since the children were brought to Australia. They include matters that bear upon the welfare and interests of the children.

Essentially, I am of the view that it is not shown that, in any substantial way, it would be contrary to the interests and welfare of the children to be returned to the USA so that, in that country, the question of with which parent they primarily reside can be determined.

In those circumstances, the policy of the Convention emerges as of particular comparative significance, and in my view the children should be returned.

53. **In relation to this Ground it is sufficient to say that in our view there is no basis for holding that his Honour's exercise of discretion miscarried. As to the sufficiency of his reasons, his Honour chose to write a short and succinct judgment, alluding to the evidence but not setting it out in detail. In our view the reasons enable the reader to discern his Honour's chain of reasoning, and while it would have been open to him to discuss the evidence in more detail, there is much to be said for succinct judgments, and we see no error in the way he has chosen to express his reasons.**

GROUND 4

54. **Ground 4 relates to the formulation of the terms on which the children are to be returned to the United States, should the other grounds of appeal fail. Since we have concluded that the appeal otherwise fails, it is necessary to consider this Ground.**

55. **The orders made by his Honour are as follows:-**

PROVIDED the FATHER files an Undertaking in Form 41A in this Court and, in respect of Undertakings in paragraphs (c), (d), (e) and (f) carries them into effect:

(a) that he agrees and will agree to a Stay of the Orders, if any, of the courts in the United States of America, relating to the custody of the children and he will not remove, nor support the removal, of the children from the care and control of the MOTHER until the issue of custody is heard and determined by those Courts;

(b) that he agrees to co-operate with the MOTHER to ensure that the Courts of the United States of America determine the issue of custody of the children without delay;

(c) that he will take all necessary steps to support the MOTHER's applications to Immigration authorities in the United States of America for her and the children to return to and remain in that country as long as necessary to enable the issue of custody of the children to be heard and determined by the Courts of that country.

(d) that he will pay to the Australian Central Authority sufficient moneys to pay for airline tickets from Australia to the United States of America for the MOTHER and the children.

(e) that he will pay to the Australian Central Authority for the payment to the MOTHER the sum of $US5,000 to cover the initial cost of temporary accommodation for the MOTHER and the children.

(f) that he will pay to the Australian Central Authority for payment to the MOTHER the sum of $US5,000 to cover the initial cost of living expenses for 14 days for the MOTHER and the children.

IT IS ORDERED:

(1) That the children, [ALT], born 22 June 1994 at Brisbane, Australia and [TDT], born 3 April 1993 at Brisbane, Australia be forthwith returned to the country of the United States of America.

(2) That pending the return of the said children to the United States of America the FATHER and the MOTHER be restrained and continue to be restrained and are hereby injuncted from removing the said children from the Commonwealth of Australia and all agents of the Australian Federal Police give effect to this order.

(3) That pending the return of the said children to the United States of America the FATHER and the MOTHER be restrained and are hereby injuncted from removing the said children from their current place of residence, namely [address specified but not reproduced here] in the State of Queensland.

(4) That subject to Order (5) below, the Commissioner of the Australia Federal Police and all agents of the Australian Federal Police retain the names of the FATHER and the MOTHER, [names specified, not reproduced here] respectively, and the children [ALK] born 22 June 1994 and [TDK], born 3 April 1993, on the PASS Alert System at all international departure points in Australia.

(5) That the said children be removed from the PASS Alert System by the Australian Federal Police upon receipt of a letter from an officer of the Department of Families, Youth and Community Care advising of the travel arrangements made for the said children to return to the United States of America.

56. **Ground 4 is as follows:-**

4. That in ordering the provision by the husband of undertakings in Form 41A the Trial Judge erred in that he:

(a) Failed to have any or any proper regard to the consent given by the Central Authority to the imposition of conditions;

(b) failed to have any or any proper regard to the inability of the respondent to enforce such undertakings;

(c) failed to give any or any adequate reasons for declining to make conditions entirely in the terms sought and acceded to by the Central Authority;

(d) failed to have any or any proper regard to the evidence that was before him as to the usual administrative arrangements seen as necessary and appropriate to secure the safe return of the children;

(e) failed to have any or any proper regard to the fact that conditions usually imposed were affirmed by the husband in his own evidence before the Court.

57. **The orders sought by the appellant if this grounds succeeds are as follows: [FN11]**

3. That the appeal be allowed in part

4. That as a condition of the return of the children to the United States that (sic) it be ordered

(a) That the husband will do all such things to stay the orders (if any) of the court of the country of habitual residence relating to the custody of the children and he will not remove the children from the care and control of the mother until the issue of custody is heard and determined by those courts.

