[2006] FamCA 93

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA

AT BRISBANE Appeal No. NA 78 of 2005

File No. BRF 1740 of 2005

BETWEEN:

DW

Appellant Mother

-and-

DIRECTOR-GENERAL,
DEPARTMENT OF CHILD SAFETY

Respondent

REASONS FOR JUDGMENT OF THE FULL COURT

CORAM: **Finn, Holden and May JJ**
DATE OF HEARING: **8 November 2005**
DATE OF JUDGMENT: **28 February 2006**

APPEARANCES:

Mr Page of Senior Counsel (instructed by Roberts Nehmer McKee Lawyers; Level 10, 320 Adelaide Street, Brisbane QLD 4000) appeared on behalf of the appellant mother.

Mr Parrott of Counsel (instructed by Crown Law; GPO Box 149, Brisbane QLD 4000) appeared on behalf of the respondent.

APPEAL SUMMARY

MATTER:	**DW** **and** **DIRECTOR-GENERAL, DEPARTMENT OF CHILD SAFETY**
APPEAL NUMBER:	78 of 2005 (BRF 1740 of 2005)
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CATCHWORDS:

FAMILY LAW – APPEAL – CHILD ABDUCTION - *FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS* 1986 – whether the mother's intention of residing with the father for the purpose of deciding whether she would persevere with the relationship in the long-term could constitute a settled intention or purpose such as is necessary to support the trial Judge's finding that the child habitually resided in the United States immediately before the child's removal by the mother to Australia – discussion of English and Australian authorities on the term 'habitual residence'.

Caselaw cited:
A v A (Child Abduction) [1993] 2 FLR 225
Cooper v Casey (1995) FLC 92-575
Department of Health and Community Services v Casse (1995) FLC 92-629
In Re J (a Minor) (Abduction: Custody Rights) [1990] 2 AC 562
M v M (Abduction: England & Scotland) [1997] 2 FLR 263
Panayotides (1997) FLC 92-733
R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309
Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993
Re F (a Minor) (Child Abduction) [1992] 1 FLR 548
State Central Authority v McCall (1995) FLC 92-552

Legislation cited:

Family Law (Child Abduction Convention) Regulations 1986

Appeal allowed.
Orders of Warnick J dated 7 October 2005 discharged.
Application of the Department of Child Safety dismissed.

FINN AND MAY JJ:

Introduction

1. This is an appeal by the mother of a very young child against orders made by Warnick J on 7 October 2005 requiring that the child be returned to the United States of America where the father of the child resides. The orders were made pursuant to the *Family Law (Child Abduction Convention) Regulations* 1986. Those Regulations give effect to Australia's obligations under the *Hague Convention on the Civil Aspects of International Child Abduction*.

2. Under reg 16(1) of the Regulations an Australian court must (subject to certain discretionary matters contained in reg 16(3) which are not presently relevant) make an order for the return of a child who has been removed to Australia (from another country which is a party to the Convention) if the court is satisfied that the child's removal "was wrongful under sub-regulation 16(1A)."

3. Under sub-reg 16(1A) a child's removal to Australia "is wrongful" if:

    (a) the child was under 16; and

    (b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

    (c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

    (d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

    (e) at the time of the child's removal or retention, the person, institution or other body:

        (i) was actually exercising the rights of custody (either jointly or alone); or

        (ii) would have exercised those rights if the child had not been removed or retained.

4. Before Warnick J the mother had unsuccessfully claimed, in opposition to an application for

the return of the child to the United States, that for the purposes of the definition of wrongful removal in sub-reg 16(1A) the child was not habitually resident in the United States immediately prior to his removal to Australia (paragraph (b) of sub-reg 16(1A)) and that the child's father was not exercising rights of custody with respect to the child at the time of that removal (paragraph (e) of sub-reg 16(1A)).

5. On this appeal the mother's only challenge to his Honour's order for the return of the child to the United States is to his "finding that [the applicant Central Authority] had satisfied him that ... the child habitually resided in the United States immediately before the child's removal to Australia."

Uncontested factual background

6. We understand the following factual background to be uncontested.

7. The mother, who is an Australian citizen, met the child's father, who was a citizen of the United States, in that country in about May 2003. The child was conceived in or about August 2003.

