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[12/03/1997; Full Court of the Family Court of Australia (Sydney); Appellate Court]
De Lewinski and Legal Aid Commission of New South Wales v. Director-General
New South Wales Department of Community Services (1997) FLC 92-737

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Nicholson CJ, Ellis and Warnick JJ

HEARD: 15 January 1997

JUDGEMENT: 12 March 1997

Appeal No. EA 98 of 1996 No. SY 5857 of 1995

IN THE MATTER OF:

Fay Barlin De Lewinski

(Appellant/Wife)

-and-

Legal Aid Commission of New South Wales

(Appellant/Separate Representative)

Director-General, New South Wales Department of Community Services

(Respondent/Central Authority)

REASONS FOR JUDGMENT

APPEARANCES:

Mr Richardson and Ms Housego of counsel (instructed by Stacks The Law Firm, Solicitors), appeared on behalf of the appellant/wife.

Mr Batey of counsel (instructed by Legal Aid Commission of New South Wales), appeared on behalf of the appellant/separate representative.

Mr O'Brien of counsel (instructed by The Crown Solicitor's Office), appeared on behalf of the respondent/Central Authority.

JUDGEMENT: Nicholson CJ, Ellis and Warnick JJ

This is an appeal by the wife and by the Separate Representative against the following orders of O'Ryan J made on 21 November 1996:- "1. That upon the Central Authority being satisfied that R.D.L. ("the husband") has given an undertaking to the Circuit Court in Stafford County,

Virginia, United States that he will pay to the Central Authority sufficient money to enable the children of the marriage N born on 18 June 1984 and C born on 18 February 1986 to travel by air from Sydney, Australia to Dulles Airport, Washington or the husband has paid to the Central Authority sufficient money to pay the cost of such air travel and further the husband has given an undertaking to the said Circuit Court that the husband will not pending further order, enforce the temporary custody order made in the Circuit Court in favour of the husband on 21 February 1995 then the Central Authority shall, as soon as reasonably practicable cause the children N and C to be returned to the United States.

That F.D.L. ("the wife") shall do all acts and things and sign all documents and writings necessary to facilitate the air travel by the children N and C in accordance with order 1 hereof.

That each of the parties are granted liberty to apply, on short notice, to a single judge of the Family Court in relation to the implementation of these orders.

That the proceedings be removed from the Active Pending Cases list.

That in relation to any documents produced to the Court in response to Subpoena to produce documents which have not been exhibited in the proceedings that the solicitor who caused such subpoena to issue shall by 4.00 p.m. on 21 November 1996 uplift such documents from the Court and shall forthwith thereafter make arrangements for such documents to be returned to the person or entity who produced the same to the Court."

At the commencement of the hearing of the appeal, Mr Milne, solicitor, on behalf of the husband, sought leave to withdraw from the hearing of the appeal and that leave was granted.

BACKGROUND

The relevant facts as found by the trial Judge are as follows:-

The husband and the wife met in 1980 whilst the wife was holidaying in the United States. They married in Stafford, Virginia, on 23 December 1983. Following their marriage, the wife, an Australian citizen, successfully applied for resident alien status in the United States of America. She was thus entitled to reside and work in the United States but, in order to maintain her status as a resident alien, was required to return to the United States once every 12 months.

There are two children of the marriage, N born 1984 and thus aged 12 years as at the date of hearing and C born 1986 and thus aged 10 years as at the date of hearing.

In January 1986, the wife and N travelled to Australia where they remained for a period of approximately four months before returning to the United States with C who was born in Australia during that period. The parties and the two children thereafter resided in the United States until the wife and the two children travelled, with the consent of the husband, to Australia in December 1991.

On 14 December 1991, they arrived in Australia and remained in this country for a period of approximately eight months, returning to the United States on 22 July 1992. The children attended a public school during the Australian school terms whilst they were residing in Australia on this occasion.

The parties and the children resided thereafter in the United States until the wife and the two children left that country on 4 July 1994, arriving in Australia on 7 July 1994. They returned to the United States on 5 January 1995. The wife asserted that the parties' marital relationship had deteriorated and continued to deteriorate in 1993 and the first half of 1994. Whilst she was in Australia on this occasion, she asserted that she formed the intention of separating from the husband and residing permanently in Australia. However, she did not assert that she communicated that intention to the husband prior to her departure from Australia. She asserted

that she returned to the United States to inform the husband of her decision and to make necessary arrangements to return permanently to Australia with the two children. Whilst in Australia on this occasion, the children again attended school.

A couple of weeks after the return of the wife to the United States, the parties had a conversation during which she alleged that she informed the husband that she had only returned to the United States to make certain arrangements because she intended returning to Australia with the two children permanently. Following further discussion relating to their separation and the care of the children, the husband had prepared a document entitled "Separation and Property Settlement Agreement". The wife declined to sign that document but when handing it to her, the husband clearly indicated to her that he wanted custody of both children. Later, the husband handed to the wife an amended page two of the Separation Agreement.

The draft documents made it clear that the husband envisaged that the permanent residence of the children would be in Virginia but that, from time to time, the wife might be able to take them to Australia.

On 17 February 1995, the wife and the two children left the home in Virginia without notice to the husband and whilst he was at his work. She did not inform the husband that she had made the necessary arrangements for her and the two children to travel from the United States to Australia. They left the United States and arrived in Australia on 18 February 1995.

