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[15/10/1998; Family Court of Australia (Sydney); First Instance]  
Director-General of the Department of Community Services v. M.S.,  
15 October 1998, transcript, Family Court of Australia (Sydney)

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**FAMILY LAW ACT 1975**

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

**BEFORE: Justice J.M.H. Maxwell**

**HEARD: 25 September 1998**

**JUDGMENT: 15 October 1998**

**No. SY8917 of 1997**

**BETWEEN:**

**DIRECTOR-GENERAL OF THE DEPARTMENT OF COMMUNITY SERVICES**

**(Applicant/Central Authority)**

**- and -**

**M. S.**

**(Respondent Mother)**

**REASONS FOR JUDGMENT**

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**APPEARANCES:**

**Mr O'Brien of Counsel, instructed by Crown Solicitor's Office, Sydney, appeared on behalf of the applicant/Central Authority.**

**Mr Anderson of Counsel, instructed by Patrick Grimes & Co., Solicitors of Lane Cove, appeared on behalf of the respondent/mother.**

**JUDGMENT: Maxwell: These proceedings under the Family Law (Child Abduction Convention) Regulations (Hague Convention proceedings) were commenced by the Responsible Authority, the Director-General of the Department of Community Services, by her Delegate, by an application filed on 14 August 1998.**

**The proceedings were transferred to my list during the course of Friday 25 September 1998 and in circumstances where voluminous material had to be read after submissions were heard on behalf of the Central Authority and the Respondent wife, I reserved my decision.**

**Unfortunately the decision has been delayed in circumstances where I was then away in another registry for the ensuing week and because of pressure of other listed cases since my return.**

**The orders sought by the Central Authority in that application are set out in Attachment "A" in these Reasons.**

**On 2 September 1998 on an earlier listing of the matter, orders were made in terms of paragraphs 1 and 4 of that application.**

**On a prior occasion, 18 August 1998, an order was made placing the subject children on the airport watch list as sought in paragraph 5 of the subject application.**

**It is asserted on the part of the Authority that:**

- the habitual residence of the subject children prior to their removal to Australia was Austria;**
- that the father the applicant under the Convention has rights of custody in relation to the children;**
- that the children were removed from Austria by the respondent mother on or about 16 August 1997.**

**In a cross-application filed 15 September 1998 the respondent mother seeks dismissal of the Central Authority's application and an order for costs.**

**In her Answer of the same date she asserts that:**

- the habitual residence of the children is Australia, not Austria;**
- that the father was not actually exercising rights of custody when the children returned to Australia and that those rights would not have been exercised if the children had not returned to Australia;**
- that since April 1997 the children have lived with their mother solely and with the father's consent, and that the mother has the benefit of a custody order under Austrian law;**
- that the father has consented or acquiesced in the children being and remaining in Australia by reason of the fact that he has been aware of custody proceedings commenced in Australia by the mother since about October 1997 and consented to the jurisdiction of the Family Court;**
- that he had been legally represented in those proceedings (a Notice of Ceasing to Act was filed on 10 September 1998) and that those proceedings have been set down for hearing; that there is a grave risk that the return of the children to Austria would expose the children to physical or psychological harm or would otherwise place the children in an intolerable situation;**
- that the children object to being returned to Austria and that the two oldest children have reached an age and degree of maturity at which it is appropriate to take account of their wishes.**

**In relation to this latter contention there was no evidence on that issue in a form discussed as appropriate in De L v Director General, NSW Department of Community Services & Anor (1996) FLC 92-706 circa 83,455.**

**In any event for reasons I refer to later I do not consider it necessary to consider the point in depth, I would have some difficulty being persuaded that the children the subject of these proceedings have attained sufficient maturity to understand the concept of "objection" as discussed in the authorities.**

**It was also contended for the respondent mother that for the purpose of determining this application this Court should have regard to the Social Report prepared by order of the Austrian Court.**

**The background to the matter is as follows.**

**The mother, born in Australia on 18 May 1956, met the husband, born in Austria on 10 June 1962, in Australia in 1988.**

**She asserts in her evidence that she was informed at that time by the husband, who was then employed at Warriewood, that he had recently become a permanent resident of Australia.**

