---

http://www.incadat.com/ ref.: HC/E/NZ 29
[21/09/1993; Family Court at Napier (New Zealand); First Instance]
Re J.E. (Child Abduction) [1993] 11 FRNZ 84

THE FAMILY COURT AT NAPIER

FP 041 153 93

IN THE MATTER of the Guardianship Amendment Act 1991

AND

IN THE MATTER of J.E.

(Child Abduction)

Hearing: 20, 21 September 1993

Judgment: 21 September 1993

(ORAL) JUDGMENT OF JUDGE INGLIS Q C

This is an application, properly made through the proper channels in terms of the Guardianship Amendment Act 1991, for an order for the return to the State of California of J.E. (born 9 December 1990), a child who in terms of the Act has been abducted to New Zealand. The 1991 statute was enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction. The objective of that international Convention was to combat what had for many years been seen as the evil of children being taken from their normal home and transported across international borders in an attempt to defeat the other parent's guardianship rights or to evade the orders of the Courts of the country of the child's normal residence, and in the expectation that the Courts of the country to which the child had been taken would allow the abducting parent to profit from the abduction. In the past it often happened that in the extended period of time occupied in the legal process of bringing a custody case to a conclusion in the country to which the child had been abducted, the child had settled there, so that it became possible for the Court, applying the local statutory rule that the welfare of the child was the first and paramount consideration, to hold that the welfare of the child prevented the child's return to his or her country of origin.

In simple terms the 1991 Act and the Hague Convention require that, where a child who is present in New Zealand has been removed from the contracting state of his habitual residence and retained in New Zealand in breach of the exercised custody rights of the other parent, the Court must on application made for the purpose order the child's return: s 12(1), (2). The section speaks of the child's 'removal', but 'removal' is defined as wrongful removal or retention in terms of Article 3 of the Convention. However s 13 enables the Court to decline to order the child's return if the party opposing the child's return proves, inter alia --

'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.'

That is the main ground relied upon here for opposing the child's return. Although the mother's opposition to the child's return was abandoned by the end of the hearing the abandonment was hedged with conditions and in order to preserve and protect the integrity of the Hague Convention and the 1991 Act it is right that I should record the Court's full reasons for arriving at the view that in the circumstances of this case the child's return to California had become inevitable.

It is provided by s 14 that applications for the return of a child must be dealt with expeditiously. It should be noted that the application was forwarded to this Court by the Central Authority in New Zealand on 8 September 1993 and that the full hearing of the application started 12 days later.

The factual background can be stated very briefly. The father is a United States citizen who is self-employed and who lives in Turlock, California, near Modesto which is east of San Francisco and Sacramento. The mother is a New Zealand citizen, a registered nurse, who met the father while working in the United States. When it was discovered that she had become pregnant with J., they married on 7 July 1990. The following year, exactly a week after their first wedding anniversary, they separated, and in February of the following year the mother commenced proceedings for divorce in the local registry of the Superior Court of California. In terms of the practice of that Court the mother's proceedings were referred first for mediation by a Court mediator. That process resulted in an order made by Judge Girolami on 8 April 1992 in which it was ordered that the parents should have joint legal custody and shared physical custody of J., the mother being designated as J.s' primary caregiver. The order went into considerable detail about what we in New Zealand would describe as guardianship arrangements.

The following year the mother wished to return to New Zealand for her brother's wedding. As she was obliged to do by the terms of the earlier order she applied to the Superior Court for an order permitting her to take J. out of the United States so that he could accompany her. On 20 April 1993 Judge Lacy ordered that --

'The petitioner' -- that is, the mother 'may take the minor child to New Zealand for vacation, to return to California on May 16, 1993. Respondent's Counsel shall prepare the formal order which shall include language pursuant to the Hague Convention. Respondent shall provide petitioner with a notarized letter for immigration purposes, giving his permission for her to take the child to New Zealand for vacation '

The mother left for New Zealand with J. on 2 May 1993. Five days later the US Immigration Service granted her residential status, so clarifying her status for immigration purposes on her expected return. She did not return with J. on 16 May l993, but on 8 June 1993 her solicitors in Napier wrote to the father saying in effect that she did not intend to return but instead proposed to file proceedings for custody in this Court, which she did on the same day. The indication that she did not intend to return was more delicately phrased, but the evidence satisfies me beyond doubt that she had reached a firm attention not to return. Her affidavit in those proceedings has been treated as her evidence in the present proceedings.