(b) that the husband will co-operate with the mother to ensure that the courts of U.S. (sic) finally determines the issue of custody of the children without delay.

(c) that the husband will not seek nor support the institution or continuation of any criminal proceedings against the mother arising from the removal of the children from the U.S.

THEREAFTER IN TERMS OF PARAS 5, 6 to 11 on pages 273 and 274 inserting in para 8 $5,000 US in para 9 $5,000 US and in paragraph 10 $20,000 US.

58. **It is evident in his Honour's orders that the opening words of the proviso distinguish between those things that the father can do prior to the departure and those that must be done after the children arrive in the United States. The father is required to undertake to do certain things in the United States, to ensure so far as possible that the courts of that country determine the question of custody of the children. And he is required to file an undertaking to carry out, and actually to carry out, the matters referred to in paragraphs (c)-(f), which have to do with the financial and other arrangements for the children's departure.**

59. **As to paragraphs (a) and (b) of his Honour's orders, the appellant says his Honour was in error in requiring the husband to make an undertaking, as distinct from imposing conditions. The appellant's argument was that the undertakings required by his Honour did not come with regulation 15(1) in that they were not "appropriate to give effect to the Convention". It is said that his Honour's reasons for declining to accept the conditions found appropriate by the Central Authority and affirmed by the husband were not consistent with the provisions of reg 15(1). It is said that his Honour did not advert to the fact that the conditions considered usual by the Central Authority had been brought to the husband's attention and he had given no evidence of his inability to meet any or all of them. Mr Page had submitted at the hearing, and before us, that his Honour should not have required undertakings but should have imposed conditions. However we are not persuaded that his Honour made any error in adopting the approach that he took.**

60. **Paragraph (c) of the orders sought by the appellant, to the effect that the husband would not support criminal proceedings against the mother, seeks an order that his Honour decided not to make. This is a matter of discretion and no significant argument was advanced as to why his Honour was in error in this respect.**

61. **In relation to the other orders sought by the appellant, we would observe that the document referred to is an extract from a document produced by the Attorney-General's Department which lists "some of the conditions which have been imposed by the Family Court and overseas courts in previous Hague Convention cases". The husband's affidavit had indicated a willingness to adhere to these conditions. However in our view it was a matter for his Honour to consider which conditions if any he thought it proper to impose, or what undertakings to require, and we are not persuaded that he fell into error. In particular, in the absence of evidence as to United States law and practice on the matter, we see no reason to assume that the undertakings required by his Honour would be less effective in carrying out the intent of the Convention than orders expressed as conditions. It is true that his Honour did not give detailed reasons for the precise orders, but in our view in all the circumstances, including the nature of the orders, he was not required to provide more reasons than he gave.**

62. **Although we have concluded that his Honour applied the wrong test in relation to the question whether the children were settled in their new environment (because he followed *Graziano*), we did not uphold this ground because on a reconsideration of the evidence we reached the same conclusion.**

ORDER

1. That the appeal be dismissed.

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No NA4 of 1999

AT BRISBANE File No BR10024 of 1998

BETWEEN:

ALANA SUE TOWNSEND

Appellant Wife

- and -

DIRECTOR-GENERAL, DEPARTMENT OF FAMILIES,

YOUTH AND COMMUNITY CARE

Respondent

REASONS FOR JUDGMENT OF THE FULL COURT OF THE HONOURABLE JUSTICE KAY

CORAM: ELLIS ACJ, KAY and CHISHOLM JJ

DATE OF HEARING: 16 February 1999

DATE OF JUDGMENT: 31 March 1999

APPEARANCES: Mr Page of Senior Counsel, instructed by Hartley Family Law Services, GPO Box 678, Brisbane QLD 4001 appeared on behalf of the Appellant Wife

Mr Parrott, Solicitor, instructed by Crown Law, GPO Box 149, Brisbane QLD 4001 appeared on behalf of the Respondent.

1. Whilst I agree generally with the judgment of Ellis ACJ and Chisholm J, and the orders proposed by them, I wish to add certain observations.

2. In order to give the term "...is settled in his or her new environment" a normal or usual meaning, reference must be had to the proper meaning of the words that constitute the phrase in the context in which they appear.