**The parties subsequently travelled to Austria where they married on 29 May 1989.**

**They returned to Australia some three months later to live.**

**At the time of marriage and for a time thereafter they resided in a home unit owned by the wife at Drummoyne.**

**That home unit was sold and in 1991 with the assistance of funds advanced by the wife's parents they acquired in joint names a property at \*, Beacon Hill.**

**That property remains in the ownership of the parties and is the subject of contested proceedings in this Court.**

**There are three children of the marriage and the focus of these proceedings: twins F. and C. born 1 June 1991 and S. born 9 July 1993.**

**In May 1994 the husband's father died in Austria and the husband travelled to Austria for a short period thereafter. The wife asserts that there were difficulties in the marriage at or about that stage.**

**The evidence seems to suggest that the husband acquired a half interest in a house and adjoining nursery premises as a result of his father's death.**

**The wife asserts that following the husband's return from Austria following his father's death, the relationship between them deteriorated.**

**The wife also asserts that in late 1994 the husband suggested that they should go to Austria "to see how the nursery was going" and that he said words to the effect, "It will only be temporary - maximum 18 months. If you don't like it we can come back here at any time."**

**The parties left Australia in May 1995 with each child on the husband's passport, the mother says at his "insistence".**

The wife organised for the matrimonial home at \* to be rented and items of furniture, electrical items, personal items and wedding presents were stored under the house, the wife says, in circumstances where the husband refused to agree to place the items in storage. Some other personal items were stored at the wife's parents.

The wife asserts that "only the most basic items including clothing for the children and a few toys" were forwarded to Austria, although she says the husband "took most of his valuable personal items including his stereo system."

The wife's car was lent to a nephew.

The wife asserts that the marriage further deteriorated in Austria where they were living in the house formerly occupied by the husband's father which the wife asserted was neglected and in need of repair. She alleges that she and the children were isolated and that her ability to communicate in German was extremely limited and as a consequence her access to facilities and assistance also very limited.

She also claims both in her affidavit material in this application and had complained in the proceedings in the Austrian Court, about interference in her domestic situation by her mother-in-law and sister-in-law. Clearly relationships between the wife and the husband's family were extremely poor as indicated by the evidence of all concerned, but particularly by the husband's mother and sister in the Austrian proceedings.

Details of her allegations in this respect and the various difficulties are also set out at length in her affidavit material in these proceedings.

The husband and his family asserted in the Austrian proceedings that it was the wife's damage to the property and inadequate housekeeping which were the reason for any difficulties with their accommodation.

The wife sets out in considerable detail the difficulties about the accommodation and even allowing for some element of embellishment I accept that the condition of the residential premises was less than satisfactory.

The wife asserted in her affidavit material that she continually questioned the husband's undertaking improvements to the nursery in circumstances where they would be returning to Australia.

It is also asserted by the wife that the house and nursery have now been transferred into the husband's sister's name although little ultimately turns on this for the purpose of the subject application.

The wife commenced divorce proceedings in Austria in December 1996 following an incident in the home on or about 12 December 1996 which led to the issue of proceedings by the police.

The parties attended Court in relation to the divorce proceedings on 24 December 1996 and ultimately the wife did not pursue the proceedings in circumstances where the husband said he wished to remain married for the sake of the children.

The wife asserts that following this, circumstances in the household deteriorated further and she returned to Australia for a month's holiday in January 1997 at her father's expense bringing the child S. She says that the husband refused to allow the twins to travel with them and insisted that the child S. travel on an Austrian passport.

The wife asserts that following their return to Austria the situation between them further deteriorated and describes the difficulties in her affidavit, particularly paragraph 49 and following. She filed a divorce application on 17 February 1997 which appears to be the day following her return.

The first hearing of the divorce occurred on 13 March 1997 whilst the parties were still residing under the one roof and a translated copy of the Protocol was attached to her material.

A number of incidents which occurred involving the children are described in the affidavit material and the various protocols, include incidents where the children were clearly involved in incidents relating to them and which also involved their paternal grandmother.

There were also a number of incidents in this period when the police were called.

The wife says that her divorce application was again before the Court on 25 March 1997 and that she believed that an order was sought on her behalf that she have sole occupation of the home.

However the Court apparently declined to require that the husband vacate the residence which was attached to his business premises. The wife declined to vacate the premises without the children because of her concerns for the care of the children, although she had by that stage found premises to which to move.

Whilst these proceedings were going on the husband reported the wife to various authorities for allegedly physically abusing the children which on one occasion involved the children being physically examined at their kindergarten.