On 21 February 1995, the husband made an application in the Circuit Court of Stafford County, Virginia, and, on that day, the Court made the following order:- "IT is hereby ADJUDGED, ORDERED, and DECREED that temporary custody of the two children, N De L and C De L, be temporarily awarded to the Complainant pending further order of this Court. It is further ORDERED that the aforesaid children not be removed from the Commonwealth of Virginia, nor the United States, and that any and all law enforcement officers assist in the immediate return of these children to Stafford County, Virginia."

In early March 1995, the wife enrolled the children in a school at Gloucester and later in a school at Taree.

On 3 March 1995, the husband completed an application for assistance under the provisions of the Convention on Civil Aspects of International Child Abduction (hereinafter referred to as "the Convention") and, on 7 June 1995, the appropriate application was filed in this Court by the Central Authority.

On 9 June 1995, that application came before the Court and orders were made in terms of paragraphs 1, 4, 5, 7 and 8. The application was served on the wife on 14 July 1995 and an Answer was filed by her on 7 August 1995.

The hearing of the application commenced on 3 November 1995 and at the conclusion thereof, judgment was reserved. On 13 December 1995, reasons for judgment were delivered and orders made declining to order the return of the two children to the United States.

The Central Authority appealed against that order. That appeal was heard on 29 February 1996 when the Full Court made orders, including an order:-

"2. That the wife no later than 4.00 p.m. on 1 March 1996, make applications for a visa to enable her to travel to Virginia, USA, with the children of the marriage N De L born 18 June 1984 and C De L born 18 February 1986, and remain there for a sufficient period of time to enable her to make application to a court of competent jurisdiction in Virginia, for custody of the said children."

Thereafter, there was some confusion relating to the wife's compliance with the orders of the Full Court. As a consequence, the matter was relisted before the Full Court on 14 March 1996. The

wife, in addition, applied to the Full Court for a stay of its orders. That application was refused on 22 March 1996.

On 19 March 1996, the wife filed an application for special leave to appeal to the High Court. On 4 April 1996, Gummow J granted a stay of the orders of the Full Court pending the disposition of the leave application. On 5 August 1996, the High Court granted the wife's application and, on 6 September 1996, heard the wife's appeal.

Judgment was delivered by the High Court on 10 October 1996 when the following orders were made:-

"1. Appeal allowed.

2. Set aside paragraphs 2, 3, 4, 5 and 6 of the order of the Full Court of the Family Court of 29 February 1996 and the order of the Full Court of the Family Court of 14 March 1996 and in lieu thereof order that the matter be remitted to a single judge of the Family Court for rehearing in accordance with the judgment of this Court.

3. The first respondent pay the appellant's costs of this appeal."

On 11 October 1996, an order was made for the appointment of a Separate Representative for the children and on 22 October 1996, an order was made by consent pursuant to reg.26 of the Family Law (Child Abduction Convention) Regulations (hereinafter referred to as "the Regulations") as follows:- "That pursuant to Regulation 26 of the Family Law Child Abduction Convention Regulations a report be prepared which considers the following matters:

1.1 whether the children N and C or either of them object to being returned to the United States of America:

1.2 if the children or either of them do object to being returned, the reason/s for that objection:

1.3 the maturity and confidence of the children (sic) formulate and maintain an objection to return to the United States of America:

1.4 the cognitive developmental level of each child:

1.5 the emotional developmental level of each child;

1.6 the risk, if any, to the children of physical or psychological harm should they be returned to the United States of America, including: 1.6.1 the nature of the children's relationship with their mother, father and maternal grandparents: 1.6.2 the effect of any interruption of the children's relationship with their parents and their maternal grandparents 1.6.3 the effect of the disruption of the children's current environment: 1.6.4 whether that risk is a grave risk.

1.7 Whether the return of the children to the United States of America would be perceived by the children as intolerable and/or place the children in an intolerable situation."

In addition, directions were given by the trial Judge who also confirmed the hearing dates, namely 31 October and 1 November 1996.

The Family Report was released to the parties on 31 October 1996.

The remitted application was heard by O'Ryan J on 31 October 1996. On 21 November 1996, the Judge made the orders against which the wife and the Separate Representative have now appealed.

No oral evidence was adduced before the trial Judge, nor was any application made to him to cross-examine any of the witnesses, notwithstanding that, during the course of the hearing, he had indicated that he was prepared to allow some limited cross-examination.

JUDGMENT OF THE TRIAL JUDGE

After setting out the background facts, the trial Judge referred to the Regulations and to the purpose of the Convention and the Regulations. He then set out the provisions of those Regulations which were more relevant to the application before him, noting that they had been amended on 26 October 1995.

The trial Judge thereafter referred to the issues which he considered arose for his determination and dealt with them under the following headings, namely, habitual residence, custody rights, wrongful removal, defences and the discretion referred to in reg.16(5).

He concluded that both children were habitually resident in the United States at the time of their removal from that country in February 1995, that, at the time of removal, the husband had custody rights according to the law of the State of Virginia and that the removal of the children from the United States was wrongful within the meaning of Article 3 of the Convention and reg.2 (1).