8. After some period or periods of cohabitation with the father, the mother returned to Australia on 13 February 2004 and remained here until the child's birth on 25 May 2004.

9. On 13 July 2004 the mother and child returned to the United States on a one-way ticket provided by the parents of the father. The child travelled to the United States on an Australian passport with a 90 day visitor's visa for the United States. At that time, the mother apparently had permanent resident status in the United States but on a conditional basis.

10. On their arrival in the United States in July 2004, the mother and child moved into the father's home where they remained until 2 October 2004. There is dispute between the father and the mother as to the nature of their relationship during that period.

11. On 2 October 2004, the mother moved to a women's shelter and on 4 October 2004 the

mother and child left the United States and returned to Australia where they remain.

12. On 21 June 2005 an application was filed by the Director-General of the Queensland Department of Child Safety (as the Central Authority for the purposes of the Regulations) for an order under the Regulations for the return of the child to the United States.

13. That application was heard by Warnick J on 20 September 2005. On 7 October 2005, his Honour delivered judgment and made the orders, now the subject of this appeal, for the return of the child to the United States.

The trial Judge's findings concerning the child's habitual residence

14. As the only issue in this appeal is, as we have said, a challenge to Warnick J's conclusion that the child was habitually resident in the United States immediately prior to his removal to Australia on 4 October 2004, it is only necessary that we refer to his Honour's reasons in relation to that issue.

15. In his reasons for judgment his Honour referred (amongst other things) to:

- the contents of a letter which the mother had written to the father in a period when they were not living together before she returned to Australia in February 2004 and in which she said she would be returning to live in New York by herself with the child and would give herself until December 2004 to see if she wanted to stay in New York without the father (paragraph 6);

- the contents of a letter which the mother had written to the American authorities on 1 March 2004 concerning an application for permanent residence in the United States and in which she confirmed her residential address in New York where she said she resided with the father of her unborn child (paragraph 8);

- a letter of 9 March 2004 to the father asking him to organise a United States passport for the child (paragraph 9); and

- the mother's evidence that she had informed Centrelink before leaving Australia of her intention to travel from Australia on 13 July 2004 and return on or about 12 October 2004 (paragraph 14) and also that she had informed Centrelink that it was her hope to try to rekindle her relationship with the father for the child's sake (paragraph 15).

16. Having referred to the above-mentioned matters, as well as to other material, his Honour observed:

> 17. Material of the mother so far discussed arguably evidences the intention to visit the USA with [the child] for a defined period.

17. His Honour then went on to refer to the fact that at no stage did the father make an application for an extension of the child's 90 day visitor's visa nor suggest that the mother should stay beyond the visa time (paragraph 20). He also referred to the parties' differing versions of their living arrangements after the return of the mother and child to the United States (paragraphs 21 and 22).

18. His Honour next referred to the matters on which the father relied in support of his contention that he believed the mother's return to the United States to be permanent as the parties had agreed to raise the child in that country. These matters included:

- the completion, within a few weeks of the mother's return, by both parties of an application for state health insurance (paragraph 23);

- the grant to the mother of permanent residence status in a letter from the United States authorities dated 2 October 2004 (which the mother claimed she never received, although she conceded making an application for the removal of the conditional basis of her permanent resident status) (paragraph 24); and

- the employment undertaken by the mother in early September 2004 (paragraph 25).

19. Having commented that the evidence of the mother "is inconsistent", his Honour then made

the following findings:

> 31. Therefore, while I do not find that the mother had the intention to live permanently in the USA with the father, I do find that she had the intention of taking up residence with the father to see how that "worked out".

20. His Honour then said that he saw "no reason why such an intention cannot be or at least become a settled intention". He then continued:

> 32. … In my view, when, with that intention, the mother took up residence with the father and remained in that residence for at least two months she, the father and the child became habitually resident … in the USA. I accept that, within a relatively short period of time after arrival, the mother may have become uncertain and concerned about whether the relationship was working out or would work out, but again this does not mean that she was not habitually resident with the child with the father at that time.