At or about this time the husband was ordered to pay \$100 per week alimony for the wife and the amount the wife was receiving as rental income on the Australian property was to cover child maintenance.

When the matter again came before the Court on 9 April 1997 in circumstances where the situation in the home was clearly highly conflictual and the children squarely in the middle of the conflict, the wife sought an order to move out of the former matrimonial home and take the children with her.

It appears from the protocol of that date that later there were directions for settlement discussions and subsequently the Court noted:

"In the light of the declared intention of the plaintiff (the wife) to leave the family house/apartment both parties agree, out of court and without prejudice to their legal positions with regard to the children of the marriage, to co-operatively want to pursue the following action:

For the duration of the divorce proceedings and the care proceedings, that were not yet initiated but immediately imminent, the temporary care be assigned to the mother of the children so that the children can live unseparated with their mother.

As the father of the children, according to his representation, has only a small income should hand over to the mother of the children a maintenance amount of a total of \$ 3,500.- for all three children based on 14% each for the twins and 12% on the first day of the month after the date of the move and then subsequent payments monthly in advance. Here the plaintiff gives the defendant permission not to have to pay the child maintenance amount in cash and

declares herself prepared to use the amount of approximately \$ 5,000.00, being half the rent income arising from a house in Australia up to the amount of \$ 3,500.- for child maintenance. The defendant authorises the plaintiff to draw on the half of the rental income from the house in Australia owing to him up to the monthly amount of \$ 3,500.- limited to the duration of the divorce and care proceedings for maintenance purposes with respect to the children. Both parties know that care proceedings cannot be initiated at this time due to the existence of a family household.

In recognition of a provisional visitation right for the same time extension (divorce and care proceedings) both parties intend to want to allow decisive significance to the desires of the children and to make it possible that the children can stay overnight with the father according to their needs and wishes.

Both parties declare that in recognition of the children they intend to apply for sole care of all the children. In this regard the plaintiff declares that she intends to remain in Austria in the long term and to be domiciled here. The defendant declares, for his part, that he would not think of resettling in Australia in the next few years for occupational reasons. Both parties admit as correct that the twins, F. and C., are included in the passport of the father whereas S. possesses his own passport that is in the custody of the plaintiff.

In the event of the divorce, both parties state their standpoints precisely as follows in the light of the legal consequences of the divorce for their assets:

1.) (Maintenance) The defendant waives maintenance from the plaintiff; the plaintiff desires maintenance; the defendant is prepared if need be to provide maximum maintenance for a limited duration if conditions are fulfilled.

2.) (Family house/apartment) This is located in Ternitz, \* is in half ownership of the defendant and his sister; the plaintiff places no value on the family house/apartment whereas the defendant strives to attain sole rights to it. The chattels in the family house/apartment, with the exception of the nursery furnishings, should be transferred to the sole ownership of the defendant according to the wishes of the plaintiff. Both parties admit as correct that there exist neither joint savings nor liabilities; the defendant points out that all liabilities that affect him are business liabilities and that he is liable for a re-development loan also concerning the family house/apartment together with his sister - with whom he is half owner of the real estate on which the family house/apartment is located. Both parties are half owners of a property with a house in Australia at the address \*\*; the plaintiff declares she is trying for ownership of the entire property whereas the defendant declares that he wants to sell his half of the ownership right in this house in Australia."

The matter was again before the court on 14 May 1997 in relation to care/custody matters and in particular in relation to allegations by the father of mistreatment of the children by their mother and the protocol of that date notes:

"After receiving an explanation of the law - the children's mother in particular is clarified about the provisional nature of the visitation rights - the parents of children agree to the settlement

1. The children's father receives visiting rights to his children, F., born on 1.5.1991, C., born on 1.5.1991 and S., born on 9.7.1993 such that he is entitled to pick the children up every Sunday at 09.00 and is obliged to hand over the children at 17.00 h on the same day at the house of the children's mother to her or to a person appointed by her; the children's father is entitled to exercise an overnight visitation right with respect to his children on every second weekend in the month, that he is entitled to pick the children up at the house of the

children's mother on Saturday at 14.00 h and is obliged to return the children on the following Sunday at 17.00 h at the house of the children's mother to her or to a person appointed by her; the children's mother is obliged to have the children ready clothed in keeping with the weather and ready to go out, she is entitled to assume that the father has waived his visiting right in its entirety without a substitute arrangement in case he does not enter into his visitation right within 30 minutes.