The trial Judge then dealt with the matters raised pursuant to the provisions of reg.16(3)(b) and (c). He was not satisfied that there was a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation and concluded that the evidence did not establish "the reg.16(3)(b) defence". In relation to reg.16(3) (c), he was not satisfied that the children objected to being returned to the United States so that the courts of that country could resolve the welfare issues and concluded that that "defence has not been established".

He then considered the discretion referred to in reg.16(5), notwithstanding that he was not satisfied that either of the reg.16 defences had been established. He nevertheless expressed the opinion that, if one of the reg.16 defences had been established, the children should still be returned to the United States.

The trial Judge then gave his reasons for dismissing an application for summary dismissal of the application of the Central Authority and for refusing to admit into evidence the Family Report prepared by Ms Marriott dated 13 October 1995.

GROUNDS OF APPEAL

The grounds of appeal relied upon by the wife were as follows:- "1. That His Honour erred in finding that, in determining whether a child "objects" for the purposes of Regulation 16(3)(c) Family Law (Child Abduction Convention) Regulations ('the Regulations') "the question to be determined is whether the child objects to being returned to the country in which the child's welfare will be determined" and in doing so His Honour formulated and applied a "test" unwarranted at law.

2. His Honour erred in finding that an objection for the purposes of REGULATION 16(3)(c) of the Regulations must be viewed within the scheme of the Convention on the Civil Aspects of International Child Abduction ('the Convention') such that it is "only in exceptional circumstances that a child will not be returned" and in doing so, failed to recognise that Regulation 16(3)(c) of the Regulations in its clear terms, is an integral part of the Convention and not something foreign to it or subversive to its objects.

3. His Honour erred in failing to find in the face of clear, incontrovertible and unchallenged evidence that the children objected to being returned within the language of Regulation 16(3)(c) of the Regulations.

4. His Honour erred in finding that the children did not relevantly object within the terms of Regulation 16(3)(c) of the Regulations and in doing so His Honour ignored incontrovertible evidence and palpably misused his advantage in: 4.1 Taking into account irrelevant matters including that the children may not have understood certain consequences of their expressed views without having given the counsellor who interviewed the children and recorded such views an opportunity to answer the proposition; 4.2 By acting on inference to the effect that evidence of persons such as school teachers was to be seen as coming from persons very closely connected to the wife and children and thereby depriving the clear terms of that evidence of weight; 4.3 Failing to accept unchallenged evidence that was neither inherently improbable nor glaringly improbable; 4.4 Failing to give weight to the counsellor's opinion that the children were expressing views independent of persons around them in particular their mother.

5. Insofar as His Honour went on to consider whether he would have exercised his discretion against returning the children in the event that he had found a defence pursuant to Regulation 16 (3) of the Regulations made out His Honour fell into error in that: 5.1 His Honour failed to make a finding in the context of Regulation 16(3)(c) of the Regulations as to whether the children had attained an age and degree of maturity at which it is appropriate to take account of their views; 5.2 In considering the exercise of discretion as to whether His Honour would refuse to make an order pursuant to Regulation 16(1) of the Regulations His Honour's discretion miscarried in that: 5.2.1 The result of the exercise of His Honour's discretion was manifestly unjust, 5.2.2 His Honour acted upon wrong principles in that His Honour purported to identify guiding considerations to the exercise of his discretion for which the Regulations provide no warrant, 5.2.3 His Honour excluded consideration of relevant evidence going to matters that he described as "welfare issues" which His Honour saw as appropriate in the context of the scheme of the Convention, 5.2.4 His Honour rejected relevant evidence going to the children's wishes in the form of a report dated 13 October 1995 by Counsellor Marriott, 5.2.5 His Honour failed to recognise that upon a proper construction of the Convention that whereas issues such as, inter alia, welfare of the subject children, their wishes, settlement in a new country, difficulties that might confront an "abducting" parent on return to the country of habitual residence do not constitute a primary defence pursuant to Regulation 16(3) of the Regulations that nothing in the Regulations excludes these factors from being taken into account in exercising the broad and overriding discretion as to whether to refuse to make an order pursuant to Regulation 16(3) of the Regulations once a ground has been established under any of sub paragraphs (1) to (d) of that Regulation.

6. His Honour erred in find (sic) that the children were habitually resident in the United States of America at the time that they travelled to Australia on 17 February 1995 and consequently erred in finding that the children were wrongfully removed within the meaning of the convention.

7. That His Honour erred in dismissing the appellant's application for summary dismissal.

8. That His Honour erred in admitting evidence that was only admissible by reason of Regulation 29 of the Regulations and was otherwise inconsistent with the provision of the Evidence Act 1995 (Commonwealth).

9. His Honour erred in rejecting relevant evidence namely the report of Counsellor Marriott dated 13 October 1995.

10. The Appellant seeks leave to amend these grounds of appeal when a transcript of the proceedings becomes available."

The Separate Representative adopted and supported Grounds 1 to 9 inclusive contained in the Notice of Appeal filed by the wife. The additional grounds of appeal relied upon by the Separate Representative were as follows:- "2. That His Honour erred in not finding that there was a grave risk of psychological harm or that the children would be placed in an intolerable situation if they were returned to the United States of America.