21. Having then expressed the view that the inferences to be drawn from what passed between the parties and what was written by the mother to organisations such as Centrelink "are not necessarily consistent one with the other" (paragraph 34), and having given some examples of such inconsistent inferences (in paragraphs 35 and 36), his Honour concluded (in paragraph 36) that none of the inferences "militate against the finding earlier referred to, namely, that the mother arrived with [the child] in the USA intent on resuming the relationship with the father and seeing how it 'worked out'."

22. Having referred to and quoted from certain of the authorities to which we will later refer his Honour reached his final conclusion regarding the child's habitual residence in the United States in the following terms:

> 39. In my view, the evidence supports the finding that within a few weeks of arrival and taking up residence in the father's house (irrespective of what sleeping arrangements were put in place) at about the time application was made for State health insurance, the mother was residing with the father for the settled purpose of deciding whether she would persevere with that arrangement in the long term. Having regard to the presence of both parents in the country (there being no doubt about the father's habitual residence) [the child] acquired the habitual residence of his parents.

The issue in this appeal

23. It will thus be seen that while his Honour expressly stated in paragraph 31 of his judgment that he did not make the finding that "the mother had the intention to live permanently in the USA with the father", he did make the findings:

    - "that [the mother] had the intention of taking up residence with the father to see how that 'worked out'" (paragraph 31);

    - "that the mother arrived with [the child] in the USA intent on resuming the relationship with the father and seeing how it 'worked out'" (paragraph 36); and

    - "that within a few weeks of arrival and taking up residence in the father's house … the mother was residing with the father for the settled purpose of deciding whether she would persevere with that arrangement in the long term" (paragraph 39).

24. In his submissions in support of the appeal, Counsel for the mother initially focussed on the question of whether, on the evidence before his Honour, these findings were open to him. We would say at this point that we are satisfied that these findings were open to his Honour on the evidence before him.

25. However as the argument progressed before us, the real question became whether these findings by his Honour regarding the mother's settled intention of residing with the father "to see how things 'worked out'" could support his ultimate conclusion that the child in question was habitually resident in the United States immediately prior to his removal to Australia on 4 October 2004. In an endeavour to answer this question, we will examine the various English and Australian authorities concerning the concept of habitual residence in the context of the Convention, to which we were referred by Counsel for the mother and Counsel for the Central Authority.

Authorities concerning habitual residence

26. Before referring to the various authorities on the meaning of habitual residence, it should be observed that neither the Regulations nor the Convention provide any guidance as to the meaning of habitual residence.

27. It was accepted by the English Court of Appeal in *In Re J (a Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 at 571-572 that habitual residence for the purposes of the Convention is a question of fact; that habitual residence must have an element of voluntariness and of residence for settled purposes; and that the intention (with respect to habitual residence) of a very young child must be those of its mother in a situation where the mother was unmarried and where the father had no rights in relation to the child. But it was also recognised by Lord Donaldson who delivered the principal judgment in the Court of Appeal that (at 572):

> … the case with which we are concerned is unusual in that the mother is an unmarried mother and, under the law of Western Australia, the father has no rights whatever until the court gives them to him. But, in the ordinary case of a married couple, in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights. Accordingly this decision cannot be applied to the ordinary case of the married couple.

28. The decision of the Court of Appeal in *Re J* was the subject of a further appeal to the House of Lords. In dismissing that further appeal, Lord Brandon of Oakbrook, with whom the other members of the House of Lords agreed, made the following points concerning the expression "habitually resident" in the context of the Convention (at 578-579):

> … The first point is that the expression "habitually resident," as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and who subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a

> single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

29. Subsequently in the decision of the Court of Appeal in *Re F (a Minor) (Child Abduction)* [1992] 1 FLR 548, Butler-Sloss LJ quoted the passage which we have just quoted from Lord Brandon's speech in *Re J* in support of her observation that (at 551):

> A young child cannot acquire habitual residence in isolation from those who care for him. While [the subject child in *Re F*] lived with both parents, he shared their common habitual residence or lack of it.

30. Later in her judgment, having endorsed the submission of Counsel for the Central Authority that "it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing," Butler-Sloss LJ went on to express her agreement with the passage we have quoted above (in paragraph 27) from Lord Donaldson's judgment in the Court of Appeal in *Re J*, and to observe (at 556):

> While parents live together, the child is habitually resident with both parents. When the parents separate the child's habitual residence may change and will, in due course, to follow that of the principal carer with whom he resides.