2. This provisional visitation right is time limited until the coming in force of the care/custody decision."

The matter was again before the Court on 16 July 1997 when depositions were taken, inter alia, from the husband's mother A.F. and sister G.D., and a witness for the wife a B.K.

It is clear from a reading of that evidence that the husband's family are most critical of and antagonistic towards the wife. They certainly attest to the wife's unhappiness in the situation and difficulties between the parties.

It is unclear from the translated protocols what occurred on that day in those proceedings although the wife asserts (affidavit paragraph 91) as follows:

"On 16 July 1997 the matter was before the Court again and the Court refused to grant a divorce. To the best of my knowledge it was because my Husband claimed that he was bankrupt and was therefore unable to pay alimony to me. Because I was a foreigner, if the Court granted me a divorce the State would not look after me as I did not have the same rights as an Austrian citizen. I believe that therefore the Court was reluctant to do grant (sic) the Divorce because I would not entitled (sic) to government benefits."

At the request of the Court reports were prepared by two social workers in relation to the custody of the children and they were in evidence.

Lehrer Marlene, the author of the report dated 23 June 1997 in relation to the mother with the children concluded:

"If one considers the results of the investigations, then it becomes clear that the situation with the mother of the children appears to be superior, on the basis of the housing situation. In addition there is the circumstance that Mrs M.S. at present is not working and therefore can devote herself fully to the care and upbringing of her three children. A separation of the three children from their mother, who clearly is very concerned to look after the welfare of the minor children as best she can, would surely be against a positive development of the three boys. The application of the mother of the children, M.S., for the transfer of exclusive custody of her three minor children F., C. and S., is therefore considered favourably."

However earlier in her report she gave a useful insight into the situation in the household:

"M.S. has been known to the social worker since March 1997. At that time the parents of the children were still living together as a family. There were already considerable differences between the marriage partners. The conflicts were partly due to the different backgrounds and outlook on life of the parents of the children. Whilst M.S. indicated that she considered consistency and regularity in the bringing up of her children as being important, it was alleged that the father of the minor children gave the children little guidance because of his indulgent attitude to the upbringing of the children. The children were said to have been often irritated as a result of the contrasting instructions by the parents and were defiant in their reactions towards the stricter demands of the mother of the children. M.S. declared to the undersigned that in such situations she did expect too much. There were also differences

in the way in which particular needs of the children were perceived. M.S. said for instance that her husband did not allow other children, playmates of his own children, in the house, that she was not allowed to give birthday parties for the children and that her husband did not provide any money for a visit to the open-air swimming pool with her children. Since January 97 M.S. had not received any money from her husband any more.

The mother of the children experienced the constant interference and advice from the grandmother on the father's side, A.F., as very difficult to put up with. She states for instance that she was not allowed to buy clothes for herself and her children. This was done by the grandmother on the father's side, while M.S. had to accept what she was given. She was not given any credence for her own powers of decision.

This tense relationship at several occasions led to an over reaction on the part of the mother of the children and to loud disputes between the marriage partners.

M.S. indicated that the situation in general, as well as the behaviour of the children, had improved since the physical separation from her husband, and that the children had become quieter, also during the night. During the house visit of the undersigned, the minor child S. was present. S. appeared to be a quiet child, and kept himself busy on his own during the visit to the house. He also showed an emotional bond with the mother."

The report of Christine Pescl of 16 June 1997 in relation to the father's household stated:

"The following can be reported in relation to the request of the Local Court of Neunkirchen of 16-05-1997, on the basis of the investigation carried out:

On 09-06-1997 a house visit was carried out at the address of the father of the children, F.S.

F.S. lives at the address in question in a single family dwelling, which belongs in equal parts to him and to his sister Ms G.D., who however does not claim ownership.

The house is very roomy and has a floor space of 150 m<sup>2</sup>. The dwelling includes, opening up from a front room, a large live-in kitchen, living room, bedrooms and three further rooms, as well as various secondary rooms. The kitchen, living room and one further room, which was used as a hunting room by the grandfather on the father's side, now deceased, although old, have been suitably furnished; in the other rooms the furnishings are very much lacking or absent altogether. F.S. gives as the reason for this that his wife has taken along most of the furniture when she left. The inside of the house can be described partly as desolate. The wallpaper has been partly torn from the walls. The carpeting on the floor is mostly dirty and stained, three doors are missing altogether. When this was brought to the notice of the father of the children, he told us that this situation was brought about by his wife.