3. In determining whether the children "objected for the purposes of Regulation 16(3)(c) (Family Abduction Convention) Regulations, His Honour's finding was not supported by the evidence had it been given its proper and necessary weight, such evidence including but not limited to:- (a) The school teacher's evidence of conversations with C (b) The school teacher's evidence of C's demeanour during such conversations; (c) The objective nature of the school teacher's evidence, as opposed to His Honour's finding that "*all of the lay witnesses are closely connected with the wife and the children*"; (d) The evidence of the Court Counsellor regarding the children's perceptions on the relevant issues; and (e) The evidence of the Court Counsellor that the children's perceptions were independent of their mother's views and those of other persons around them. (f) His Honour erred in that he diminished the proper weight attributable to the children for the "*objection*" in that he required the children to express their objection within adult formulation and concepts.

4. His Honour erred in attributing to the, "defences" in Regulation 16(3) a lesser status than the objectives of the Convention on the Civil Aspects of International Child Abduction, and in so doing failed to acknowledge that Regulation 16(3) is an integral part of the said Convention.

5. In considering whether he would have exercised his discretion and nonetheless returned the children to the United States, His Honour's discretion miscarried in that: -(a) His Honour failed to consider relevant evidence of issues referred to by His Honour as "*welfare issues*"; (b) His Honour failed to properly take into account the practical difficulties facing the mother and the children by return to the United States, and the likely adverse impact of these difficulties upon the children; (c) His Honour failed to consider the evidence of the school teachers.

6. ...

7. The child's representative seeks leave to amend these Grounds of Appeal upon receipt of the transcript of the proceedings."

Ground 6 has not been set out as it was abandoned.

WIFE'S SUBMISSIONS ON APPEAL

The wife submitted that there were four issues raised before the trial Judge which remain relevant to the appeal, namely:- "1. Was a defence within reg.16(3)(c) made out and if so should the discretion which thereby arises be exercised in favour of refusing to order the return of the children;

2. When the children were removed to Australia on 17 February 1995 were they removed from their place of habitual residence such as to constitute a "wrongful removal" to which the convention applies;

3. Was certain material filed in support of the application which was purportedly admissible as a consequence of reg.29 inadmissible as a result of conflict with certain provisions of the Evidence Act, 1995 such that the application of the Central Authority ought have been summarily dismissed;

4. Was the report of counsellor Marriott relevant evidence to the discretionary exercise if reg.16 (3)(c) was satisfied such that his Honour's discretion miscarried by the wrongful rejection thereof."

As submissions were made under those headings rather than under the individual grounds of appeal, it is convenient for us to likewise consider them.

REGULATION 16(3)(c) CONSIDERATIONS

It was submitted that it is important to recognise that the defences referred to in reg.16 are an integral part of the terms of the Convention and of the Regulations and that the defences to an application arising therefrom comprise an important part of the scheme of the application of the Convention. Thus, it was put that when the defences referred to in reg.16 are made out as an exception to the otherwise strict requirements that a child be returned to his/her place of habitual residence, a court, recognising the exception, is not acting contrary to the spirit of the Convention.

It was then submitted that a court considering a reg.16(3)(c) defence is invited by the clear language of the Regulation to consider these distinct issues:-

1. whether the the child objects; if so

2. whether the child has attained an age and degree of maturity at which it is appropriate to take into account the child's view; and

3. in the event that there is an affirmative answer to both the foregoing, whether the discretion arising from the word "may" in the opening phrase of reg.16(3) should be exercised to refuse to order the return of the child.

The relevant Regulation for the purpose of these proceedings is the regulation as it was prior to the 1995 amendment: De L v. Director-General, New South Wales Department of Community Services and Another 20 Fam LR 390 at 397 [(1996) FLC 92-706]. That Regulation provided:-

"(1) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

(2) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that: (a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal; (b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of sub-regulation (3), the court may take into account such information relating to the social background of the child as may be provided by the Central Authority of the convention country from which the child was removed.

(5) A court may stay or dismiss an application for an order of the kind referred to in paragraph 15(1)(d) in relation to a child if it is satisfied that the child is no longer in Australia."

We were then referred to the following conclusions and findings of the trial Judge, namely:-

"The reported cases clearly and unequivocally establish the following: that the object is to return the child wrongfully removed to the State of habitual residence, that the court considering an application for return is not considering welfare issues, that the court(s) in the country of

habitual residence will consider the welfare issues and finally that it is only in exceptional circumstances that a child will not be returned."

Emphasis was placed upon the observation of the trial Judge that "it is only in exceptional circumstances that a child will not be returned".

The trial Judge went on to say:-

"In my opinion the question to be determined is whether the child objects to being returned to the country in which the issues of the child's welfare will be determined. I have to consider whether the return to which the children object is the return to the United States so that the courts of that country can resolve the merits of any dispute as to where and with whom the children should live. In my opinion this is not a strict and narrow reading of the exception in reg 16(3)(c). I am not considering what the children have said in the sense of seeking to ascertain if it is the expression of a wish or preference or vehement opposition. I am simply considering what the children have said in the context of what is required by the Convention. It does not represent an *additional gloss* [De L, supra at p 399]."

In the ultimate, the trial Judge was not satisfied that the children objected to being returned to the United States so that the courts of that country could resolve the welfare issue.