The mother's custody application came before His Honour Judge Ellis in this Court on 15 June 1993. Anticipating that issues under the Hague Convention were likely to arise, His Honour ordered that the child not be removed from this Court's jurisdiction and that he

remain living in this area. His Honour gave directions for service of the mother's application and other directions.

In the meantime the father, in Modesto, California, went back to the Superior Court and on 23 June 1993 Judge Lacy made a further order determining that the mother was in violation of his earlier order. As a result the Child Abduction Unit attached to the District Attorney's office became involved on the father's behalf and is the applicant in the proceedings now before this Court (see s 12(1)). As its name suggests, the Unit was set up to investigate and handle both international and interstate child abductions. As a result of the Unit's intervention Judge Lacy further ordered the Unit to ensure that J. was returned to California so as to be available to the Superior Court on 15 October 1993. That is the date set for further mediation. In evidence before this Court it was explained that if mediation, as a first step, fails, the Superior Court itself will undertake a hearing to determine J.' future, and that such a hearing is likely to take place within a matter of weeks of the mediation session. By the law of the State of California, as in New Zealand, in a domestic custody dispute the welfare of the child is treated as the first and paramount consideration.

In the present proceedings in this Court there can really be no dispute that the mother intends, if she can, to retain J. in New Zealand in violation of the orders of the Superior Court of California and in violation of the father's guardianship rights and responsibilities which he wished to exercise in regard to his only child. In her affidavit filed in her custody proceedings in this Court she gives a number of reasons for her decision to retain J. in New Zealand, including dissatisfaction with the father's conscientiousness in caring for the child and dissatisfaction with aspects of his personal lifestyle. Notwithstanding those concerns she proposed in her affidavit to spend three weeks in each year in the United States for the purpose of enabling the father to exercise visitation rights on those occasions, though in her oral evidence she suggested that those visitation rights were likely to be of a limited kind. Of course this Court is not concerned to determine in general terms whether it is in the best welfare and interests of J. to live in New Zealand or to live in California, or whether it is in his best welfare and interests that his mother or father should be his primary caregiver: see W. v W. [1993] NZFLR 273, 277. In terms of the l991 Act the only issue for this Court is whether grounds have been made out to justify the Court in declining to order J.s' return to California. The starting point is that he must go back unless the Court can be satisfied that a different result is required by any of the elements of s 13.

I have already stated the provisions of s 13(1)(c) which are the principal grounds relied upon on behalf of the mother. In the present case subss (2) and (3) have no application as to the remaining provisions of subs (1), para (a) does not apply; in terms of para (b)(i) the father was exercising his custody rights and wishes to continue to exercise them; in terms of para (b)(ii), while he consented to the child being taken out of the United States for a short vacation visit to New Zealand he certainly did not consent to the child remaining here indefinitely. While para (b)(ii) speaks of the child's removal, I draw attention again to the definition of 'removal' which includes retention. The father has not consented to or acquiesced in the child's retention in New Zealand. In view of J.s' age it cannot be determined in terms of para (d) whether or not he 'objects' to being returned. The provisions of para (e) do not apply.

That leaves, as the only remaining issues, whether it has been proved in terms of para (c) that there is a grave risk that the child's return to California would expose J. to physical or psychological harm or would otherwise place him in an intolerable situation. The risk of these things happening must, as the statute says, be 'grave'. As His Honour Judge Boshier has illustrated in D. v D. [1993] NZFLR 548 with extensive reference to overseas case law of high authority, the burden cast on an abducting parent by s 13(1)(c) is a heavy onus indeed.

