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[07/07/1995; District Court of New Zealand at Henderson; First Instance]
Secretary for Justice v. P., ex parte C. [1995] NZFLR 827

The applicant is Australian, the respondent a New Zealander. All three children were born in Australia.

The family came to New Zealand in June 1991 but by this time the marriage was in difficulty. The respondent and the children remained in New Zealand while the applicant returned to Australia.

On 12 December 1991, the respondent obtained ex parte an interim custody order out of the North Shore Family Court.

Equally, on 2 December 1991, the applicant obtained ex parte a custody order out of the Family Court of Australia at Melbourne.

The applicant returned to New Zealand in March 1992. The children stayed in the custody of their mother and the applicant had access. A mediation conference occurred on 2 February 1993 and it seems clear that the applicant was content to leave J. and A. in the prime care of their mother but felt that C. should be in his care. The Court initiated an investigation as to welfare but in April the applicant's solicitors wrote advising that Mr C. would consent to custody in favour of Mrs C. A hearing occurred on 18 August 1993 at which only the respondent and her counsel attended. The Court determined that a final custody order should be made in favour of the respondent.

The applicant was well aware of these orders and at a joint dissolution of marriage hearing which occurred on 5 October 1993 the Court was satisfied that appropriate care orders were in place for the children. Shortly after this the applicant returned to Australia. He had been involved in a quite serious car accident and as well as suffering some injury, it seemed that he was wanted for questioning by the police. After his departure the applicant did not return to New Zealand but maintained some contact with the children mainly by telephone.

By early 1994 the respondent was concerned that the children, who had a good relationship with their father, might not be given the opportunity to explore that given all of the circumstances. She accordingly decided to move to Australia and try life out there, afresh.

On 25 April the respondent and three children left Auckland having terminated the tenancy of their home having for all intents and purposes cut immediate ties, and visited the applicant in Melbourne. The meeting between the children and their father was a success. However the respondent made it clear that she wished some space between herself and the applicant and she accordingly moved to Brisbane.

The move to Australia was not the success that the respondent would have liked. The children found it difficult to settle at school and missed their New Zealand friends badly. The respondent found it difficult to "put down roots". By June, Miss Penney had turned her thoughts to returning to New Zealand.

During this time, the applicant maintained fortnightly telephone contact with the children but as a result of an early morning drunken phone call, the respondent confined telephone access. No physical visits occurred at all between the applicant and the children until November 1994.

Mr C. had learnt that the respondent had begun to think seriously of relocating to New Zealand. He accordingly travelled up by bus from Melbourne to Brisbane on 16 November 1994. Discussions occurred between the applicant and respondent and as those are of some importance, I will need to refer to them later. On 24 November 1994 the respondent and the children left Australia abruptly. The applicant did not know of their departure.

The applicant initiated action to have the children returned to Australia on about 4 December 1994. Since that time, Mr C. has remained in Australia and Miss P. and the children have remained in New Zealand.

Before turning to the issues, I should record that the delay in having this matter determined seems unacceptable.

The file indicates that the Australian Attorney-General's Department conveyed its request to the New Zealand Central Authority on or about 16 December 1994. Miss Casey was not briefed by the Authority until 3 March 1995 and she then moved swiftly to have the application filed on 7 March.

The Court was able to provide a fixture for 27 April but as a result of strong submissions by Mr Keys that a psychological report ought to be obtained, the fixture had to be vacated so that the report could be obtained. The two months that have elapsed since then is regrettable. Overall, it is hard to see that s 10(1)(d) and s 14 have been complied with.

(3) The issues

As the respondent's position has changed throughout this case, it is proper to frame the issues as they were confirmed to me by counsel in closing submissions.

