---

http://www.incadat.com/ ref.: HC/E/NZ 492
[03/09/2001; Family Court at Taupo (New Zealand); First Instance]
Secretary for Justice v. Abrahams, ex parte Brown

The Secretary for Justice, as the New Zealand Central Authority on behalf of R. Brown, Applicant

and Y. Abrahams, Respondent

FP 069/134/00

15 August 2001

Family Court at Taupo

Appearances: Mr A Tisch for the Applicant; Ms A Gartner for the Respondent; Mr J Olphert - Counsel for the Children

Judgment: 3 September 2001

RESERVED JUDGMENT OF JUDGE P WHITEHEAD

This Hague Convention case pursuant to the Guardianship Amendment Act 1991 involves the following issues:

Whether the removal of two children from South Africa was in breach of the mother's rights of custody in respect of those children;

Whether the mother at the time of removal of those children was exercising rights of custody or would have exercised those rights of custody but for the removal;

Although conceded that the application was made within 12 months of the children's removal, the respondent submits that the children are now settled in their new environment – s.13(1)(a);

That the applicant mother was not exercising custody rights at the time of the removal – s.13 (1)(b);

That the applicant consented to the removal – s.13(1)(c);

That the children object to being returned and have obtained an age and a degree of maturity at which it is appropriate to take account of the child's views.

HISTORICAL BACKGROUND

The parties were married in South Africa according to Islamic Rites. Evidence from an advocate of the High Court of South Africa is that in South African law no recognition is at present given to marriages in terms of Islamic Rites. Therefore a child who is born of a

Muslem union is considered in civil law to be illegitimate. Both guardianship and custody of such a child vests in the mother of such child provided the mother is a major (in other words, over the age of 21 years). The father had no rights of guardianship or custody to any children of this Islamic Rites marriage unless he obtained orders to that effect through the High Court of South Africa.

Two children were born of this Islamic Rites marriage, namely M. born 8 February 1989 and B. born 2 July 1990.

The parties were divorced according to Islamic Rites in August 1997 and the mother retained the principal care of the children thereafter.

Certain Children's Court inquiries were undertaken in 1997 and 1998 as a result of allegations by the father that the children were being physically abused by the applicant mother and B. sexually abused by a relative. Those inquiries established that there was no evidence that the children had been physically or sexually abused whilst in the care of their mother, and it was recommended in the end result that the children remain in the care of Ms Brown the applicant.

There is a further allegation that the mother hurt M. on 29 June 1999. The respondent, in his affidavit of 27 October 2000, paragraph 15, states that he saw his son on 30 June 1999 and he had a blue and bruised mark over his face and had obviously been beaten. The injury was examined by the District Surgeon of Cape Town and the Police Child Protection Unit took care of the children. At this stage there was discussion with the applicant mother and she agreed that custody of the children would vest in the father.

The applicant has throughout the documentation relating to these proceedings totally denied that she ever assaulted M. on that date. The respondent filed an affidavit dated 3 August 2001 contrary to prior directions of the Court, but I accept this affidavit in evidence as updating the position between the parties. Annexed to that affidavit is an affidavit sworn by the mother filed in support of an application for a declaratory judgment in the High Court of South Africa ancillary to these Hague Convention proceedings which I shall refer to subsequently. In that affidavit the applicant mother admits that M. "was hurt on the 29th of June 1999 in the way the respondent describes, and that it was my fault. The incident he describes in this paragraph is the faithful recollection of events on that day – and it has never stopped haunting me. I truly regret my actions."

It is not known what paragraph in what document the applicant is referring to but it is clear that this is the incident related in the respondent's affidavit of 27 October 2000.

The applicant filed proceedings in the High Court of South Africa at Cape Town in July 1999 seeking guardianship and custody of the minor children. The application was supported by affidavits sworn by the applicant mother and she states in her affidavit of 13 July 1999 sworn in support of the respondent's application:

"5. I sincerely believe that it would be in the best interests of my minor children for them to be placed in the custody of Y.A. and furthermore, that he be granted guardianship and custody of the said children.