31. It can be said that the above-mentioned decisions of the Court of Appeal in *Re J* and in *Re F* and also of the House of Lords in *Re J* have established the principles on which the English and Australian courts have subsequently relied in their approach to the concept of habitual residence in the context of the Convention.

32. Thus, in *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993 at 995, Waite J concluded that the following three principles emerge from authorities such as *Re J* and *Re F*: (21/8/92)

> 1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
>
> 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.
>
> All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
>
> 3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in *Re J*, … refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in *Re F* (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.

33. The concept of "settled intention" as referred to by Lord Brandon in the passage from his speech in *Re J* which we quoted above (in paragraph 28) and also by Waite J in the third of the principles just set out, was further considered by Rattee J in *A v A (Child Abduction)* [1993] 2 FLR 225 at 235**.**

34. Rattee J suggested that when referring to "a settled intention being necessary to constitute habitual residence", Lord Brandon had meant "a settled intention to take up long-term residence in the country concerned." The relevant passage from Rattee J's judgment is as follows:

> It does seem, in my judgment, plain from the speech of Lord Brandon to which I have referred in the case of *Re J* [1990] 2 AC 562 and in particular from the passage which I had already cited at pp 578H-579A, … that before a person can become habitually resident in a country he has to have formed some settled intention or other because Lord Brandon says:
>
> > "An appreciable period of time and a settled intention will be

necessary to enable him or her to become so."

> That is to say, to become habitually resident in a new country. While his Lordship does not, in that sentence, spell out the nature of the settled intention concerned, it seems to me that he must be taken to be referring back to a sentence which appears at pp 578H … in which he says that a person may cease to be habitually resident in country A in a single day if he or she leaves it with the settled intention not to return to it but to take up long-term residence in country B instead.
>
> I consider that when, in the latter sentence, Lord Brandon refers to a settled intention being necessary to constitute habitual residence, what he meant was a settled intention to take up long-term residence in the country concerned. …

35. A somewhat different interpretation of the concept of "settled intention", which the authorities appear to equate with the concept of "settled purpose" or "purposes", is to be found in the judgment of Butler-Sloss LJ in *M v M (Abduction: England & Scotland)* [1997] 2 FLR 263. In that case (which was not concerned with the operation of the Convention but rather the question of whether proceedings concerning children should be heard in England or Scotland) the trial Judge concluded that a family who had resided in Scotland for two years with the intention "sooner rather than later… to leave to go to England" were not habitually resident in either England or Scotland or indeed in any country.

36. In holding that the trial Judge was wrong in reaching this conclusion, Butler-Sloss LJ (with whom Millett LJ and Aldous LJ agreed) said:

> In my view, in coming to that conclusion, which is partly a question of fact but also of course an element of law, the judge was wrong. He did not take into account the fact of them living there, the fact that they were settled there, albeit not necessarily for the rest of their lives, and he did not, in my judgment, take into account perhaps the most relevant passage of all in the numerous authorities with which we have been supplied on what is meant by habitual residence, that of the speech of Lord Scarman in *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309, 342 and 343. At 342 he said:
>
> > 'I agree with Lord Denning MR that in their natural and ordinary meaning the words [which in that case were "ordinarily resident"] mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short

> duration". The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes.'

At 343G Lord Scarman said:

> 'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or of long duration.'

In my respectful view those observations in relation to ordinarily resident apply equally to habitual residence on which there appears to me to be absolutely no difference in principle. Consequently applying those words to this case this couple settled in Scotland voluntarily as part of a regular order of their life for the time being for what the judge himself saw as a medium duration. This court has found periods of only a few months, even as short as one month, have been sufficient in the right circumstances to be treated as a habitual residence.

37. As will later emerge, it is unnecessary for present purposes for us to resolve such conflict as may exist between Rattee J's understanding of the content of the "settled intention" which is necessary to constitute "habitual residence" and that of Butler-Sloss LJ. We would only observe that the test propounded by Lord Scarman in *R v Barnet London Borough Council* which was relied on by Butler-Sloss LJ in *M v M* informs part of the second principle extracted by Waite J in *Re B* from earlier authorities.