With regard to the sleeping arrangements of the children when exercising visiting rights, F.S. told us that the minor children currently only have the marriage bed of the parents at their disposal. He himself is meant to be sleeping on a couch.

There is a plant nursery adjacent to the house, half of which also belongs to the sister of the father of the children. F.S. who is a gardener by trade, works in an enterprise. He indicates that his monthly income currently is 8.000.-- Austrian Shillings.

If the children should be allocated to the father, then he would want to look after them himself, since he indicates that as an "independent person" (somebody who works for his own account) his working hours are flexible. The grandmother on the father's side, Mrs F.,



born on \*-\*-1941, living at \*\*, is said to be willing to assist her son with the care of the grandchildren during three weekdays.

F.S. currently does not carry any compulsory insurance, and therefore has no sickness benefit for himself or for the children.

The father is for the moment in agreement with the visiting contact arrangement as described in the settlement. He has however not yet indicated any considerations in regard to what the visiting rights should be in case his wife should receive the right to custody of the minor children. F.S is firmly convinced that he will be granted the of (sic) the boys."

An issue of some significance in this period was the lack of health insurance for the wife and children because the husband had ceased payments in this respect early in 1997.

The wife believed and I accept that without that insurance she would be unable to remain in Austria.

Following the listing in July 1997 and prior to her return to Australia the wife acquired one month's health insurance for herself and the children at a cost of \$350 for the one month.

The wife appears to have relied, inter alia, on the failure of the husband to provide that health insurance and otherwise provide for herself and the children financially, to obtain passports for the children without the husband's knowledge and consent.

When the matter returned to Court on 13 August 1997 the husband did not attend and the wife was unrepresented. She informed the Court of the lack of insurance and financial support by the husband and her reliance on the financial support of her family and an order was made for maintenance for the three children in a sum of 3900 ATS per month and the proceedings were again adjourned until October 1997.

The husband subsequently appealed that maintenance order and his appeal was dismissed by the Austrian Court on 27 April 1998.

As emphasised on behalf of the Central Authority in the context of her complaints about lack of financial support the wife continued to receive the rental of the Beacon Hill property. However that was clearly taken into account by the Austrian Court.

The husband is said to be in a perilous financial position and referred to at one point in the material, as now bankrupt.

The wife returned to Australia, she said, suddenly and without premeditation on 15 August 1997, with tickets arranged by her father.

Upon her return to Australia, in October 1997 she obtained accommodation at Drummoyne and enrolled the twins in school.

The younger child commenced school this year.

The wife set out in considerable detail the current living and social arrangements for the children, which lend a great deal of weight to her contention that the children are now happy and well settled here, although that is not a matter germane to my decision.

Of considerable concern however is the fact that the three children have had no contact with their father despite his clearly having made a number of attempts to telephone them through the wife's parents.

As I pointed out during the submissions on behalf of the respondent when he was addressing on "the risk of psychological harm to these children" - that lack of contact with their father is an important area of risk for them at the present time.

On 23 October 1997 the wife filed a Form 7 application in this Court seeking the following orders:

" 1. That the Respondent Husband forthwith do all such things and sign all such documents as may be necessary to transfer all his right, title and interest in the property at \*\*, in the State of New South Wales and being more fully described as Folio Identifier (sic) to the Wife.

2. That the Wife indemnifies and keeps indemnified the Husband from and against all liability in relation to the repayment of the loan to the Wife's parents, together with all charges on the said property.

3. That the wife have sole custody of the three children of the marriage, namely F.S. born 1 June, 1991, C.S. born 1 June, 1991, and S.S. born 9 July, 1993.

4. That the Respondent Husband be restrained from taking the children outside New South Wales or Australia without the consent of the Family Court of Australia.

5. That the Respondent Husband be granted access to the three children of the marriage only when he is in Sydney, Australia, under the supervision of the Applicant Wife or the Applicant Wifes parents, such access to be during the day and the arrangements made between the Respondent Husband and the Applicant Wife prior to the Respondent Husband coming to New South Wales.