I will exercise reasonable access to the minor children at all reasonable times, which access arrangements have been consented to by Y.A.

I thus support my ex-husband's application to this Honourable Court and I would request that an Order be granted in terms of which guardianship and custody of our minor children, M.A. and K.B.A., we (sic) awarded to him, with my having the right of reasonable access."

As a result of that consent, there was entered into the Chamber Book of the High Court of South Africa on 23 July 1999 by Mr Justice Blignault the following record:

"IT IS ORDERED:

That guardianship and custody of the minor children born from his marriage by Moslem Rites, namely: (a) M., born on the 8th February 1989;

K.B., born on the 2nd July 1990

is awarded to him."

These orders clearly vest guardianship and custody in favour of the applicant Y.A. which provided him with legal status in respect of his children as distinct from his position in South African law under his Islamic Rites marriage.

Subsequently, by affidavit sworn on 30 July 1999, R.B. stated:

"I hereby grant my Consent to the minor children whose names are set out in paragraph 3 hereof, leaving the Republic of South Africa with my ex-husband Mr Y.A."

The applicant mother then states that she believed the respondent father and children were to leave South Africa for approximately three months with the intention of holidaying in Bali and elsewhere.

The respondent and children left South Africa in October 1999. The children rang their mother every two to three weeks through until July 2000 when contact virtually ceased as the respondent did not like what the applicant was saying. It is apparent that she was insisting that the children be returned. An application was made through the Central Authority in September 2000 for the return of the children.

Some explanation is required for the delay in bringing this matter to hearing. The application was timetabled in October and November of 2000 and came on for hearing on 15 February 2001 in Rotorua. A sworn statement had been filed by Janet Louise McCurdie, an Advocate of the High Court of South Africa, which cast significant doubt as to the meaning of the orders that were made by Justice Blignault and as a result, the Court at that time sought an order in terms of s.12(3) Guardianship Amendment Act 1991 requiring an order from a Court of the South African State or a decision of competent authority of that State declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State. The proceedings were adjourned accordingly for such an order to be obtained.

On 10 May 2001 before the Honourable Mr Justice Blignault, the High Court of South Africa Provisional Division Cape of Good Hope issued a rule nisi calling upon the respondent Y.A. to show cause, if any, on Wednesday 30 May 2001 as to why a final order should not be granted in the terms that Mr Justice Blignault's orders of 23 July 1999 meant that the respondent had vested in him co-guardianship and custody of the minor children together with a final order that the permanent removal of the minor children from the Republic of South Africa by the respondent was unlawful in terms of South African law.

It was noted that service of the order in the notice of motion was to be effected on the respondent's attorneys in Taupo, New Zealand.

On 21 June 2001, Ms Justice B J van Heerden in the High Court of South Africa Cape of Good Hope Provincial Division made a declaratory order to the effect that the order made by the Honourable Justice Blignault on 23 July 1999 was interpreted to read:-

"That co-guardianship of and custody of the minor children born from the respondent's marriage by Moslem Rites was awarded to the respondent.

Further there was made a declaratory order that the permanent removal of the minor children, M.A. and K.B.A. from the Republic of South Africa by the respondent was unlawful in terms of South African law and wrongful within the meaning of Article 3 of the Hague Convention on the civil aspects of international child abduction."

ISSUES, SUBMISSIONS AND THE LAW

The hearing proceeded on affidavit evidence only with no rights of cross-examination. This is the usual process adopted in Hague Convention cases – refer His Honour Judge Mahony, Principal Family Court Judge, in his decision in Fisher v Fisher 15 February 2000, District Court Whangarei, FP 60/99.

Where there is irreconcilable affidavit evidence, Her Honour Butler-Sloss LJ in Re F [1992] 1 FLR 548 at 533, paragraph (g) stated:

"If the issue has to be faced on disputed non-oral evidence, the Judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the Judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the Judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on the other side, the applicant will have failed to establish his case."