In a situation where the Hague Convention is relevant some psychological harm to the child is unavoidable, whether or not the child is returned, and the words 'or otherwise place the child in an intolerable position' give emphasis to the gravity of the degree of risk of harm that is required.

The father's evidence comes before the Court by notarised deposition but he has remained in Modesto and there has been no opportunity to cross-examine him. The mother has given quite extensive oral evidence about her fears for J.s' psychological state if he has to be sent back. One of the two representatives of the Child Abduction Unit who came to New Zealand for the hearing and who gave evidence had personally investigated the father's situation, both on the ground as it were and by consulting police and other records. Both representatives of the Unit had long expierence as peace officers (or, as we would say, police officers). In their evidence they demonstrated a child-centered approach, absolute fairness and impartiality, and a high degree of professionalism. Of course their duty is to uphold and enforce the orders of the Superior Court of California and that is why they are here, but they were able to give valuable and up to the minute evidence about local conditions in Modesto and its area and the facilities that are and can be made available to ensure J.s' safety and welfare if he is returned.

The investigation of the father, which I am satisfied was thorough and meticulous, discloses no basis on which it can be said that he is undesirable or disqualified as a parent. The investigator paid an unannounced home visit and produced photographs of a well-maintained and comfortable home with a bedroom suitably set up for the needs and entertainment of a small child. The investigator's evidence was that in talking to the father then and at other times he had noticed nothing that was inappropriate in the father's attitude to either J. or the mother, and in particular noticed nothing that would indicate that the father felt any particular degree of malice or vindictiveness towards the mother. I am sure that this investigator, from long experience, was well able to pick up and identify the messages that are sometimes more clearly conveyed by body language than by words. That investigator's evidence, carefully and thoughtfully presented, satisfied me that there is no grave risk of physical or psychological harm to J. in the company of his father. The risk of psychological harm comes more from the situation of discord between the two parents.

I have carefully considered the mother's evidence which suggests that the father may sometimes be careless over matters of child care, may not always be fully aware of the needs of a child of this age, and may not always be absolutely truthful. I deliberately refrain from any finding on any of these matters because the father is not here to defend himself and what has been said against him goes to welfare issues generally rather than to the particular issue which the Court is obliged by the 1991 Act to address. I accept that there are features which may -- I emphasise 'may' -- make the situation for J. and the mother in Modesto less satisfactory for them than their present situation in New Zealand; but again that goes to welfare issues generally rather than the issue to which the Court is confined. However I am satisfied that the mother's view of the total situation is coloured to a considerable if not overwhelming degree by how it affects her personally, and I am not sure that she is sufficiently detached to understand how it might affect J. She has told the Court that it would be intolerable for her to return to Modesto and she implied that because of the impact on her it would make it intolerable for J. as well. One must have a great deal of sympathy for that viewpoint, but it overlooks the fact that J. has rights which are independent of both his mother and his father, and it cannot be assumed that J.s' welfare and happiness necessarily march in tandem with how the mother sees her own welfare and happiness.

The mother is a very determined and strong-minded person. For reasons which are perfectly understandable she has substantially closed her mind to the benefits which J. is likely to gain

from his own father's upbringing and influence. In some of her evidence she tended to be evasive and that evasiveness on some crucial issues satisfies me that at a relatively early stage following her return with J. to New Zealand she determined to rebuild her own life here, assuming that it would be in J.s' best interests to be cut off from his father's company, and led herself to believe that she was sufficiently remote from California to violate with impunity the Superior Court's orders, to violate the father's guardianship rights, and -- it has to be said -- to violate J.s' own right to know and have the company and companionship of his father. I am satisfied that the mother's evidence about the risks to J. if he were returned to California was largely rationalisation and an attempt to justify her own decision to remain in New Zealand.

For those reasons I am satisfied that there is nothing in s 13 to impede J.s' return to California where the matters I have mentioned will no doubt be considered de novo by the Superior Court, which is the appropriate tribunal to decide James' future in a definitive way. It follows, in terms of the 1991 Act, that this Court has no option but to order J.s' return to California forthwith.