> **(i) It is agreed that the children were in Australia prior to removal and that they were removed by the respondent. The respondent does not accept, pursuant to s 12(1)(d) of the Guardianship Amendment Act 1991 ("the Act") that the children were "habitually resident immediately before the removal".**
>
> **(ii) The respondent concedes that the applicant had "rights of custody" and that he was exercising those in accordance with s 12(1)(b) and (c).**
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> **(iii) The respondent raises a first defence pursuant to s 13(1)(b)(2) by alleging that the applicant consented to the removal of the children. She had previously argued for acquiescence but abandoned that defence.**
>
> **(iv) The respondent alleges that pursuant to s 13(1)(d) the children, particularly J. and A., object to being returned and their views ought to be taken into account.**
>
> **(v) Finally, the respondent contends that if J. and A. do object and if the Court in taking account of their views orders that they not be**

returned, it would cause grave risk of psychological harm to C. if the Court does order her return and she is separated from her brothers.

(4) Evidence

Given delays which have occurred in this case, it seemed to me to be important to press on with the hearing.

However on the morning of the first day, Miss Casey advised that she did not have Mr C. present and she either sought an adjournment to enable him to attend or asked me to carry on in his absence. She said that such a course was permissible and that she still wished to cross-examine the respondent notwithstanding that Mr C. was not available to be cross-examined on his affidavits.

Mr Keys expressed unhappiness with this approach and made it very clear that he wished to have Mr C. present for cross-examination.

I elected to hear opening submissions from Miss Casey and Mr Keys and having done so I ruled that Mr C. need not be present for cross-examination and that Miss P. should be cross-examined.

As Miss Casey pointed out in her submissions as to procedure, the giving of oral evidence in Hague Convention cases appears to have been discouraged in England (see Re E (a minor) (abduction) (1989) 1 FLR 135 and Re F (a minor) (child abduction) [1992] 1 FLR 548). In M. v M. [1995] NZFLR 225 at 228, Judge von Dadelszen in ruling on an issue as to oral evidence said:

The practice as to the giving of viva voce evidence appears to be inconsistent in New Zealand. I heard oral evidence in P. v G. [1994] NZFLR 854 although it must be said that the point was not raised. It appears that the Court heard evidence in the other three cases cited earlier in this judgment. However I note that His Honour Judge Pethig did not allow the giving of oral evidence in P v P (Family Court, Nelson 260/93, 23 September 1993).

In M. v C. [1994] NZFLR 885 at 889, Judge Inglis referred to having been disadvantaged by not having heard oral evidence from the father. He had heard evidence from the mother.

For my part, I would not want to restrict the right to have deponents of affidavits cross-examined. Certainly in M. v D. (1994) 12 FRNZ 231, I felt that cross-examination was crucial in establishing credibility on some most important matters. It transpired that some of the documentary evidence was quite misleading.

In this case, I was able to assess that some of the evidence given by Mr C. in his affidavits was plainly wrong because it ran contrary to other known facts. I accordingly indicated to Mr Keys that I would treat Mr C.'s affidavit evidence with caution. I indicated however that I saw nothing procedurally unfair in requiring the respondent to be cross-examined.

Cross-examination of the respondent proved helpful. I found her a sincere and impressive person whose evidence I could accept without difficulty. I have no reason to believe that her version of events is other than her best recollection.

The Court had obtained a psychological report from Elizabeth Bailey, a registered psychologist, pursuant to s 29A of the Guardianship Act. Mrs Bailey was cross-examined on her report. She felt that J. had a strong preference not to return to Australia which verged on an objection to doing so. She found him mature and reasoned. She said that A. had a

clear preference and that it was similar to J.'s. Perhaps not surprisingly, she found C. to be much less exact and certainly much more immature.

(5) Decision

(i) Habitual residence:

This issue has not been easy to determine.

The events of 1991 to 1993 are important in considering this aspect.

Notwithstanding that the applicant obtained a custody order in December 1991 in Australia, it is crystal clear that from separation until arrival of the children back in Australia in April 1994, the children's home was New Zealand. The applicant damages his credibility badly when he consistently flourishes the December 1991 custody order but fails to record or acknowledge that that order had been superseded by New Zealand Family Court orders. He knew that that was so and was content to rest with it. Even when the respondent returned to Australia in April 1994, he did not contend that his custody order was paramount nor did he contend that the children were in fact returning "home".

Had the respondent not returned to Australia in April 1994, the children's habitual place of residence would, undoubtedly, have been New Zealand. The question is whether her return constituted a change of habitual residence. The respondent contends, probably with the benefit of hindsight, that her return to Australia was ever only a trial and that she had decided fairly early on that as the venture had not worked, she would return "home" to New Zealand.

