---

http://www.incadat.com/ ref.: HC/E/NZ 303
[16/02/1993; District Court at Wellington; First Instance]
W. v. W. [1993] NZFLR 277

IN THE DISTRICT COURT

HELD AT WELLINGTON FP 743/92

BETWEEN R.W.

Applicant

AND M.W.

Respondent

Date of Hearing: 15 & 16 February 1993

Date of Decision: 16 February 1993

Counsel:

Mr Howman for Applicant

Ms Gray for Respondent

Ms Mathers for Children

ORAL DECISION OF JUDGE D J CARRUTHERS

This application comes before the Court under S.12 of the Guardianship Amendment Act 1991. This Act was passed as an amendment to the New Zealand Guardianship Act 1 968 in order to implement the Hague Convention on the Civil Aspects of International Child Abduction. Section 12(1) provides:

(1) Where any person claims: (a) that a child is present in New Zealand and (b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child and (c) That at the time of that removal those rights of custody were actually being exercised by that person or would have been so exercised but for removal and (d) That the child was habitually resident in that Contracting State immediately before the removal; that person or any person acting on that person's behalf may apply to a Court ... for an order for the return of the child."

The section requires the Court if it is satisfied that the grounds are made out to make an order that the child is returned forthwith to a person or country specified in the order. There are other relevant provisions to which I shall refer shortly.

In this case, it is agreed that the United States of America is a Contracting State within the terms of S. 12. The Convention came into force between the United States and New Zealand on 1 October 1991. The child involved is F.W., born on 16 May 1986, whom I will call F. His parents are American citizens. Until January 1992 F. and his parents lived together in Galveston, Texas.

The brief background to this application is that in January 1992 the parties separated and cross-applied to the Galveston County District Court for divorce and custody. I will have more to say about these proceedings later. On 7 February 1992 Mrs W. was appointed temporary managing conservator of F. and Doctor W. was appointed temporary possessory conservator. Those positions are respectively akin to interim custody as it is understood in New Zealand and interim access orders. Both parties were enjoined from removing the child from the jurisdiction of the Court.

On 1 March 1992 Mrs W. left the United States for New Zealand. There is dispute about whether Doctor W. knew of her intention to do so. On 16 March 1992 Doctor W. was awarded temporary managing conservatorship or interim custody by the Galveston County District Court and Mrs W. was ordered to return F. to the jurisdiction of that Court. These orders were appealed by Mrs W.'s attorney and that appeal was dismissed on 9 April 1992.

There are a number of matters in dispute between the parties in respect of this application, and the first of them relates to the application of the New Zealand Guardianship Amendment Act to this situation. In order to establish that the Amendment Act does apply, the application has to prove the four things set out in S.12(1).

First, there has to be proof that the child is present in New Zealand. I do not understand anyone to deny that that is the case.

Next there has to be proof that the child was removed in breach of the applicant's rights of custody in respect of the child. "Rights of custody" under the Guardianship Amendment Act are defined in S.4 in the following terms:

(1) For the purposes of this part of this Act a person has rights of custody in respect of a child if, under the law of the Contracting State in which the child was immediately before his or her removal habitually resident, that person has either alone or jointly with any other person or persons

(a) the right to the possession and care of the child and

(b) to the extent permitted by the right referred to in paragraph a of this subsection, the right to determine where the child is to live."

The first dispute then is whether or not in this case the applicant had such rights of custody.

The temporary orders made by the County District Court, which I have referred to, set out the respective powers of the temporary managing conservator, and the temporary possessory conservator. Those powers are included in the Court documents. The temporary possessory conservator is to have, according to that document, the following rights, privileges, duties and powers:

(a) The duty of care, control, protection and reasonable discipline of the child during periods of possession.

(b) The duty to provide the child with clothing food and shelter during periods of possession.

(c) The power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child during periods of possession.

(d) The right of access to medical, dental and education records of the child to the same extent as managing conservator.

(e) The right to consult with any treating, physician or dentist of the child.

(f) The right to consult with school officials concerning the child's welfare and education status, including school activities.

A further part of the order sets out the days and times when the temporary possessory conservator was to have possession of the child and in this case that involved alternate weekends and some part of Wednesdays.