Recognizing by the end of the hearing that such a determination had become inevitable, the parties met during the lunch adjournment on the second day to discuss what measures might be appropriate on the making of such an order. I was informed that it had been agreed (1) That J. should return to California in the company of his mother; (2) That his return to California would not be required before 12 October 1993 (that is, 12 October according to the United States calendar); (3) That the air ticket for J.s' return presently held by the Child Abduction Unit be made available to the mother; (4) That there would be no objection to the mother staying with J. at Pleasanton, California (a town not far from Modesto but outside the Stanislaus County limits); (5) That the Child Abduction Unit would use its best endeavours to set up a mediation conference by telephone link involving the father, the mother, the Modesto Court mediator (Lynne du Bois) and counsel; (6) If the matter were not resolved by mediation (either by teleconference or in Modesto) the Child Abduction Unit would use its best endeavours to have the parties' dispute set down urgently for a long cause hearing in the Superior Court; (7) That Mr Harter, the supervisor of the Child Abduction Unit, continue to monitor the situation and be ready to assist in any way he can, (8) That the Child Abduction Unit would not commence proceedings against the mother in the Superior Court of California for contempt, (9) That the Child Abduction Unit will immediately activate such enforcement proceedings for child support as may be appropriate; (10) That there be a direction that the New Zealand Police assist the Child Abduction Unit in any appropriate way.

These matters of agreement are noted, and it is necessary to add the following observations of my own. First, on my reading of the 1991 Act the Court has no discretion to make its order for the return of J. conditional on compliance with any of the above heads of agreement. Second, it is of concern that an attempt to mediate by teleconference may place unfair pressure on the father to waive his right to insist on James' return to California. I wish to record that I am by no means satisfied that it is in J.s' best welfare and interests to remain in New Zealand where the siege mentality which these proceedings has produced is more likely than not to be encouraged. As the case stands -- though I readily concede that the final decision must be made by the Superior Court in Modesto -- I consider it likely that J. will benefit if he has real contact with both his parents. One must bear in mind a child's sense of time, and there is nothing in the case that persuades me that what would be really no more than token visitation at long spaced out intervals will be of true benefit to the child. My own view is that it is better that the law should take its course and that J.s' future should be settled in Modesto, with both parties present.

Third, I have doubts about any suggestion that J.s' return should be linked to recovery of child support or arrears of child support. Since not long after her arrival in New Zealand the mother applied for and was granted a domestic purposes benefit and to that extent has not required child support from the father. Her action in abducting the child in response to what were essentially her own needs may be highly relevant to any issue of recovery of child support to be considered by the Superior Court of California.

Fourth, and finally, further delay may lead to a situation which the Hague Convention and the 1991 Act were clearly designed to avoid, that is, that there might remain some hope that the longer negotiations last, the more the child will become settled, and the harder it will be to move him. Whatever result outside the confines of the 1991 Act I might myself have preferred is beside the point. The Court is required to apply and enforce the Act by making an order for the return of J. to California forthwith. Any private arrangements which the Child Abduction Unit may be prepared to make with the mother must be their responsibility. I am not prepared, nor is there power, to impose conditions.

For the reasons given the mother's custody application filed in this Court will be dismissed, so that the orders of the Superior Court of California are fully recognised and remain effective until varied by that Court There will be an order that J. be returned to California and to the jurisdiction of the Superior Court forthwith. No order for costs is sought by the Child Abduction Unit, whose assistance in these proceedings is gratefully acknowledged by the Court, and no order for costs is made. The question whether there should be a contribution towards the costs of counsel appointed to represent J. is reserved for further consideration.

A copy of this judgment is to be furnished as a matter of courtesy to the Superior Court of California at Modesto.

Counsel: Penny Clothier for the Child Abduction Unit, District Attorney's Office, Modesto, California, USA

Bryan King for mother

Garth Thomton, appointed to represent child

Solicitors:

Loughnans, Palmerston North, for Child Abduction Unit, Modesto Cal.

Langley Twigg, Napier, for mother

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