38. In Australia the decisions of Lord Donaldson and Lord Brandon in *Re J* and also Rattee J in *A v A* were relied on by Treyvaud J in *State Central Authority v McCall* (1995) FLC 92-552 when his Honour made the following observations concerning the concept of habitual residence in the context of Convention cases (at 81,523):

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

> which, I believe, ought to be adopted.
>
> Habitual residence is a question of fact; there are two elements — the fact of residence, and the intention to reside habitually. …
>
> … I agree with the comment of Lord Donaldson M.R. in *C.V.S. (A Minor) (Abduction)* (1990) 2 FLR 442 at 449 that, in the ordinary case of a married couple, it would not be possible for one parent unilaterally to terminate their child's residence by removing the child from the jurisdiction in breach of the other's parental rights. See also per Lord Brandon of Oakbank at 454. This authority is also reported as *Re J. (A Minor)* (1990) 2 AC 562. See also *A. v. A. (Child Abduction)* (1993) 2 FLR 225 per Rattee J.

39. In delivering the principal judgment of the Full court in *Cooper v Casey* (1995) FLC 92-575, Nicholson CJ (with whom Kay and Graham JJ agreed) can be seen (at 81,695-696) as adopting for this country the three principles extracted from the earlier authorities by Waite J in *Re B*. (See also the decision of the Full Court in *Hanbury-Brown* (1996) FLC 92-671 at paragraphs 560-561.) Nicholson CJ can also be seen as agreeing with Butler-Sloss LJ's observation in *Re F* concerning the desirability for purposes of the Convention of finding that a child does have an habitual residence.

40. Although the relevant passage from Nicholson CJ's judgment in *Cooper v Casey* is lengthy and repeats extracts from the English authorities which we have already quoted, we see benefit in also quoting it here as it appears to be the first consideration by the Full Court of this Court of the concept of "habitual residence" in the context of the Convention and as we have said, can be seen as adopting for this country the three principles extracted from earlier English authorities by Waite J in *Re B*.

41. The relevant passage is as follows (at 81,695-696):

> I am in full agreement with [the trial Judge's] finding as to habitual residence. [Counsel for the appellant] valiantly argued that the various authorities that she cited supported the proposition that on the facts and at law his Honour should have found that the children had no habitual place of residence. In my view, however, the remarks made in those cases and the facts of this case point inexorably to the correctness of his Honour's finding. In *Re B (Minors) (Abduction) (No 2)* (1993) 1 FLR 993, Waite J, after referring to a number of authorities, summarised (at page 995) the principles relevant to the case before him as follows:

> "1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
>
> 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or of long duration.
>
> All that the law requires for a `settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
>
> 3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in *Re J*, sub nom *C v S* (above) refrained, no doubt advisedly, from giving any indication as to what an `appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in *Re F* (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country."

…

In *Re F*, *supra*, Butler-Sloss LJ, delivering the principal judgment of the Court of Appeal, pointed to conflicting evidence which could conceivably have justified a finding that the children in question had abandoned their principal place of residence of the United Kingdom and not acquired one in Australia and said, at pages 555-6:

> "The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe to be in this case, an appreciable period of time. Looking realistically at the position of A, by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly three months. Mr Setright, wearing two hats, on behalf of the mother and of the Lord Chancellor as the central authority, reminds us that it is

> important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing. Paraphrasing his argument, we should not strain to find a lack of habitual residence, where on a broad canvas, the child has settled in a particular country."
>
> As was pointed out during the course of argument in the present case, the making of a finding that a child has no habitual residence could easily operate to defeat the purpose of the Convention and leave children open to the possibility of repeated abductions by both parents. …

42. Later in 1995 in *Department of Health and Community Services v Casse* (1995) FLC 92-629 Kay J, sitting at first instance, quoted, as part of a review of relevant authority but without further comment, the passage from Nicholson CJ's judgment in *Cooper v Casey*, which we have just quoted (although as part of a longer quotation from Nicholson CJ's judgment).