There are a number of affidavits filed on behalf of the applicant suggesting the contrary and that the respondent had conveyed to various people that she intended to remain living in Brisbane. Certainly, in June, she had obtained a six-monthly tenancy on a home; her partner had relocated to Australia to be with her; she had terminated benefits and bank accounts in New Zealand, and was trying to establish roots. In M. v M. [1994] NZFLR 93 at 94 Judge Pethig had no difficulty in finding that in circumstances not dissimilar to those in this case, a child who had gone from New Zealand to Australia from August 1992 until April 1993 had been habitually resident there. He said:

> **Habitual seems to me to be a qualification of residence immediately before the removal and I think that as the matter of fact that was a continuous period of residence and means that the child was habitually resident in Australia immediately before the child was removed.**

The leading authorities as to "habitual residence" are In re J [1990] 3 WLR 492 (HL) and Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993.

Hague Convention cases decided in New Zealand thus far have clearly opted for a lower threshold test as to what "habitual residence" requires, in contrast perhaps to a more rigorous test applicable to cases where domicile is in issue. In this respect there is a useful review of the authorities by Judge Twaddle in I. v J. (Family Court, Hamilton 476/94, 19 September 1994). Much is made in this case by Mr Keys of the respondent's actual state of mind and intention. I think that to place undue emphasis on a subjective test such as this has inherent dangers. While doubtless there is some room for an inquiry into intention, I think it preferable for most emphasis in an inquiry to be based on an objective approach. To suggest otherwise would be to invite evidence given with the benefit of hindsight.

This is a very finely balanced case because I believe the respondent when she says that after a quite short period she had begun to have doubts about remaining in Australia. But the fact is:

(a) Tenancy of the house in New Zealand was terminated and belongings were moved to Australia.

(b) The children were removed from schools completely.

(c) No bank accounts or property were retained in New Zealand and a benefit was applied for and granted in Australia.

(d) A tenancy of some duration was entered into in Australia.

(e) The respondent's partner joined her.

(f) Although apparently in June the respondent began to wish for a return to New Zealand, she did nothing to procure that and indeed only left peremptorily because of intervening circumstances.

In my view, these factors point to an habitual place of residence in Australia at the material time which is in the appreciable period of time leading up to her departure.

(ii) Applicant's consent:

Initially, Mr Keys had made a strong submission that events leading up to April 1994 were strongly reflective of the applicant's acquiescence to the children living in New Zealand. Mr Keys was forced to concede however that this could not afford a defence in terms of s 13, as acquiescence must be subsequent to the act of removal. He acknowledged that there was no acquiescence post 24 November 1994. Instead, he amended his defence to one of consent on the part of the applicant.

This defence relies on an exchange between the applicant and respondent sometime between 16 and 24 November. Both were present in Brisbane at the time. According to the respondent, when she told the applicant that it was her intention to return to New Zealand he said that he wanted C. but that she could keep the boys as he could not afford to look after all three. The inference was that he consented to her removal of the two boys to New Zealand.

There is corroboration for her evidence that the applicant's prime interest has been C. The mediation conference of 2 February 1993 is an example.

But it is straining the ordinary meaning of consent to say that there was such a consent to removal in this case. At most it was conditional. The condition was never fulfilled as agreement was never reached. While I think it likely that in the discussion that did occur between applicant and respondent, there may well have been an indication from the applicant that he would not oppose the respondent's return to New Zealand with the boys in some circumstances, I am not prepared to go that crucial further step and hold that there was a consent upon which I can rely.

It seems to me that when the defence of acquiescence or consent is raised, the evidence must be clear and compelling. Thus in M. v M. (supra) the Judge was able to find that a letter written post-removal easily evidenced acquiescence. I would normally expect there to be consent evidenced in writing. If not, the surrounding circumstances must be such as to

reasonably corroborate consent. In this case the opposite is so. The applicant had travelled to Brisbane because of his concern as to removal and he acted promptly when he found that the children had been unexpectedly removed.

I accordingly find against this part of the respondent's defence.