There are four essential limbs for the applicant to establish her case before the Court can found its jurisdiction for the return of the child to the contracting State. These are set out in paragraph 12(1) Guardianship Amendment Act 1991 as follows:

"12 Application to Court for return of child abducted to New Zealand - (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 the 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 having jurisdiction under this Part of this Act for an order for the return of the child.

(2) Subject to section 13 of this Act, where—

(a) An application is made under subsection (1) of this section to a Court; and

(b) The Court is satisfied that the grounds of the application are made out,—

the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.

(3) A Court hearing an application made under subsection (1) of this section in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a Court of that state, or a decision of a competent authority of that state, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that state, and may adjourn the proceedings for that purpose.

(4) Where—

(a) An application is made to a Court under subsection (1) of this section in respect of a child; and

(b) The Court—

(i) Is not satisfied that the child is in New Zealand; or

(ii) Is satisfied that the child has been taken out of New Zealand to another country,—

the Court may dismiss the application or adjourn the proceedings."

It is not disputed in this case that the child is in New Zealand and nor that the child's habitual residence was South Africa prior to the child's removal from that contracting State or retention of the child in New Zealand. The issue raised by counsel for the respondent is whether the mother had rights of custody in respect of the children and secondly that at the time of removal or retention, those rights of custody were actually being exercised by the mother or would have been so exercised but for the removal/retention.

A Did the mother have rights of custody and were the children removed/retained in breach of those rights of custody?

If there was doubt that the mother had "rights of custody" as defined in s.4 Guardianship Amendment Act 1991 that has been dispelled by the order of the High Court of South Africa dated 21 June 2001 which vested co-guardianship and custody of the minor children in the respondent father. This order preserves the rights of guardianship in the mother initially solely vested in her favour pursuant to South African law in terms of this Moslem Rites marriage.

Advocate Janet McCurdie of the High Court of South Africa deposes that:

"Generally speaking, the right of guardianship is the right or power to administer the property of the child. In terms of the Guardianship Act 192 of 1993, the concept of guardianship was changed in certain respects. Unless a Court ordered to the contrary, then parents of a legitimate child (a child born within a civil marriage or conceived by parents who subsequently marry in terms of a civil marriage) are able to make decisions as co-guardians of such child with regard to the administration of the child's estate. The Guardianship Act, in terms of section 1(2) thereof, provides that in five specific cases, unless a Court orders to the contrary, the consent of both guardians would be necessary in respect of:

the contracting of a marriage by the minor child (in other words a child under the age of twenty-one years);

the adoption of the child (by third party/ies);

the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;

the application of a passport by or on behalf of a person under the age of eighteen years;

the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor child."

It is clear by the order of the High Court of South Africa that the mother has retained co-guardianship of the children and therefore must consent to the removal of the children from the Republic of South Africa or the children's retention in another contracting State. In terms of s.4 Guardianship Amendment Act 1991, rights of custody are defined as:

"For the purposes of this Part of this Act, the term rights of custody, in relation to a child, shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child."

The applicant mother in terms of Guardianship Act 192 of 1993 in South Africa has a right to determine the children's place of residence under the law of the South African contracting State in which the child was habitually resident immediately before the removal/retention of the child.

Article 3 of the Hague Convention provides:

"Article 3

The removal or the retention of a child is to be considered wrongful where—

it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

In this case therefore, the applicant mother has rights of custody arising by operation of law in the first instance and as defined by the Honourable Ms Justice BJ van Heerden by order of 21 June 2001.

The mother by the affidavit she swore on 30 July 1999 consented to the removal of the children from the Republic of South Africa. Prima facie therefore, the removal of the children from South Africa was not unlawful.

The issue becomes: was the continued retention of the children in New Zealand unlawful being in breach of the mother's rights of custody? It is necessary to consider the affidavit evidence in that regard on which there is a conflict and which must be determined in terms of Her Honour Butler-Sloss LJ's decision referred to above in Re F.