43. Subsequently in *Panayotides* (1997) FLC 92-733 at 83,897 the Full Court majority (Fogarty and Baker JJ) quoted with apparent approval the following passage from the judgment of the trial Judge in that case, Jordan J (emphasis added):

> The question of habitual residence has been the subject of much judicial deliberation, and I have been referred to numerous authorities in that regard. From those authorities, the following principles emerge:
>
> (1) the expression "habitually resident" is not to be treated as a term of art with some special meaning, but rather it is to be understood according to the ordinary literal meaning of the two words used (see, *In re J (a minor)* (1990) 3 WLR 949);
>
> (2) the question of whether a person is or is not habitually resident in a specified country is a question of fact to be determined by reference to all the circumstances of the case (see, *In re J (a minor)* (supra);
>
> (3) the habitual residence of a child whose parents reside together is the habitual residence of those parents (see, *Re B (minor)* (1993) 1 FLR 993);
>
> (4) it is not possible for one parent to unilaterally determine a child's habitual residence by removing that child (see, *State Central Authority v McCall* (1995) FLC 92-552);
>
> **(5) habitual residence refers to the parents' habitual abode in a country:**

> **'Which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or long duration.'**
>
> (See, *re B (minor)* (supra) p.995).
>
> I expressly adopt the aforementioned observations and those of Kay J in the *Department of Health and Community Services v Casse* (1995) FLC 92-629, wherein his Honour said:
>
> > **'All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.'**
>
> I do not accept an interpretation of the proposition advanced in *In re J* [supra], wherein it might be argued that the reference in that decision to "an appreciable time" was intended to be construed as meaning a long time. In my view, once an intention to adopt an habitual residence has been reached and acted upon in a decisive way so as to provide a degree of certainty and continuity, then it may be open to a Court to find that habitual residence has been changed from that point.

44. It is important, we think, to observe that this emphasized passage is virtually a direct quote of the second of the three principles which Waite J in *Re B* extracted from the English authorities and which was approved and adopted for Australia by Nicholson CJ (with whom the other members of the Full Court concurred) in *Cooper v Casey*.

Conclusion in relation to the present case

45. In the present case the trial judge clearly had regard and endeavoured to apply both the second and third principles enunciated by Waite J in *Re B* and adopted by Nicholson CJ in *Cooper v Casey* (albeit in reverse order, and also sourcing the second of the principles to the Full Court majority judgment in *Panayotides)* when he said in paragraphs 37 and 38 of his judgment:

> 37. I have regard to the authorities referred to by counsel for the Central Authority, *State Central Authority v McCall* 1995 FLC 92-552; *Panayotides v Panayotides* 1997 FLC 92-733 and in particular the statements in *Re B (Minors: Abduction) (No.2)* 1993 1 Fam Law R 993:
>
> > 'Although habitual residence can be lost in a single day, for example

> upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J refrained, no doubt advisedly, from giving an indication as to what an "appreciable period" would be. Logic would suggest that provided that the purpose was settled, the period of habitation need not be long… (at p 995)'

38. And, in *Panayotides*:

> (5) Habitual residence refers to the parents' habitual abode in a country: which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or long duration.
>
> I expressly adopt the aforementioned observations and those of Kay J in the *Department of Health and Community Service v Casse* (1995) FLC 92-629, wherein his Honour said:
>
> > 'All that the law requires for a "settled purpose" is that the parents shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.' (at p 83,897)

46. Apparently in light of those authorities, his Honour then proceeded to conclude:

> 39. In my view, the evidence supports the finding that within a few weeks of arrival and taking up residence in the father's house (irrespective of what sleeping arrangements were put in place) at about the time application was made for State health insurance, the mother was residing with the father for the settled purpose of deciding whether she would persevere with that arrangement in the long term. Having regard to the presence of both parents in the country (there being no doubt about the father's habitual residence) [the child] acquired the habitual residence of his parents.

47. It is clear from this last paragraph that in order to determine the habitual residence of the young child in this case, his Honour, correctly, looked to the habitual residence of the two parents with whom the child had been living in a shared residence arrangement from mid-July 2004 to two days before his departure from the United States on 4 October 2004. The fact that his parents were unmarried would seem on the material before us to have been an irrelevant consideration given that the father apparently had rights of custody under American law.

48. However, it will be recalled that the second of the principles enunciated by Waite J and adopted by Nicholson CJ refers to "the parents' shared intentions". We regard the word "shared" as having the same meaning as "same" or "common". That is, that the parties in question had the same or a common intention about their future living arrangements, even though – life being what it is – they may not have had a specific discussion and/or reached a clear agreement regarding their future living arrangements.