It was submitted that the trial Judge erred in finding that the children did not object in the relevant sense and that he misdirected himself in applying the principles referred to in the majority judgment of the High Court in De L v. Director-General, New South Wales Department of Community Services and Another.

In that case, under the heading "Objects to being returned" at page 398, having earlier referred to the text of reg.16, their Honours set out the text of Article 13 of the Convention and went on to say:-

"In this setting there is no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as "the child objects to being returned". The terms is "objects". No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No "additional gloss" [S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at 499 per Balcombe LJ] is to be supplied.

The judgments of the Court of Session in Urness v Minto [[1994] SLT 988] are in point. Section 1 of the child Abduction and Custody Act 1985 (UK) relevantly provided that the provisions of the Convention, set out in a Schedule to the statute, were to "have the force of law in the United Kingdom". Accordingly, the court was construing directly the terms of Art 13. At first instance, Lord Penrose said [[1994] SLT 988 at 993]: The expression ["the child objects to being returned"] is to be applied in its ordinary literal sense. The child must object to returning to the country from which it was wrongfully removed in the circumstances envisaged at the time. The questions were whether the child objected to being returned and whether the child had attained an age and degree of maturity at which it was appropriate to take account of its views, these being matters of fact to be determined in the light of the information before the court.

A reclaiming motion was dismissed. The opinion of the court was delivered by the Lord Justice-Clerk, Lord Ross. His Lordship [[1994] SLT 988 at 998] applied the following statement of the principle by Balcombe LJ in S v S (Child Abduction) (Child's Views) [[1992] 2 FLR 492 at 499]: [T]he return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live ... There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances.

Balcombe LJ had continued [[1992] 2 FLR 492 at 499-500]: Thus, to take the circumstances of the present case, it may be that C would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Art 12.

In New Zealand, it has been said, dealing with the equivalent provisions in ss 12 and 13 of the Guardianship Amendment Act 1991 (NZ) [Clarke v Carson [1996] 1 NZLR 349 at 351. This passage was accepted without challenge by the New Zealand Court of Appeal in Andersen v Central Authority for New Zealand (11 June 1996, unreported) at 8]: Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the convention which it implements and schedules. (See Re A (Minors) (Abduction: Custody Rights) [[1992] 2 WLR 536 at 550 per Lord Donaldson of Lymington MR]). It therefore requires assessment of whether decisions affecting the child should be made in the court from the country from which the child has been wrongfully removed or the country of the court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other.

Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what child have to say and by taking a literal view of the term "objection". That is because it remains for the court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised [[1996] FLC 92-674 at 83,017].

Regulation 16(3)(c) fell for application in this case upon the construction indicated by Nicholson CJ and in the authorities, to which we have referred above, from Canada Scotland, England and New Zealand. It follows that the majority of the Full Court misconstrued what had been the task of the primary judge in applying reg 16."

The trial Judge did not have the benefit of the reasons for judgment of this Court (although differently constituted) in Director-General, Department of Community Services v. Crowe (1996) FLC 92-717, which was delivered on the same day as he gave judgment in this matter. In that case, the Full Court clearly purported to follow the decision of the High Court in De L v. Director-General, New South Wales Department of Community Services and Another (supra), as did the trial Judge in this case. In so doing, that Full Court concluded that the relevant objection was an objection to the return which would be otherwise ordered, i.e. an immediate return to the country of habitual residence so that the courts of that country could resolve the merits of any dispute as to where and with whom the child should live.

It was submitted, however, that Director-General, Department of Community Services v. Crowe (supra), at least in relation to the reg.16(3)(c) defence, was wrongly decided because the Full Court there overlooked the following observation of their Honours in the High Court at page 398:-

"As we have indicated, the Convention itself contains a compromise, reflected in the terms of the regulations, by which certain exceptions are allowed to the general principle that an abducted child be returned forthwith to the State of the child's habitual residence."

and further, because it misunderstood the principle enunciated by Balcombe LJ to which their Honours in the High Court referred. It was put that the statement of principle was "the return to which the child objects is that which would otherwise be ordered under Article 12, namely an immediate return to the country from which it was wrongfully removed" and that the words appearing thereafter, namely, "so that the courts of that country may resolve the merits of any

dispute as to where and with whom it should live" form no part of the statement of principle but merely constitute a commentary on it.

In further support of the submission, we were referred to passages contained in Urness v. Minto (1994) SKT 988 and Abraham and Abraham (unreported decision of Judge Inglis QC delivered on 9 September 1996 in the Family Court of New Zealand).

On the issue of whether this Court should consider itself bound by the decision in Director-General, Department of Community Services v. Crowe we were referred to Ivanovic v. Ivanovic (1996) FLC 92-689 at 83,156 and the cases therein cited.

The Central Authority submitted that the formulation and application of the relevant test by the trial Judge was correct and that where one of the grounds referred to in reg.16(3) is made out, the consequence is not that the application for the return of the child will be refused but that the Court is no longer obliged to order the return of the child but has a discretion whether or not to do so: see Clarke v. Carson (1996) 1 NZLR 349 referred to with approval by the High Court in De L v. Director-General, New South Wales Department of Community Services and Another (supra) at page 399.