The applicant mother states that she was duped into believing that the respondent was taking the children from South Africa on holiday. In support of her position she refers to her affidavit of 13 July 1999 in support of Mr A.'s application for guardianship and custody in the High Court of South Africa. There it is set out that the applicant mother will exercise reasonable access at all reasonable times which clearly indicated an intention she says that the children would come back to South Africa. Further, the applicant produces letters and correspondence and sworn statements from a number of persons who support her belief that the children were to return to South Africa after a holiday. The first is a sworn document from one Alwena Denton who states that she discussed with Mr A. when he was in New Zealand, his reasons for not advising Ms B. of his intention to depart South Africa permanently prior to his departure. Secondly, a statement from Magdalene Malgas who states that she was told by Mr A. that he would take the children for an overseas holiday and that they would continue to have regular contact with their mother during week days and weekends. Thirdly, two letters have been received from the Principal of the children's school and the school's bursar which indicate that Mr A. had told them that he was taking the children away on holiday and that they would be away from South Africa from mid October until late January or even February 2000. From his comments the Principal stated that he was clear that Mr A. wished the children's places in school to be reserved and that was acted upon by the school.

These statements are clear corroboration that the children and Mr A. were leaving South Africa on holiday only. If I am wrong in that finding then because of the conflict in the evidence I would find that the conflict could only be resolved on the oral evidence of the witnesses in South Africa.

I interviewed the children in the presence of Counsel for the Children. It was clear from their statements to me that they believed that they were going on holiday with their father rather than a permanent departure from South Africa. The children did indicate that the issue of residing in a country outside South Africa was discussed with the mother (but it would seem this discussion was after they had left South Africa) and it is apparent on the evidence that because of her requests to return the children, contact was lost with them from July 2000 onwards.

Therefore as at 30 July 2000 when contact between the children and their mother ceased, I find that the children were being retained in New Zealand without the mother's consent nor approval. Prior to that time, she had believed that the children were merely going on holiday notwithstanding it was an extended holiday with their father. It could be said that there was some acquiescence by the mother with the children remaining in New Zealand up to 30 July 2000 but it is equally apparent that she was objecting to this position leading to the termination of contact and the filing of these proceedings.

I accordingly determine that from 30 July 2000 onwards, the respondent unlawfully retained the children in New Zealand in breach of the applicant mother's rights of custody.

B Was the applicant exercising her rights of custody at the time of the children's removal/retention or would she have done so but for the removal?

The evidence is not clear whether the applicant mother exercised her rights of custody to the children after the making of the guardianship and custody orders and before the father and

the children departed from South Africa. What is clear however is that the applicant mother did attempt to preserve her rights of access in the documentation that was presented to the High Court of South Africa and her affidavit stipulates that those rights of access were agreed to by the father.

The initial contact with the children through until July 2000 resulted in requests by the mother to have the father return the children to South Africa which were refused. She was by these requests exercising her rights of custody (and guardianship), and in effect had withdrawn her consent to the temporary removal of the children from South Africa.

Accordingly I determine that as at 30 July 2000 the mother was exercising her rights of custody and was frustrated from exercising those rights (by the continued retention of the children in New Zealand) and accordingly the retention of the children in New Zealand was in breach of her rights of custody and unlawful.

By the above findings, the defences as raised by the respondent in s.13 have largely been resolved in favour of the applicant. Section 13 provides as follows:

"13 Grounds for refusal of order for return of child

(1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—

(a) That the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) That the person by or on whose behalf the application is made—

(i) Was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

(ii) Consented to, or subsequently acquiesced in, the removal; or

(c) That 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; or

(d) That 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

(e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating, to the protection of human rights and fundamental freedoms.

(2) In determining whether subsection (1)(e) of this section applies in respect of an application made under section 12(1) of this Act in respect of a child, the Court may consider, among other things,—

(a) Whether or not the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum:

Whether or not the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On the hearing of an application made under subsection (1) of section 12 of this Act in respect of a child, a Court shall not refuse to make an order under subsection (2) of that section in respect of the child by reason only that there is in force or enforceable in New Zealand a custody order relating to that child, but may have regard to the reasons for the making of that order."