(iii) Children's objections:

This ground is relied upon strongly by the respondent and is also a ground put forward by Mr Ryan as counsel for the children to support the submission that the Court ought not to return the three children to Australia.

Because this aspect was a feature of the case, I decided to see the three children together with Mr Ryan. I accordingly have the benefit of not only Mrs Bailey's views but of my own observations.

There is now a large amount of case law on the interpretation of s 13(1)(d) of the Act.

That is understandable as the defence gives rise to a philosophical dilemma. On the one hand, rights of children, particularly those mature enough to express a view, must be heard, respected and implemented if possible. It seems to me that this is inevitable given this country's ratification of the United Nations Convention on the Rights of Children, (ratified March 1993)

On the other hand, the scheme of the Act is clear and it requires a return of children to country of origin in most circumstances. That Courts should be slow to frustrate this purpose is clearly reflected in the recent judgment of C. v B. [1995] NZFLR 614 a decision of Judge MacCormick.

In that case the Judge was dealing with children aged ten years and seven and a half years. The facts of course are significantly different in that the children had come to New Zealand for a very short period pursuant to a specific United States Court order and it was clear that they were due to be returned. The Judge noted the children's objections to returning to the United States but having reviewed the scheme of the Act and the particular circumstances, he held that it was pursuant to American law that any conflict should be resolved and he accordingly made an order for return.

The Judge considered his own decision in S v M [1993] NZFLR 584 where he had declined to return children to Australia noting not only their objections but also other objective material that suggested that the children had every reason to be fearful upon their return.

In I. v J. (supra) Judge Twaddle was also faced with the defence of the children's objections and at p 15 he reviewed the relevant authorities. Judge Twaddle considered, inter alia, S v S (High Court, Nelson M 12/94, 28 July 1994) where Ellis J referred to some of the English authorities including Re S [1993] 2 All ER 683 at 690. Ellis J concluded:

> **In my view s 13 requires that the Court must first be satisfied that Shannan's objection should be taken into account, bearing in mind his age and maturity. I am satisfied that it should. The Court must then exercise its discretion whether or not to refuse to make an order. Plainly that involves a consideration of his welfare.**

Judge Twaddle concluded in I. v J. (supra) that notwithstanding that the child (then aged seven years and nine months) had views indicating that he did not wish to return to Australia, those views were not determinative.

The various cases seem to me to demonstrate that mere expression of view or preference is insufficient and that what is required is a strong clear preference, soundly and maturely based and which amounts to an "objection" within the ordinary definition of that word. This is not to put a gloss on the meaning of "objection" but merely to differentiate between "preference" and "objection".

It seems to me to be important to look at the background in order to see whether, if there is an objection, it is reasonable.

I have no difficulty in finding that in this case both J. and A. object to returning to Australia. J. is better able to articulate that objection. I am unable to regard C. as mature enough to express a view.

J. and A. point out to me that

> **(a) When they left for Australia, they left behind friends and family in Auckland.**
>
> **(b) They did not settle into school in Brisbane and did not develop friends. They were pleased to return to New Zealand which they regarded as "home".**
>
> **(c) They have been able to return to the home which they previously rented and accordingly they are now in completely familiar surroundings.**
>
> **(d) J. has now started Intermediate and so he is at a different school. However he has friends at his present school. A. has been able to return to his former school.**

The boy's views are maturely expressed and having regard to the background are reasonable.

(iv) Grave risk of psychological harm to C.:

This submission relies on the premise that if the Court exercises its discretion not to return the boys to Australia because of their views and accordingly the boys remain here, it would cause psychological harm to C. if she is separated from her siblings because of a forced return to Australia.

The children have always been together and I could not contemplate separating them.

In B v K (Child Abduction) [1993] Fam Law 17 the Court considered that of the three children, two were old enough to express a view but the third was not. The report of the case which does not purport to be a reproduction of the judgment of Johnston J) says:

The youngest child was not of an age and degree of maturity at which the Court should take account of his views. However, it was plain that he would be devastated to be separated from the others. Accordingly, while rejecting the mother's case that the children would suffer psychological and physical harm or be placed in an intolerable situation, his Lordship had no difficulty in holding that the youngest child would be exposed to psychological harm and placed in an intolerable situation if he were returned to Germany and the other two children were not. Accordingly, it fell to the Court to exercise the discretion conferred by the operating words of Article 13 with regards to the youngest child.