Having regard to the submissions of the wife, which were adopted by the Separate Representative, we are not satisfied that the decision of the Full Court in Director-General, Department of Community Services v. Crowe (supra) is wrong, nor do those submissions lead us to believe that there is sufficient doubt as to the correctness of that decision to warrant a re-examination of the relevant issue by this Full Court.

We are thus of the view that the trial Judge did not misdirect himself as submitted and we turn to consider whether the trial Judge erred, as alleged, in his application of the relevant principles to the facts of this case.

It should be noted that counsel for the Central Authority, during the course of the hearing before us, conceded that the evidence disclosed that the children had each attained an age and a degree of maturity at which it was appropriate to take account of their respective views.

The trial Judge referred to the relevant evidence, including that of the wife, Ms M., C's school teacher, Ms C., N's school teacher, Ms B., a friend of the wife, Ms M., the wife's sister, the wife's parents, and Mr and Mrs C., friends of the wife. In addition, the trial Judge referred to the evidence of the Court Counsellor as set out in his Report prepared in October 1996.

The evidence of the Court Counsellor was that "[i]t is clear that the children object to a return to the United States" and that that was the thrust of what the various witnesses referred to asserted. Further, the Court Counsellor reported:-

"There were indications throughout the interviews that the children's primary and fundamental concerns (as they understand them) related to a need to be with and the fear of absence from the mother and from their current network of friends and relatives. If being in America meant the absence of, or the diminished presence of, the mother and this network the children clearly object to being in America."

The trial Judge was aware of the periods of time the children had spent both in the United States and in Australia, that they had resided continuously in this country since 18 February 1995 and that they are well settled and progressing well at school. In addition, the wife asserted that, as she has not returned to the United States since her arrival in Australia in February 1995, she believes that her status as a resident alien in the United States has been cancelled. As appears from the evidence of Ms Young, the wife may well face other problems, including difficulties remaining in the United States for other than a short period and pursuant to the Federal Criminal International Kidnapping Act. The trial Judge referred to the close connection between the lay witnesses and the wife and the children and noted that they were not cross-examined before him.

He concluded that the children had been influenced by t he wife and other significant adults and that he could place little, if any, weight on the evidence of the wife and her lay witnesses. The trial Judge did not reject the evidence of the various witnesses but concluded that, having regard to that evidence, he was not satisfied that the children objected to the relevant return.

The primary facts in the case were not in question. The position and duty of an appellate court in such a case was considered by the High Court in Warren v. Coombes (1979) 142 CLR 531. The headnote, in our opinion, correctly sums up the effect of the majority judgment:-

"In general on an appeal by way of rehearing from a judge sitting without a jury an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it." ... "An appellate court, which, after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, ought not then to uphold his erroneous decision. The duty of the appellate court is to decide the case - the facts as well as the law - for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."

The trial Judge, in this case, clearly was in no better position than this Court to determine the proper inference to be drawn from the facts and to determine whether the children object in the relevant sense to return to the United States.

In our consideration of the evidence, the observations of Nicholson CJ in Director-General, Department of Community Services v. De Lewinski (1996) FLC 92-674 at 83,016 are apposite:-

"... a Court should not expect children to necessarily express their views within adult formulations. While Courts may appreciate notions of forum, comity and jurisdiction, and that an objection to meet the terms of Regulation 16(3)(c) must as a matter of law be with respect to the place of habitual residence rather than the person with rights of custody, this is not the stuff of children's concepts and nor should it be expected that children will speak in such terms unless rehearsed."

The October 1996 Report of the Court Counsellor, which was before the trial Judge, contained the following passages:-

"It is clear that the children object to a return to the United States. " ... "There were indications throughout the interviews that the children's primary and fundamental concerns (as they understand them) related to a need to be with and the fear of absence from the mother and from their current network of friends and relatives." ... "The children's given reasons for objecting to a return to the United States range from simplistic comparisons between the two countries through to to (sic) a real fear of "loss" as described in 1.1. Their reasons are listed below. The children tended to give similar reasons. Where they have given different reasons these have been identified." ... "Counsellor is of the view that the children would percieve (sic) such a return as intolerable if they were unable to be supported by the mother in the USA irrespective of the reason for her absence from their lives."

It is clear that the objection must be an objection to being returned to the country of the children's habitual residence, here the United States of America, not to living with a particular parent, here the husband. However, as was pointed out by Balcombe LJ in Re R (Child Abduction: Acquiescence) (1995) 1 FLR 716, there may be cases "where the two factors are so

inevitably and inextricably linked that they cannot be separated." We are of the view that this is such a case.

We would not suggest that children must articulate that they object to being returned to the country of their habitual residence for the purpose of enabling the courts of that country to resolve the merits of any dispute as to where and with whom they should live in order to come within the provisions of reg.16(3)(c). That is not the language of children and the Court should not expect them to formulate and articulate their objection, if they had objected in the relevant sense, in that manner. The Court must have regard to the whole of the evidence and determine, no matter how the children articulate their views, whether the children object in the relevant sense. In our view, this was the approach adopted in cases such as Director-General, Department of Community Services v. Crowe (supra), Abraham and Abraham (supra) and Urness v. Minto (supra).