Section 13(1)(a), (b), (i) and (ii) defences have been resolved by the above findings.

Counsel for the respondent has submitted that in terms of s.13(1)(a) that notwithstanding that the application was made within time, nevertheless the children are now settled in their environment and that on its own should be a ground for refusing an order for return of the child. I determine that it is not open to the respondent to argue that the children are settled separately from the requirement that the application was made outside the period of one year after the removal of the children. The determining factor is the word 'and' between these two statements of position and one cannot stand mutually exclusive of the other. This ground must therefore fail.

The respondent further submits that the applicant consented to the removal or retention of the children. There can be no issue that the applicant consented to the removal of the children from South Africa. The determination of this Court is that such consent was on the basis of a temporary removal and this is now reinforced albeit retrospectively by the declaratory order of the High Court of South Africa on 21 June 2001 that the permanent removal of the minor children from the Republic of South Africa by the respondent was unlawful in terms of South African law and wrongful within the meaning of Article 3 of the Hague Convention on the civil aspects of international child abduction.

The respondent submits that from this declaratory order, it is not apparent that the Court specifically considered the issue of consent.

The wording of the declaratory order is that "the permanent removal was unlawful …". The necessary conclusion to be drawn from this is that the temporary removal was not unlawful but that at a point in time subsequent to the removal the retention of the children became unlawful and I have determined that this arose on or about 30 July 2000 when contact between the children and their mother ceased.

Whilst the temporary removal was subject to the consent of the applicant, the permanent removal was not and accordingly this ground of defence must fail.

C There is a grave risk that the child's return would expose the child to physical or psychological harm or place the child in an intolerable situation

The respondent relies upon statements made by him that the children were abused by the applicant and her family. Two investigations were undertaken in South Africa by the appropriate authorities which established that there was no evidence concerning sexual abuse as was alleged on B. nor physical abuse as was alleged on M.

Counsel for the Child reports that in his interviews with the children, B. has stated that she did not like South Africa as there was too much crime and drugs there" and "her mother had been mugged two or three times". She recalls her mother smacking her when she was really stressed and her mother took no notice of her problems. She was, it is stated, hit with

an iron spoon around the arms and legs. She stated that she would rather kill herself than go back.

M. says that if he went back she (referring to his mother) would probably smash him up. He claimed that he was hit on the hand with a heavy iron spoon and would be punched every day, and that in South Africa people break into houses a lot and there was bullying at school. He also said that he would probably kill himself if ordered to go back to South Africa.

I interviewed both children in Chambers with Counsel for Child present. Both without prompting indicated that they would be frightened to return to South Africa because of the statements that they had made. M. related how he had been assaulted by his mother using a steel spoon on 29 June 1999 and from the affidavit evidence of the mother in support of the declaratory order, it seems that she now admits this event occurred. Both children wish to remain in New Zealand. Both indicated that the only reason their mother wished them back is because she was "after dad's money". I had the distinct impression that both had discussed with their father matters to which they should not have been privy and both raised matters that would not normally be within children's areas of concern.

Prior investigations by social workers and the relevant authorities in South Africa have not established concerns as to the care of these children. Indeed, the children, whilst indicating that they were disciplined from time to time by their mother, were happy in their relationship with her and had forged a close relationship.

Furthermore, if the children are returned to South Africa, they do not need to be returned into the care of the mother until a proper investigation has been undertaken to establish safety issues. On the evidence I find the respondent has not established that there is a grave risk that the children would be subject to physical and psychological abuse, and nor do I determine that they would be placed in an intolerable situation.

D Children's wishes

The Court has the discretion to refuse to return the children to a contracting country if they object to being returned and have obtained an age and degree of maturity at which it is appropriate to take account of the their views.