6. That the Respondent Husband be ordered to hand in his passport to the Family Court of Australia at Sydney with the two children of the marriage, F. and C..

7. That the Respondent Husband be ordered to pay maintenance for the three children of the marriage in the sum of Two Hundred Dollars (\$200.00) per week per child.

8. That any bank accounts, investments, superannuation or shares currently in the possession of each party remain the possession of that party.

9. That the Respondent Husband pay the costs of the Applicant Wife."

On the same day she filed a Form 8 application seeking relief identical with the orders sought in paragraphs 3 to 7 inclusive above.

That matter first came before this Court on 7 November 1997 when both parties were legally represented and it was adjourned to 12 December 1997.

On 12 December 1997 when both parties were again represented it was adjourned to 10 February 1998 and the following noted:

"29 Adjourned to allow matter to proceed in Austria

30 No further directions made as parties need to consider their current positions."

On 10 February 1998 both parties were again represented, the husband was directed for file a Form 7A and a Form 17 by 20 March 1998, the wife to file a Form 17 by 24 February 1998 and the matter stood over to 27 March 1998 on which date, when both parties were legally

represented, the parties were directed to a conciliation conference on 19 May 1998, and it was directed that the husband might be involved by telephone link-up at his expense.

That conference occurred, again with both parties legally represented, and a pre-hearing conference was then fixed for 4 August 1998 for this case as a standard matter with property, residence, contact and specific issues at issue. Again it was directed that the husband's involvement in that conference could be by telephone link-up.

In the meantime on 27 March 1998 the husband through his then solicitor filed a faxed copy of a Form 7A and a Form 17.

In that Form 7A the husband sought orders as set out in the document which is Attachment "B" to these Reasons.

At that pre-hearing conference both parties were represented although the husband was not present.

The matter was fixed for three days' hearing commencing on 30 November 1998 and the Court conference sheet notes:

"The husband's representative agrees matter should be listed for hearing despite Order 2 in the husband's Form 7A filed 27 March 1998. Husband is overseas and is to return for the hearing and counselling. Husband is to file originals of Form 7A and Form 17 within one month (properly attested to conform with Rules)."

On 10 September 1998 John Quinn, the solicitor representing the husband in those Family Court proceedings to that date, filed a Notice that he had ceased to represent the husband whose future address for service was given as being in Austria.

This was confirmed by a document from the husband in evidence before me.

The husband asserts in circumstances where he was apparently represented by the same legal representative throughout the Austrian proceedings that it was only "at the beginning of the year" that he became aware of the Hague Convention on the Civil Aspects of International Child Abduction" through his Australian solicitor and that it was then he sought the advice of his Austrian solicitor on the topic.

Regulation 16 of the relevant regulations provides:

"...

16(1) ... Subject to subregulations (2) and (3); on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

16(2) ... A court must refuse to make an order under subregulation (1) if it is satisfied that:

(a) the removal or retention of the child was not a removal or retention of the child within the meaning of these Regulations; or

**(b) the child was not an habitual resident of a convention country immediately before his or her removal or retention; or**

**(c) the child had attained the age of 16; or**

**(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country; or**

**(e) the child is not in Australia.**

**16(3) ... A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:**

**(a) the person, institution or other body making application for return of a child under regulation 13:**

**(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or**

**(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or**

**(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or**

**(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.**

**16(4) ... For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.**

**16(5) ... The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return."**

**The first matter at issue is whether Austria was the habitual residence of the children as at 15 August 1997 when they were removed and within that issue whether the family intended to remain in Austria or it was intended to be a "temporary" measure.**

**The matters emphasised by counsel for the Central Authority against the wife's contention that it was temporary were:**

**o that they had been living in Austria for some two years;**

**o that the husband had a business in Austria which he had inherited from his father and the business was run with his sister in premises attached to the house;**

**o the children were attending kindergartens in Austria;**

**o the wife's evidence to the Austrian Court in April 1997 to the effect that she had every intention of staying in that country;**

**and he relied mainly on these matters to submit that:**

**o the parties moved to Austria with the intention of running the husband's father's business;**

**o that they intended to stay there at least in the foreseeable future; and**

**o that the unilateral decision of the wife to move back to Australia is not sufficient to change the habitual residence of the children;**

**and in the course of those submissions I was referred to Murray v Director, Family Services, ACT (1993) FLC 92-416; Cooper v Casey (1995) FLC 92-575, and Hanbury-Brown and Hanbury-Brown (1996) FLC 92-671**