49. There is apparently no question that the father in this case intended the United States to be his habitual or long-term residence. It is the mother's intention that is the significant consideration in this case.

50. It will be recalled (see paragraph 23 above) that his Honour expressly stated that he did not make the finding that "the mother had the intention to live permanently" in the United States. Rather, his Honour variously found that the mother had the intention of taking up residence with the father to see how it "worked out" and that she was residing with the father for the settled purpose of deciding whether she would persevere with that arrangement in the long term. Nevertheless, his Honour concluded that that settled purpose or intention on the part of the mother was sufficient for her to have become habitually resident in the United States with the father and thus with the child.

51. With the greatest respect to his Honour, we cannot see how it can be said that a person who takes up residence in a particular country to see how a relationship with a resident of that country will "work out" could be said to have become habitually resident in that country on the basis:

    - either, if Rattee J's interpretation in *A v A* of Lord Brandon's judgment in *Re J* is accepted, that that person has a "settled intention to take up long-term residence" in that country (indeed Warnick J expressly did not make the finding that the mother had the intention to live permanently in the United States); or

    - alternatively, if Lord Scarman's formulation in *R v Barnet London Borough Council* as adopted by Bultler-Sloss LJ in *M & M (Abduction; England and Scotland)* is

accepted, that that person has adopted an abode in that country "for settled purposes as part of the regular order of his life for the time being, whether of short or long duration".

52. In our view on either formulation it would be almost a contradiction in terms, and would clearly be wrong, to conclude that a person who has taken up residence in a particular country to see how a relationship with a resident of the country would "work out" either had a settled intention to take up long term residence in that country (which in any event Warnick J found the mother did not have) or had adopted an abode in that country for settled purposes as part of the regular order of his or her life, and was accordingly "habitually resident" in that country.

53. The result of this conclusion is, of course, that there could be no shared intention on the part of the parents of the child in question that the United States was to be their habitual residence. Thus the child cannot be held to have been habitually resident in that country immediately prior to his departure from that country, and thus could not be the subject of an order for return under reg 16(1).

54. We appreciate that our decision may well be said to deny the child the benefit of the Convention – a result which Butler-Sloss LJ in *Re F* and Nicholson CJ in *Cooper v Casey* suggested that courts should try to avoid. However we are of the view that the interests of children generally could well be adversely affected if the courts too readily find that a parent of a child who attempts a reconciliation in a foreign country with the other parent in order to try to create for the child a family consisting of both its parents, has, together with the child, become "habitually resident" in that foreign country.

55. Accordingly we propose to allow the appeal, discharge his Honour's orders and dismiss the application of the Central Authority.

56. In light of the submissions made at the conclusion of the hearing of the appeal, we understand that neither party wished to make any application in respect of the costs of the appeal regardless of the outcome of the appeal.

HOLDEN J:

57. I have had the advantage of reading the draft reasons for judgment of Finn and May JJ. I agree that his Honour's findings of fact as set out in paragraph 23 of the judgment of the majority were open to him on the evidence before him. I also agree that the real question raised by this appeal is whether those findings regarding the mother's settled intention of residing with the father "to see how things worked out" could support his ultimate conclusion that the child in question was habitually resident in the United States immediately prior to his removal to Australia on 14 October 2004.

58. The critical passages of his Honour's judgment are as follows:

> 31. Therefore, while I do not find that the mother had the intention to live permanently in the USA with the father, I do find that she had the intention of taking up residence with the father to see how that "worked out".
>
> 32. I see no reason why such an intention cannot be or at least become a settled intention. In my view, when, with that intention, the mother took up residence with the father and remained in that residence for at least two months she, the father and the child became habitually resident … in the USA. I accept that, within a relatively short period of time after arrival, the mother may have become uncertain and concerned about whether the relationship was working out or would work out, but again this does not mean that she was not habitually resident with the child with the father at that time.
>
> …
>
> 39. In my view, the evidence supports the finding that within a few weeks of arrival and taking up residence in the father's house (irrespective of what sleeping arrangements were put in place) at about the time application was made for State health insurance, the mother was residing with the father for the settled purpose of deciding whether she would persevere with that arrangement in the long term. Having regard to the presence of both parents in the country (there being no doubt about the father's habitual residence) [the child] acquired the habitual residence of his parents.