Having considered the whole of the evidence and after giving full weight to the conclusion of the trial Judge, notwithstanding the forceful arguments to the contrary advanced on behalf of the Central Authority, we are of the view that the trial Judge was wrong. In our view, the proper inference to be drawn from the evidence was that the children object to being returned within the meaning of reg.16(3)(c). As we earlier noted, counsel for the Central Authority conceded that the children had attained an age and degree of maturity at which it was appropriate to take account of their views.

Having reached that conclusion, we must consider how the relevant discretion ought to be exercised. We do not consider, in the circumstances, that we are bound by the hypothetical exercise of discretion by the trial Judge, given that he was of the view that none of the defences raised were established.

We have already referred to certain of the matters relevant to the exercise of that discretion. In addition, as a consequence of the cancellation of her status as a resident alien, the wife asserted that, if she returned to the United States, she would be unable to obtain employment or any form of assistance such as that provided by the Department of Social Security in Australia. She asserted that she would thus be unable to house herself and the children as she could not return to the matrimonial home and would be unable to feed herself and the children. She further asserts that she would be unable to prosecute, or defend any application by the husband, for custody of the children. Having regard to those matters and giving due weight to the policy of the Convention, it is appropriate, in our judgment, in the circumstances of this case, to exercise our discretion by refusing to make an order for the return of the children.

We would emphasise, as did counsel for the Central Authority before us, that, in coming to that ultimate decision, this is a very special case with facts peculiar to it for reasons which we trust will not be repeated.

HABITUAL RESIDENCE

In support of the submission that the trial Judge erred in finding that both children were habitually resident in the United States in February 1995, we were referred to a number of authorities, including Cooper v. Casey (1995) FLC 92-575.

It was the contention of the wife that the children were habitually resident in Australia from July 1994. It was submitted, in support of that contention, that the move to Australia in July 1994 was for an indefinite period and was the last relevant decision relating to the children about which the parents were ad idem. That fact, coupled with the passing of a period of about six months before the children returned to the United States, was sufficient, it was submitted, to establish habitual residence in Australia.

No challenge was made to the correctness of the decision in Cooper v. Casey (supra). In that case, Nicholson CJ (with whom Kay and Graham JJ concurred) referred, with approval, to the

following summary of the principles set out by Waite J in Re B (Minors) (Abduction) (No. 2) (1993) 1 FLR 993 at 995:-

"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 the instant case, there was a history of time spent by the wife in Australia with the children or one of them for indefinite periods, but except in respect of the last occasion, always with the intention of both the husband and the wife of a return of the wife and children to the United States to continue residence with the husband there. In our view, it would be extremely difficult to suggest that the residence of the wife and children in Australia from July 1994 to January 1995 was with the shared intention of the husband and the wife that the children and wife be habitually resident here or resident here for a settled purpose. In our view, it was clearly open to the trial Judge to find, as he did, that:-

"... the time spent in Australia was not for any settled purpose but only to visit the wife's family, there being no agreement of the parents that the children's habitual residence would change from the United States."

In our view, it was clearly open to the trial Judge to find that both children were habitually resident in the United States in January 1995. Indeed, we are of the view that that finding was the only finding open to him on the evidence.

ALLEGED CONFLICT BETWEEN THE REGULATIONS AND THE EVIDENCE ACT

The written submissions of the wife in relation to this issue were as follows:-

"3.1 The Evidence Act 1995 came into operation on 19 April 1995. It's (sic) provision (sic) apply to all proceedings in a Federal Court: It binds the Crown in all capacities: s.7 It specifically provides for the manner of admissibility of evidence in Federal Courts. Every person is competent and compellable to give evidence (s.12) save for those lacking capacity in the terms of s.13. A witness must take an oath or affirmation before giving evidence: s.21 The only exception or exclusion is where a right exists to make an unsworn statement in criminal proceedings: s.25.The independent admissibility of documents is limited to documents which would not, per se, include the contents of an unverified application or documents forwarded in support of it: s.48. Thus the Act makes clear provision for the giving of evidence by witnesses and the independent admissibility of documents.

3.2 Reg. 29(1)(a) purports to make documentation which would not otherwise be admissible under the Evidence Act admissible in a Court to which Act applies.

3.3 It is trite that where there is conflict between an Act of Parliament and a Regulation the former will prevail. Subordinate legislation is prima facie ultra vires if it is inconsistent with the substantive provisions of a parliamentary enactment: Hacking v Lee (1860) 2 E&E 906 at 911 per Crompton J and Irving v Askew (1870) LR5 QB 208 at 211 per Hannen J.

3.4 Such a provision as it stood at the commencement of the Act would have been saved: s.8(2), but that saving provision expressly excludes from it's (sic) operation any regulation which is the subject of amendment after the commencement of the Act. The authors of Cross on Evidence, Butterworths, Looseleaf describe the effect of s.8(2) as follows (#1695):- "Section 8(2) provides that the Act does not affect the operation of regulations that are made under an Act other than the Evidence Act and are in force on the commencement of s.8. However, s8(2) also provides that the section ceases to apply to a regulation once it is amended after the commencement of s.8.

3.5 Reg. 29 was amended by Statutory Rule No. 296 of 1995 which commenced on 1 November 1995 and as a consequence was deprived of the saving protection of s.8.