In its terms, therefore, it can be seen that during the time where the temporary possessory conservator had rights in respect of the child, they were rights expressly to the possession and care of F. I have no doubt, therefore, that that part of the definition is complied with by the temporary possessory, conservatorship order. The next limb of the definition is the right to determine where the child is to live to the extent permitted by the right to possession and care. There is nothing in the orders which were made which prevents the "access" parent, for want of a better word, being able to take the child to such place as he thinks fit and indeed there is a duty to provide the child with shelter during periods of possession. It is implicit I think in the order that during the times of temporary possession for the purposes of what New Zealand Courts would describe as access, or the American Courts describe as visitation, there is a right to determine where the child is to live. It is limited, of course, to an extent by the fact that the right exercised is an access or visitation one. I conclude, therefore, that both limbs of the definition in S.4 are satisfied and that there is, therefore, in this case a right of custody within the purpose of the definition and under the Law of the Contracting State.

I have mentioned that the temporary orders which I referred to also enjoined the parties inter alia from removing the child beyond the jurisdiction of the Court. In C v C 1989 2 ALL ER 465 CA a father was found to have a right of custody according to Australian Law, though the mother had the right to possession and care of the child by a custody order made there. Lord Donaldson MR said at 473:

"Custody as a matter of non-technical English means "safe keeping, protection, charge, care, guardianship". But "rights of custody" as defined in the Convention includes a much more precise meaning which will I apprehend usually be decisive of most applications under the Convention. This is the right to determine the child's place of residence. This right may be in the Court, the mother, the father, some care taking institution such as a local authority, or it may, as in this case, be a divided right in so far as the child is to reside in Australia, the right being that of the mother, but in so far as any question arises of the child residing outside Australia it being a joint right, subject always of course to the overriding rights of the Court. If anyone, be it an individual or the Courts or other institution or a body has a right to object and either is not consulted or refuses consent the removal will be wrongful within the meaning of the Convention."

That decision has been applied in the recent case in England of B v B [1992] WLR 865 and in New Zealand in Lynch v Lynch [1992] NZFLR 523. The obiter view to the contrary expressed in Lehartell v Lehartell [1992] NZFLR 517 I do not regard as helpful in this case. Lehartell was decided on other grounds. What is important here is the emphasis that the Law involved is that of the Contracting State. The evidence which I have about the Law in

Texas is to be found in the decision of the Texas Court of Appeal in Henry v Rivera (San Antonio 1990) 783 S.W.2d 766, 768 referred to in the affidavit of the Galveston attorney, Mr Radcliffe. It is established there that a custody determination includes visitation rights. I conclude for those reasons that there was here a removal of this child in breach of Doctor W.'s rights of custody; both because of his rights and the Court's rights. Because I come to the firm view that there was here a removal in breach of custody rights I need not consider the submission helpfully offered to me concerning wrongful retention of the child in New Zealand.

The third requirement under S.12 is that at the time of that removal, rights to custody were actually being exercised by that person. There is no dispute that was the case here. Doctor W. was seeing his child in terms of the Court order and was exercising those rights at the time albeit with agreed amendments to the overnight stays.

Finally, it must be proved that the child was habitually resident in the contracting State. Again as I understand it, there is no dispute about that at least up to 1 March 1992. I find as a fact that he was so resident.

I find that, therefore, that the requirements of S.12 have been complied with and there is proper proof of those requirements before this Court.

I now turn to the matters which are set out under S.13 of the Guardianship Amendment Act. There are three matters which need to be referred to in this respect. Section 13 provides grounds for refusal of an order for return of the child. For the purposes of this application it is necessary to consider whether or not in terms of S.13(b)(ii) Doctor W. consented to or subsequently acquiesced in the removal of the child to New Zealand. It is a further ground for refusal of the order that in accordance with S.13(1)(c) there is a grave risk that the child's return (i) would expose the child to physical or psychological harm or (ii) would otherwise place the child in an intolerable situation. I take note in passing that the language used is forceful and vigorous. It is not a "best interests" test. That must await the substantive Court hearing. The onus of proving the existence of such a grave risk is on the respondent.

The other provisions of S.13 do not apply in this case.

I turn, therefore, to consideration of whether Doctor W. consented to or subsequently acquiesced in the removal. The evidence of Mrs W. about this is that he always knew that they planned to go to New Zealand. Her evidence is that the family was in the habit of coming to New Zealand at frequent intervals. Mrs W.'s mother lives here and she says it was always part of her plan to come to New Zealand herself. Not only does she say that Doctor W. consented to this but she said he actively encouraged and urged her to do so. That is completely denied by Doctor W., who said he had no knowledge of where she had gone to when he went to exercise his access rights in accordance with the order and found the house deserted. He says that immediately he found that to be the case he traveled to their California residence to see if she had arrived there, it being part of their discussion that she take up residence in that place where his and his family's contact with the boy could be maintained.