I have not the least doubt that if the children are separated, there would be a grave risk to C.'s psychological welfare.

Miss Casey submits however that I should be very cautious indeed before accepting this part of the respondent's case. She asks me to accept that it is in fact unlikely that the respondent would permit the children to be separated and that if I do order C.'s return to Australia, it is more likely than not that the respondent and the boys will return as well.

However I am not prepared to approach the case in that way. J. in particular has views which he is entitled to express and have implemented if possible. For me to permit a situation in which on the one hand I say that he does not have to return to Australia but on the other hand make it impossible for him to not do so is quite wrong.

(v) Exercise of the discretion:

As the respondent has succeeded in establishing a defence to return of the children, it is no longer mandatory that they be returned. However as Miss Casey very rightly submits, the Court must exercise its discretion pursuant to s 13 and that involves going one step further beyond the mere acceptance that a ground for non-return exists.

Mr Ryan strongly submitted that the discretion here should be exercised in favour of permitting the children to remain in New Zealand. He said that in reality this was an access dispute and he considered that at the end of it all, it was more likely than not that the children would be permitted to live in New Zealand but have access to their father in Australia. He considered that the overall welfare of the children including a disruption in their lives if I returned them to Australia was relevant to the exercise of discretion.

Miss Casey did not accept that the discretion could be exercised on such broad welfare grounds as put forward by Mr Ryan, and I am sure she is correct. And yet it is impossible to ignore welfare when exercising the discretion.

Having reconsidered my observations in D. v D. [1993] NZFLR 548 and the subsequent decisions of C. v B. (supra) and I. v J. (supra) I have come to the view that the exercise of the discretion in a case such as this should be exercised by having regard to the circumstances leading up to wrongful removal. In some cases there can be little or no justification for removal and to give proper effect to the scheme of the Act, removal must be ordered. Here, it is acknowledged that there was no premeditated or malicious removal. Rather, the respondent elected to move back to New Zealand but regrettably failed to undertake that move in a considered fashion.

In coming to this view of the matter, I am conscious that in a hearing such as this the Court should be careful to avoid any detailed inquiry into welfare.

As Greig J stated in H v H (High Court, Wellington AP 359/94; 12 April 1995) at p 3.

It is, I think important to stress, as has been done already and it is recognised in the submissions that have been made to me, that this is not a case about the custody of the children or their access. It is not for the Court to come to any opinion or judgment as to that nor really to enter into the matters which may be in issue in that. The purpose of the hearing and this appeal is to decide the question under the Act and under the Hague Convention as to whether the pre-requisites are made out and whether, in the circumstances, the mandatory provisions should be applied. It is a limited inquiry to see whether an abduction has taken place contrary to the provisions of the Act and then to decide, whereupon it is for the Court of residence to decide the questions of custody.

Accordingly, in that case, the High Court upheld the Family Court which had ordered return of children to the United States after they had been quite clearly wrongfully removed by subterfuge.

My reference to the background of this case is deliberate because it is unavoidable that there should be some slightly broader inquiry as to welfare than one might normally expect. I am reinforced in that view by s 13(3) which states:

On the hearing of an application made under subs.(1) of s 12 of this Act in respect of a child, a Court shall not refuse to make an order under subs (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.

It may be that this provision is designed to discourage reliance on interim custody orders obtained upon arrival in New Zealand in the event of later Hague Convention proceedings. However, as Mr Ryan submitted to me, the Court is entitled to "have regard to the reasons for the making of the order" which in this case of course pertains to August 1993. The relevance here is that both parties intended that for the foreseeable future, the children would remain living in New Zealand in the prime care of their mother. This cannot be heavily persuasive in view of the subsequent change of habitual residence but it is nevertheless of relevance to the background and, to some extent, to the exercise of discretion.

For all of these reasons, I find that there is a defence made out pursuant to s 13 for the non-return of the children to Australia and I exercise my discretion against requiring return.

The application is accordingly declined

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