An onus therefore falls upon the respondent to establish to the satisfaction of the Court that the child objects to being returned and is of an age and maturity at which it is appropriate to take account of the child's views. Nevertheless, even if the ground is established, the Court retains an overriding discretion as to whether to make an order for return or not.

Inherent in any application under the Hague Convention is the underlying principle of forum conveniens. In this case there is considerable disputed evidence, and if the case were to be determined on the basis of forum conveniens, then the most convenient place to hear the matter would be in South Africa where every witness is except for the respondent. It is not for this Court to determine the substantive issues relating to the care of the children. It is also necessary to remember that the Hague Convention on the Civil Aspects of International Child Abduction has as its main principles:

The interests of children being of paramount importance in matters relating to their custody;

Protecting children internationally from the harmful effects of their wrongful removal or retention;

To establish procedures to ensure their prompt return to the State of their habitual residence;

To secure protection for rights of access.

Article 1 specifically addresses these principles. It is also recognised that cases where the exercise of the discretion in favour of refusing to return a child would be comparatively rare and in unusual circumstances.

With those factors as a background, it is necessary to consider the wishes of the children. In Re: S (a minor) (abduction) [1993] 2 All ER 683 the English Court of Appeal held that the Court could exercise its discretion under Article 13 1985 Convention to refuse to order the immediate return of a child to the country from which it had been wrongfully removed solely on the basis that the child objected to being returned and had obtained an age and degree of maturity at which it was appropriate to take account of its views without having to decide under Article 13(b) whether the return of the child would expose it to physical or psychological harm, or otherwise place it in an intolerable situation. Lord Justice Balcombe at page 690 determined that there was no warrant for importing any gloss on the words of Article 13 as did Bracewell J in Re R (a minor) (abduction) [1992] 1 FLR 105 at 107-108:

"The wording of Article is so phrased that I am satisfied that before the Court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Rather the Court followed an earlier decision of Sir Stephen Brown P in Re M (minors) 25 July 1990 unreported in which the Learned President rightly considered Article 13 by reference to its literal words and without giving them any additional gloss.

In Re S was followed in S v S unreported 28 July 1994 per Ellis J High Court Nelson M12/94.

I accept the submissions of Counsel for the Child that the issue of objection is a factual one and that the objection will be recognised only if the Court considers that the child has substantive and valid reasons for his or her objections. Refer His Honour Judge Boshier in Damiano v Damiano [1993] NZFLR 548 at 555:

"The first requirement is clearly that there is an objection on the part of the child. Preference is not sufficient. There must be a quite emphatic reluctance that extends to the unacceptable. It is only if that threshold is reached, that the Court can move on to consider if the objection is one to which the Court ought to take note."

It is clear on the cases decided that the age and maturity of the children must be established on the basis of the factual circumstances. In S v S Justice Ellis held that a boy aged 9 years 8 months had reached an appropriate level of maturity. In the present case the children are aged 12 and 11 and are, in my determination, sufficiently mature to express their own wishes.

Article 12 United Nations Convention on the Rights of the Child provides:

"1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance of the age and maturity of the child."

As stated by His Honour Justice Fisher in S v S [1999] 3 NZLR 513 at 522:

"There is in fact a tension between the principal anti-abduction thrust of the Hague Convention and respect for a mature child's wish to remain as a subsidiary consideration under the same convention. But there is no such difficulty where the wish is to return." (As was the case in S v S).

Justice Fisher determined that a mature wish to return was inherently likely to give real impetus to the presumption already created by s.12. S v S may therefore be distinguished on its facts where the children aged 11 to 15 were ordered to be returned to Australia.

At page 523 Fisher J:

"The Court must pay regard to the wishes of a mature child whether the wish be to stay or return. The weight to be attached to such wishes will turn upon age and maturity, the reasons given by the child, possible influences upon the child, competing considerations and all the surrounding circumstances."

The children have given various reasons why they do not wish to return to South Africa. These include the prevalence of crime and drugs in South Africa; the mother being mugged three to four times; the mother's physical abuse of the children; the children being settled and happy at their current schools; bullying in schools in South Africa; and "the only reason mum wants us back is to get at dad's money".