When she was not to be found there he suspected she had gone to New Zealand, had no way of contacting her in New Zealand, in spite of his efforts could not obtain her address or speak to his son and finally hired a private detective at a cost of $11,000 to track her down in New Zealand. It is a question in this case of credibility. I prefer the evidence of Doctor W. to that of Mrs W. It is unbelievable he would have traveled from his home in Galveston to California if he had known of the arrangement and consented to it, that she was to go to New

Zealand with the child. It is also unbelievable that he would, as has been established, spent a large sum of money on a private detective to locate her in New Zealand if he had known and consented to her traveling here. There would simply have been no occasion for that expenditure. All his actions are consistent with his not knowing or agreeing to such an arrangement. The subsequent Court proceedings are also consistent with that. All Mrs W.'s actions are consistent with her fleeing from the United States without such consent, confirmed by her subsequently covering her tracks and making communication difficult or impossible in New Zealand. I much prefer Doctor W.'s evidence in this respect. There is no evidence that he acquiesced in the child either coming to New Zealand or remaining here. There were firm Court hearing dates set down in Galveston and for some time he acted on assurances that those dates would be complied with and that the child would come back to the United States for the hearings. It was only when it became abundantly clear that that was not happening that he took action under the Convention. He was entitled to do that. The delays were not unreasonable and do not amount in my view to acquiescence. I do not find on the evidence which I have that he consented to or acquiesced in the removal. I also accept his evidence that he had never instructed his counsel to negotiate on the basis that he agreed to his son staying here. The draft agreement proffered in evidence by Mrs W. as evidence of negotiations which were agreed to by Mr W., I regard with suspicion.

I now turn to the question of whether there is a grave risk that F.'s return would expose F. to physical or psychological damage or would place F. in an intolerable situation.

It is Mrs W.'s case that her fundamental concern for F. and indeed the cause of their marriage break-up lay in the fact that one day shortly prior to all these unhappy events she found on F.'s bed a bag belonging to Doctor W. and in it she found objects relating to his propensity for sexual deviation. She found a film which showed him in various sexual acts with a former colleague of hers. She found pornographic materials and advertisements and she found equipment used for sexual gratification. She also found lists of names of people, and from this evidence she concluded that Doctor W. was part of a ring of sexual deviants involved in bestiality, sodomy, torture, and acts of sexual deviation which were disgusting to her and dangerous to F. All these items were taken by her and lodged with her lawyer in the United States. Late on the first day of the hearing of this evidence a parcel was sent by her attorney in the United States containing copies of this evidence for the benefit of this Court. I will have something more to say about this shortly. This exposure came as an enormous shock to Mrs W. who suddenly realised that her husband had had a secret life kept from her and F. for many years and it is this which makes her fearful about F.'s contact with her husband. What she fears, she says, more than contact with her husband is contact with the co-respondent in these matters, whom she now says was also involved in "lesbian, deviant and incestuous relations with her son".

I have looked at the exhibits which were sent to New Zealand. They consist of personal advertisements of a sexual nature with rather blurred photographs. The cover describes those as a magazine or advertisement for "swingers". There are no indications of any activities with children or animals. Doctor W. has said in his evidence that he completely denies that he was involved in any sexual deviant behaviour. He admits that he was involved with the woman in the film and that they took a film of their conduct together. He says nothing was done in front of F., nor were any of these activities shown to him or made available to him in any way. The activities shown in the materials I have seen are those of consenting adults involved in sexual acts. I see nothing about them which would make me worry about F.'s position in respect of them and indeed there has never been any suggestion that F. was at risk of being involved in these activities. Mrs W. has elevated these things into a nightmare of horror and drama, which the evidence simply does not support. I do not

believe F. is at risk from these activities and I accept Doctor W.'s assurances about that. The evidence simply does not support assertions made by Mrs W.