**In Cooper v Casey Nicholson CJ discussed the issue of habitual residence at some length and after quoting from the passage from the judgment of the trial Judge in which he had pointed out that habitual residence is not defined either in the regulations or the Convention and is in each case a question of fact, at page 81,695 Nicholson CJ referred to the following passages in the judgment of Waite J in Re B (Minors) (Abduction) (No 2) (1993) 1 FLR 993 at 995 setting out the relevant principles as follows:**

**'...**

**"1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.**

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

**All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.**

**3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v S (above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country."**

**...'**

**Counsel for the wife stressed the passage which refers to the requirement of establishing a 'settled purpose' 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" to submit that "the habitual residence of these children was Australia when they left for Austria and it**

remained Australia because the children and the parents went to Austria for a period of time but without the necessary settled purpose by both their parents to remain permanently or for whatever period of time suggested to give the children an habitual residence in Austria." I accept that submission.

Whilst conceding the evidence of the wife referred to in the divorce proceedings to the effect that the wife intended to remain in Austria in the long term and to be domiciled there, he also referred to the husband's declaration that, for his part that he would not think of resettling in Australia for the next few years for occupation reasons, to submit that that evidence was given in the context of both parents indicating an intention to apply for sole care of all children.

Mr Anderson for the wife also referred to the question put to the husband's mother as to the wife's contention "that the defendant had only promised the plaintiff a temporary stay in Austria; that he had gone against the desires of the plaintiff and deviated from it and the plaintiff had to struggle against increasing difficulties in adapting in Austria" and her response, "Well, I am hearing this for the first time." Given the mother's antipathy towards the wife, evident from a reading of her evidence, I do not accept that that response is of particular significance.

Counsel for the wife also referred to the evidence of the husband's sister to the effect that the wife became "hysterical" about a year after their arrival from Australia and submitted that this coincided with the wife "beginning to realise that she was trapped in Austria and that the husband had no intention of honouring the promise that was made at the time they left Australia."

I am further satisfied that the evidence, particularly that relating to the parties' leaving items of furniture, personal clothing, children's clothing and toys, and the wife's motor vehicle in Australia and retaining ownership of their former matrimonial home here, is supportive of the submission that when they left for Austria their habitual residence remained Australia.

However I have given careful consideration to whether at some subsequent time they developed a settled purpose to stay in Austria. Ultimately I am not persuaded on the evidence in this case that these parents ever formed a shared intention to remain in Austria and for it to be the permanent residence of these children.

However if I am in error in that finding there are other aspects of this case which support the wife's resistance to the application for return of the children.

Counsel for the wife dealt with the two issues as to whether or not there had been a removal or retention under the regulations (Regulation 16(2)(a)) and whether the husband was exercising rights of custody (Regulation 16(3)(a)(i)), together.

He submitted that the "removal" is only a removal within the meaning of the regulations if there is a breach of rights of custody which were actually being exercised and I accept that submission.

Regulation 3(1) provides:

"...

**3(1) ["removal of a child"] A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:**

**(a) were actually exercised, either jointly or alone; or**

**(b) would have been so exercised but for the removal of the child.**

**3(2) ["retention of a child"] A reference in these Regulations to the retention of a child is a reference to the retention of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of retention those rights:**

**(a) were actually exercised, either jointly or alone; or**

**(b) would have been so exercised but for the retention of the child."**

**Regulation 4 provides:**

"...

**4(1) ["rights of custody"] For the purposes of these Regulations, a person, an institution or another body has rights of custody in relation to a child, if:**

**(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and**

**(b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.**

**4(2) [Care of the person of the child] For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.**

**4(3) [How rights of custody may arise] For the purposes of this regulation, rights of custody may arise:**

**(a) by operation of law; or**

**(b) by reason of a judicial or administrative decision; or**

**(c) by reason of an agreement having legal effect under a law in force in Australia or a convention country."**

**Attached to the application is a certificate from the Federal Ministry of Justice of the Republic of Austria which states:**

"...