Obviously these children are of an age and mature enough to express their own viewpoints but in my discussions with them in Chambers, there seemed to be a certain influence upon them. Certainly no child would wish to return to a physically abusive household but on the evidence there is only one possible incident occurring on 29 June 1999 which, with respect, has been enlarged upon to suggest that such occurrences occurred on a daily basis.

Whilst it is necessary for me to take the wishes of the children into account, this does not require the wishes of the children to be determinative of the situation as was referred to by Justice Elias in Clarke v Carson [1996] 1 NZLR 349 at 354:

"The position at which it is right to take into account the views of children seems to me in the normal course to be the time when they are able to reason. That is a position supported by the Convention on the Rights of the Child. Here, on the whole, the reasons put forward by the children for their objections are reasonably held. Even though there are indications that some reasons are affected by their lack of maturity and even though I have doubts as to their capacity to see the whole picture (so that I would not accept that their views should be determinative), I accept that both children are of an age and degree of maturity which makes it appropriate to take their views into account."

If the evidence of the applicant mother is to be accepted, the father planned the abduction from South Africa with some considerable caution. The mother further has stated that the respondent was physically verbally and emotionally abusive towards her during the course of their marriage, and exercised considerable power and control (example: preventing her from seeing her family etc).

Many of these details given by affidavit are disputed by the father. The appropriate place for determination of such issues is in South Africa. To retain the children in New Zealand and force a custody dispute in this country would create a situation where it would be impossible for the mother to mount a custody hearing in New Zealand. There is simply so much in

dispute and so much that requires resolution that the appropriate forum for these proceedings is in South Africa.

The final issue in relation to the children's wishes in balancing surrounding circumstances and competing considerations is the factor of delay. The evidence discloses that the mother did contact the children and request their return as early as March 2000 but an application under the Hague Convention was not filed until September 2000, and the applicant first swore an affidavit on 13 October 2000. Subsequent delays have been created by a shortfall in the procedure and the lack of supporting evidence of the applicant's claim and dispute over the meaning of the original orders made by His Honour Justice Blignault on 30 July 1999. These are concerning issues and when balanced with the length of time that the children have been in New Zealand (nearly two years), there remains a residual concern as to the possible effects on them of a return to South Africa. What must however be remembered is that a return to South Africa does not mean a return to the custody of the mother. I am satisfied that the South African authorities are able to ensure the safety and care of the children if they are returned to South Africa. Of course the father still retains an order vesting co-guardianship and custody in him. In those circumstances it would be more likely for him to return with the children and continue his care of them in any event.

ORDERS

The two children, M. and B. are to be returned on the first available flight to South Africa.

The costs of the children's return to South Africa is to be met by the respondent father Y.A. pursuant to s.68 Guardianship Amendment Act 1991.

That the Registrar shall release the children's passports to Mr Olphert as Counsel for the Children who will in turn use and release them in such manner as will best secure the return of the children to South Africa.

The order preventing removal dated 22 September 2000 and the CAPS listing are varied to allow the children to return forthwith to South Africa.

A warrant is to issue authorising any member of the Police or a social worker to take possession of the said children and deliver them to a person nominated by Counsel for the Children for the purposes of returning the children to South Africa, such warrant to be held by Counsel for the Children and not executed unless the need arises.

Leave is reserved to all parties to apply for costs.

The above orders are suspended for a period of seven days from the date upon which this judgment is delivered. Counsel are to confer as to the appropriate means of return of the children and how this can be best achieved.

Further leave to counsel to come back to Court on two hours notice on any ancillary matter or to seek further orders to better implement the above orders.

Signed at: 3.30 pm on 3 September 2001

Solicitors: Mr A Tisch, P O Box 251, Taupo; Le Pine & Co, P O Box 140, Taupo; Olphert Sandford, P O Box 99, Rotorua

---

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