Nor do I accept that her real view of the matter is that the child would be safe with his father but not safe with other people. All her actions seem to me have been aimed at preventing contact with the father. In the United States there was an interim order giving access overnight to the father. Doctor W.'s evidence is that Mrs W. was so hysterical about being separated from her son overnight that he agreed to see the child during the weekends when access was to be exercised by him during the day only, returning F. at nights. It is clear from the evidence that that was not in order to ensure Freddy's safety or to ensure that F. continued to settle in a stable life - it was to ensure Mrs W.'s stability and security, she having said that she could not manage to spend a night without him. Her fleeing from the United States in circumstances of secrecy and concealment are further evidence of her desire to keep F. away from his father and when Doctor W. arrived in New Zealand she resisted his application for access to the child here. Again, she resisted it on the basis of deceit. She filed a formal sworn affidavit in this Court saying that F. was settling into another class at his school and that whilst he would be familiar with class mates generally, there would be new people in the class and a new teacher with whom it was important he became accustomed. She also referred to the research which she was doing at the school and how humiliating it would be for her to have F. removed at such an early time of the year, giving rise to inevitable and difficult questions in her professional working environment. What she did not say was that in fact she had removed F. from the school he had previously attended in New Zealand and placed him in a different school. There would have been no classmates familiar to him at all and she was not of course working there. She not only deceived the Court by this sworn affidavit, she deceived Mr Mathers, counsel for the child, as well and the deception included her place of residence, which she failed to disclose both to the Court and to counsel for the child, deliberately giving the impression that she was living with her mother when that was not true. The whole of her actions were aimed at preventing the child from having contact with the father.

The most dramatic example of that finally, however, came when Doctor W.'s application for access was heard in this Court on 29 January. Mrs W. was not present at the time but the case was fully argued by her counsel on her instructions. The Court made an access order granting access to Doctor W. for the period up to this present hearing and also issued an order that the child not be removed from the country. Three days later Mrs W. was arrested by the Auckland Airport Police trying to leave the country with the child. She said in evidence that she had been strongly advised by her counsel to leave the country prior to the hearing. She had thought that she had some days in which to do that. She agreed that it was, in her words, the worst mistake she had ever made. There is no doubt in my mind that her actions again confirm her obsession about this child and her obsessive desire to keep him away from his father.

Doctor W.'s position in the United States is one where he is able to adjust his work situation and hours to properly care for this child. The evidence is that the child and he have had an enjoyable two weeks together waiting for this case to come to hearing and that they have enjoyed each other's company. This is confirmed by Ms Mathers, Court appointed counsel for F. I was impressed by Doctor W.'s acknowledgment of F.'s situation and F.'s desire and concern for his mother. In the difficult situation which Doctor W. finds himself, it would have been understandable were he to over-emphasise the quality of their reconciliation as father and son and to deny the position of the mother in the son's life. Doctor W. did not attempt to do that and he referred to F.'s distress at the parting from his mother in Auckland Airport and F.'s subsequent concern for his mother. I am, however, satisfied that Doctor W. is a sensitive and perceptive parent who will do his best to ensure that F. is looked

after properly. There is no evidence that a return to the United States in his father's company would expose F. to physical or psychological harm or would place him in an intolerable situation. Indeed, I think the reverse is the truth. The mother's actions in this case have been concerning. Her invitation during the hearing yesterday to Doctor W. to play golf with her was, in the circumstances of the history of their separation, such bizarre nonsense that it is of worrying dimensions. The way in which she has uprooted this child from the United States to New Zealand, kept him from his father, denied access, tried to prevent access in New Zealand, and attempted to flee New Zealand again, shows an obsession with this child which is simply unhealthy.

I have considered, therefore, all the aspects which I am required to do under the New Zealand Guardianship Amendment Act. I do not find that grounds for refusal are made out in S.13. Coming to this conclusion as I do, the result is a very clear, decisive and somewhat draconian one. I would have preferred that there be an arrangement made by these two parents in a co-operative way for the managed return of F. to the United States for the hearing in Galveston which is expected to take place in April. That would have been in Freddy's best interest. However, it is clear in the circumstances of these parents that no such co-operation can be expected. The mother's obsession to keep F. from the father would prevent that being done on a proper basis. There is no alternative, therefore, making the order required of me in S.12(2)(b). The grounds of the application are made out. I now make an order that the child is to be returned forthwith to Doctor W. for the return to the United States and for the hearing in Galveston. There will also be orders for the release of the child's and Doctor W.'s passports. The order preventing the removal of the child from New Zealand is discharged.

I express the wish that there be some contact between F. and his mother in a structured and supervised way without any opportunity for further abduction and in a way which will minimise distress for F. I ask counsel for the child to organise that if possible. If it is not possible and the mothers co-operation cannot be obtained in a proper way, then the child will simply have to leave the country with his father and await the proper determination of this family dispute by the Court of competent jurisdiction in Galveston.

/s/ D. J. Carruthers

(D. J. Carruthers)

District Court Judge

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]