3.6 Without the content of the application being admissible there would have been no evidence of matters essential to proving a basis for the application of the Convention and it then would have been appropriate for the Central Authority's application to be summarily dismissed in accordance with the principles discussed and summarised by Nygh J in Aldred and Aldred; Westpac Banking Corp. (1986) FLC 91-753 esp. 75,491-2."

We were informed that the earlier regulation was reg.23.

The Central Authority submitted the provisions of the Act and the regulation can stand together and that there is thus no inconsistency.

However, counsel for the wife informed us that he would only rely upon Grounds 7 and 8 if all other grounds of appeal were unsuccessful. As we have concluded that the appeal should be allowed, it is not necessary for us to consider these grounds further.

However, we draw to the attention of the relevant authorities the submissions of the wife for appropriate attention if necessary.

REJECTION OF THE MARRIOTT REPORT

It was submitted that the Report was "only relevant in the event that the first preliminary limb of reg.16(3)(c) is made out, i.e. it is relevant to the children's maturity and more importantly, to the discretion to be exercised thereafter." Whilst there may be substance in the submissions, they were not developed before us and in the light of the conclusion which we have reached, it is not necessary to consider this ground (Ground 9) further.

SEPARATE REPRESENTATIVE'S SUBMISSIONS

As indicated earlier, the Separate Representative abandoned ground of appeal numbered 6. The Separate Representative adopted and supported the submissions of t he wife.

However, the Separate Representative, unlike the wife, submitted that the trial Judge erred as set out in Ground 2 "in not finding that there was a grave risk of psychological harm, or that the children would be placed in an intolerable situation if they were returned to the United States of America."

The trial Judge dealt with this issue at pages 148 to 152 of the Appeal Book. In our view, no cogent arguments were advanced in support of the ground of appeal and it was not demonstrated

that the trial Judge erred in finding that he was not satisfied that there was a grave risk that the return of the children would expose them to physical or psychological harm, or otherwise place them in an intolerable situation.

DELAY

In the course of his reasons, the trial Judge drew attention to the delays following the filing of the application by the Central Authority on 7 June 1995. He said:-

"The proceedings in the Family Court unfortunately have been protracted since June 1995. On 9 June 1995 the application filed on 7 June 1995 first came before the Family Court, Sydney Registry. On 9 June 1995 orders were made in the terms of paragraphs 1, 4, 5, 7 and 8 of the application. These orders related to the children not being removed from Australia, the children's passports being surrendered to the Registrar of the Family Court, the names of the wife and the children being placed on the Airport watch list and service of the orders. The proceedings came before the court on 23, 28 June, 12 and 14 July 1995.

The application filed on 7 June 1995 was served on the wife on 14 July 1995. The proceedings came before the court on 19 July 1995. On 7 August 1995 the wife lodged the children's American and Australian Passports and her Australian Passport with the Family Court in accordance with the orders made on 9 June 1995. As seen on 7 August 1995 an answer was filed on behalf of the wife.

On 10 August 1995 the proceedings were adjourned on the application of the Central Authority. On 7 September 1995 the proceedings were listed for mention before Moore J. On 7 September 1995 the proceedings were listed for hearing before Moore J on 19 September 1995. On 19 September 1995 the hearing date was vacated and the proceedings listed for hearing on 4 October 1995. On 4 October 1995 the hearing was adjourned on the application of the Central Authority to 3 November 1995. On 4 October 1995 an order was made for the preparation of a Family Report. On 3 November 1995 the hearing commenced before Moore J and at the conclusion of the hearing judgment was reserved. On 13 December 1995 reasons for judgment were delivered by Moore J and her Honour made final orders."

We have been informed that the original hearing date was vacated on the application of the Central Authority, which was not then ready to proceed. Indeed, it was not until 4 October 1995 that an order for the preparation of a Family Report was sought.

It can thus be seen that the unacceptable delay in the hearing of the application was occasioned by the parties, particularly the Central Authority. Applications under the Convention should be dealt with expeditiously and the Central Authority must take steps to ensure that it is in a position to promptly proceed.

CONCLUSION

In our judgment, the trial Judge did not err in finding that the children were habitually resident in the United States in February 1995, nor did he err in finding that he was not satisfied that there was a grave risk that the return of the children to the United States would expose them to physical or psychological harm or otherwise place them in an intolerable situation. He did not misdirect himself in his application of the principles referred to in the majority decision of the High Court in De L v. Director-General, New South Wales Department of Community Services and Another (supra).

However, the trial Judge erred in not finding that the children object to being returned. We are satisfied that the children object to being returned to the United States and that each has attained an age and degree of maturity at which it is appropriate to take account of their respective views. In the exercise of our discretion, we refuse to make an order for their return.

ORDERS

We would therefore order:-

1. That the appeals be allowed.

2. That Orders 1 and 2 made on 21 November 1996 be set aside and in lieu thereof order:- "1. That the application filed on behalf of the Central Authority on 7 June 1995 be dismissed." 3. (a) That any party be at liberty to make an application by way of written submissions in respect of costs incurred by him or her in relation to the appeals within twenty-one (21) days of this date. (b) That the other parties have a further fourteen (14) days in which to make written submissions in answer thereto. (c) That the first mentioned party have a further seven (7) days in which to make any written submissions in reply thereto. (d) That each submission have endorsed on the cover sheet the date on which a copy of that submission was served on the other parties.