3. Ascertaining the usual meaning of the words "is settled in" is not an easy task. The New Shorter Oxford English Dictionary (1993) devotes three full columns to 35 different definition of "settle". The most apt meanings for present purposes seem to be:

*** To take up residence in (a country, place, house, etc);**

*** to establish in a way of life;**

*** to make stable; place on a permanent basis;**

*** to take up residence in a new country or place;**

*** to come to rest in a particular place;**

*** settle in, to move into a new home and adapt oneself to new surroundings.**

4. The Macquarie Dictionary proffers 29 meanings of which the following seem to be applicable:

*** Put in a seat or place of rest;**

*** place (a person) in an attitude of repose, so as to be undisturbed for a time; make comfortable;**

*** in *pass. & refl.* Have taken up one's abode; be installed in a residence, have completed one's arrangements for residing;**

*** fix or establish permanently (one's abode, residence, etc.);**

*** stop moving about and adopt a fixed abode; establish a permanent residence, make one's permanent home, become domiciled. Also foll. By *down*.;**

*** foll. By *in*: a Dispose oneself comfortably for remaining indoors. b. Become established in a new home; become accustomed to a new home or to new surroundings."**

5. Because the search for the ordinary meaning of the words is a search for that meaning in the context of these particular Regulations, which have, as their genesis, the provisions of Article 12 of the Convention on the Civil Aspects of International Child Abduction (conveniently referred to as "the Hague Convention"), (see Regulation 2(1B)), and because the Convention is a bi-lingual convention, it is appropriate to see whether the French text assists in the interpretation of the English phrase. See Hanbury-Brown (1995) 20 Fam LR 334 at 357, De L v Director-General, New

South Wales Department of Community Services and anor (1996) FLC 92-706 at 83,470; 20 Fam LR 390 at 424 per Kirby J.

6. The French language text uses the words "...s'est intégré dans son nouveau milieu" where the English text speaks of "...is now settled in its new environment". These words translate to "is integrated in his new environment" (Collins Robert French Dictionary (1991)). The Macquarie Dictionary in turn defines "integrated" as becoming amalgamated (as a racial or religious minority) with the rest of the community. The French text would thus appear to throw little light on the problem as to what the words mean in their English presentation.

7. The New Shorter Oxford English Dictionary (supra) relevantly defines "environment" to mean:

"The set of circumstances or conditions, esp. physical conditions, in which a person or community lives, works, develops, etc., or a thing exists or operates".

More helpfully perhaps, the *Macquarie Dictionary* defines "environment" as "the aggregate of surrounding things, conditions, or influences".

8. Apart from the short passages from the husband as to the child TDK's distress in recent telephone calls, the evidence overwhelmingly supported a conclusion that the children were "settled" in Australia, whichever possible definition is applied. The husband's evidence does no more than indicate that the children, and especially TDK, were unhappy being apart from their father. But is their "new environment" simply the geographic locality or does it entail other considerations such as the household in which they live? Is the children's environment defined by where they live rather than with whom they live? Clearly such considerations would change in emphasis depending upon the age of the child. The essential environment for a babe in arms would most likely be the immediacy of its principal caregiver no matter where that care is provided. The environment for a teenager may well be dependent on other relationships and more material factors including education, housing and the like.

9. Whilst it might be said that in many respects the evidence disclosed that these children were settled in Australia, it could not be said that the evidence would positively satisfy the Court that the children were settled in a household from which their father was absent. When taken as a whole, the facts necessary to establish the exception "settled in his or her new environment" were not made out.

[FN]

[1]The orders are set out at Appeal Book 5-7.

[2]*De L; The Director-General NSW Department of Community Services* (1996) 20 Fam LR 390; (1996) FLC 92-706.

[3]*Graziano and Daniels* (1991) FLC 92-212.

[4]*Director-General, Department of Community Services v. M and C and the Child Representative* (1998) 24 Fam LR 178; (1998) FLC 92-829.

[5]*Director-General, Department of Community Services v. M and C and the Child Representative* (1998) 24 Fam LR 178; (1998) FLC 92-829, at paragraph 91 (after rejecting, in paragraphs 88-90, suggestions that the phrase requires a "long term settled position" or a position that "imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent."

[6]*Warren v Coombes* (1979) 142 CLR, at p 552.

[7]We have been assisted by the helpful summary of the evidence in the respondents' written submissions, pages 8 - 10.

[8]See the obiter dicta of Kay J in *State Central Authority v Ayob* (1997) FLC 92-746; compare *Director-General, Department of Community Services v Apostolakis (1996) FLC 92-718* (Moss J) and the remark of the Full Court in *MC* ("we are not necessarily persuaded that Kay J's view is correct"). English authority supports the view that there is a discretion: *Re N (Minors)(Abduction)* (1991) 1 FLR 413, 417; *Re S (a minor)(Abduction)* (1991) 2 FLR 1, 25 (UK).

[9]*House v. The King* (1936) 55 CLR 499 at 504-5.

[10]*Gronow v. Gronow* (1979) [11]As set out in the minute of order handed to us during the hearing.

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