59. The majority, in their reasons for judgment conclude:

> 51. With the greatest respect to his Honour, we cannot see how it can be said

> that a person who takes up residence in a particular country to see how a relationship with a resident of that country will "work out" could be said to have become habitually resident in that country on the basis:
>
> - either, if Rattee J's interpretation in *A v A* of Lord Brandon's judgment in *Re J* is accepted, that that person has a "settled intention to take up long-term residence" in that country (indeed Warnick J expressly did not make the finding that the mother had the intention to live permanently in the United States); or
> - alternatively, if Lord Scarman's formulation in *R v Barnet London Borough Council* as adopted by Bultler-Sloss LJ in *M & M* (Abduction; England and Scotland) is accepted, that that person has adopted an abode in that country "for settled purposes as part of the regular order of his life for the time being, whether of short or long duration".

60. In my view, the test to be applied is not whether the parties have a settled intention to take up long-term residence.

61. In *Re B (Minors) (Abduction) (No. 2)* 1993 1 FLR 993 at 995 Waite J concluded that the following principle applied:

> Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, <u>whether of short or long duration.</u> (underlining added).

62. In his written submissions, counsel for the appellant concedes that:

> … [A] person can, however, be habitually resident in a country, although he or she is uncertain whether to remain there in the long-term, and even though he or she may intend to move to another country at some time in the future.

63. Authority for that proposition can be found in the judgment of Butler-Sloss LJ in *M v M (Abduction: England & Scotland)* [1997] 2 Fam LR (Eng) 263 at pp 266-267.

64. The trial Judge in that case had concluded:

> It seems to me, if one is looking at the term "habitual residence" in its proper sense that it cannot truly be said that this family were habitually resident in Scotland on 10 June 1996. They had resided there for 2 years,

but they had only resided there for 2 years and it was their intention, sooner rather than later, I think, to leave and go to England. In my view it is not accurate to say that they were habitually resident in Scotland, neither is it accurate to say that they were habitually resident in England. They were, although I do not suppose they stopped to consider it – because only a lawyer would and then only under very special circumstances – at the material time not habitually resident anywhere. They had not formed a place of habitual residence. That is, in my judgment, the correct analysis of the position as at that date.

65. In referring to that conclusion, Butler-Sloss LJ said as follows:

> In my view, in coming to that conclusion, which is partly a question of fact but also of course an element of law, the judge was wrong. He did not take into account the fact of them living there, the fact that they were settled there, albeit not necessarily for the rest of their lives, and he did not, in my judgment, take into account perhaps the most relevant passage of all in the numerous authorities with which we have been supplied on what is meant by habitual residence, that of the speech of Lord Scarman in *R v Barnet London Borough Counsel ex parte Shah* [1983] 2 AC 309, 342 and 343. At 342 he said:
>
> > 'I agree with Lord Denning MR that in their natural and ordinary meaning the words [which in that case were "ordinarily resident"] mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration". The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes.'
>
> At 343G Lord Scarman said:
>
> > 'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or of long duration.'
>
> In my respectful view those observations in relation to ordinarily resident apply equally to habitual residence on which there appears to me to be absolutely no difference in principle. Consequently applying those words to this case this couple settled in Scotland voluntarily as part of a regular order of their life for the time being for what the judge himself saw as a medium duration. This court has found periods of only a few months,

> even as short as one month, have been sufficient in the right circumstances to be treated as a habitual residence.

66. In my opinion, whether or not the mother was certain whether to remain in the United States in the long-term and the length of time that she had, in fact, been living in the United States, are largely irrelevant considerations. In my view, it was open to his Honour, based on findings made by him and all of which were open to him, to conclude that the mother was "habitually resident" with the father in the United States for the settled purpose of deciding whether she would persevere with that arrangement in the long-term. That being the case, I would dismiss the appeal.

ORDERS OF THE COURT:

67. The orders of the Court are:

(1) That the appeal be allowed.

(2) That the orders of the Honourable Justice Warnick dated 7 October 2005 be discharged.

(3) That the application of the Department of Child Safety filed 21 June 2005 be dismissed.