**The Federal Ministry of Justice empowered to do so by art. 282 of the Act concerning the judicial procedures in non-contentious matters, 1854, and by art. 4 para. 2 of the Act executing the Hague Convention on the Civil Aspects of International Child Abduction certifies as follows:**

According art. 144 of the Austrian Civil Code both parents of a child born in wedlock are entitled to care for the child, to administer his/her property and to act as legal representatives of the child (joint parental responsibilities). They are bound to exercise these rights on good terms with each other."

In circumstances where the arrangements set in place for these children by the Austrian Court were that the children should reside with the mother and the father have visitation rights, I am satisfied that the father was not exercising rights of custody to the children at the time they were removed from Austria and that accordingly their removal was not a removal within the meaning of the regulations.

A further significant aspect of this case is the wife's defence that the husband has acquiesced in the children's retention in Australia.

Although I have found in the wife's favour in relation to regulation 16(2)(a) and (b), I propose dealing with the evidence in relation to this further defence because I am satisfied that it is a significant matter which lends support in all of the circumstances of this case, to a finding that the application under the regulations should fail.

Counsel for the wife relied on a House of Lords decision of *In re H. and Others (Minors) (Abduction: Acquiescence)* 2 WLR, 25 April 1997 at page 563 where at pages 572-575 Waite LJ discussed acquiescence and in particular at page 574-575:

"It is a feature of all developed systems of law that there are circumstances in which one party, A, has so conducted himself as to mislead the other party, B, as to the true state of the facts. In such a case A is not allowed subsequently to assert the true facts as against B. In English law, this is typically represented by the law of estoppel but I am not suggesting that the rules of English law as to estoppel should be imported into the Convention. What is important is the general principle to be found in all developed systems of law.

It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted.

Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.

Therefore in my judgment there are cases (of which *In re A.Z. (A Minor) (Abduction: Acquiescence)* [1993] 1 F.L.R. 682 is one) in which the wronged parent, knowing of his rights, has so conducted himself vis-a-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary that this exceptional case arises.

My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a



**request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs.**

**It may be object that to admit the existence of such exceptional cases in which the actual subjective intentions of the wronged parent do not prevail is to reintroduce by the back door the distinction between active and passive acquiescence which I have rejected. It is true that there are features common to both approaches. But in my judgment the two concepts are not the same. The concept of active and passive acquiescence has led to the approach that acquiescence has to be tested objectively whereas in my view it is a question of subjective intention. The concept of active and passive acquiescence has also led, as in the present case, to a wronged parent who has not, in fact, acquiesced being held to have acquiesced because he has taken some positive action without any analysis of what he has in fact done. The important factor to emphasise is that the wronged parent who has in fact never acquiesced is not to lose his right to the summary return of his children except by words or actions which unequivocally demonstrate that he was not insisting on the summary return of the child."**

**(emphasis added)**

**The husband through his legal representative in this country actively participated in these proceedings for well in excess of nine months before the wife was served with this application.**

**Whilst I am conscious of and have taken into account:**

**o the husband's evidence that he did not receive advice until about April 1998 (ie. about six months after the commencement of the Family Court proceedings) as to the existence of the procedure under the Convention, he has been legally represented in both countries at all times until comparatively recently; and**

**o the terms of his Response filed on 27 March 1998 (which appear to amend the original intention of the document in relation to the children) which sought that issues in relation to the children be dealt with in Austria and issues of property be dealt with in Australia (which in my view in the context of these proceedings does no more than raise a former issue in relation to one aspect of the proceedings commenced in this Court);**

**I consider that the wife in this case was entitled to believe that the husband was not insisting on the summary return of the children to Austria.**

**Given those findings I do not propose to traverse in detail the other defences raised on the wife's behalf, although I have taken into account in relation to regulation 16(3)(a) the information as to the social background of the children, contained in the protocols particularly the report of the social worker.**

**Accordingly because I am not persuaded:**

**o that removal of these children was a removal with the meaning of the Regulations;**

**o that the children were habitual residents of Austria at the time of removal;**

**o that the father was actually exercising rights of custody at the time of their removal;**

**and am satisfied:**

**o that the husband has subsequently acquiesced in the children being retained in Australia;**

**I would dismiss the application of the Central Authority.**

**However I consider that the orders of 18 August 1998 and 2 September 1998 should continue until further order.**

**For all these Reasons my Orders will be:**

**1. That the Orders of 18 August 1998 and 2 September 1998 continue until further Order of this Court.**

**2. That the balance of the application of the Central Authority filed 14 August 1998 be dismissed.**

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