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http://www.incadat.com/ ref.: HC/E/NZ 251
[08/07/1994; District Court of New Zealand at Auckland; First Instance]
Secretary for Justice v. D., District Court of New Zealand

IN THE DISTRICT COURT OF NEW ZEALAND

FAMILY DIVISION AT NORTH SHORE, AUCKLAND

Heard: 7 and 8 July 1994

Decided: 8 July 1994

Boshier J.

The Secretary for Justice as the New Zealand Central Authority and D.

Counsel: M M Casey for the applicant; L Heah for the respondent

JUDGE P F BOSHIER

Application

By application brought on 6 May 1994 the applicant applies for an order for the return of K M and S M to the United Kingdom. The application was brought pursuant to s 12 of the Guardianship Amendment Act 1991. The applicant also seeks a warrant authorising the children to be delivered into his possession to enable any such order for return to be implemented and, finally, for an order that the whole or part of any costs in returning the children be met by the respondent.

The respondent opposes that order. In an amended notice of defence she says:

(i) The children were not habitually resident in the United Kingdom at the time they were removed to New Zealand by the respondent.

(ii) The children are habitually resident in New Zealand.

(iii) The removal of the children from Scotland by the respondent was not in breach of the applicant's "rights of custody" in terms of s 4 and s 12 of the Guardianship Amendment Act 1991.

The respondent furthermore applies for custody pursuant to s 11 of the Guardianship Act 1968 so that she can retain the children in New Zealand. There is at present an order in force preventing the removal of the children from New Zealand.

Background

The parties were married on 1 May 1987 in Scotland. They had previously lived together, including, for a time, on the island of Islay in Scotland. The two children, K and S, were born on 23 January 1988 and 2 December 1989 respectively. In 1992, a decision was taken to emigrate to New Zealand. The family obtained the requisite visitors permits and, complete with all family possessions, arrived in New Zealand on 19 September 1992.

In February 1993, Miss Denholm confided in Mr M that she was a lesbian and a discussion occurred as to the consequences of that. At the end of February, Miss D moved out of the matrimonial home and into a flat. By this time both parents had obtained employment. It suited their quite different work hours for Miss D to come to the home and care for the children in the morning. In the afternoon when both parents worked the children were cared for by a professional child minder, Mrs L. Mr M had a routine of uplifting the children at 4.30 pm and he cared for them for the balance of the time while Miss D was working.

Miss D commenced a relationship with a friend, L R, and that relationship is a deep one and endures. Mr M found the situation difficult. He decided that he wanted to return to Scotland. By early April 1993 it had been agreed between the parties that Mr M and the children should return to live in Scotland permanently. This agreement was furthered by application to the British High Commission to have the children placed on Mr M's passport. On 22 April 1993 Miss D wrote a letter consenting to both children being placed on his passport for the purpose of them travelling back to the United Kingdom.

Prior to his departure it is the contention of Miss D that what had previously been an agreement that Mr M leave permanently had been replaced by an agreement that they would merely go temporarily and for a holiday. This contention is heavily in dispute. On 6 June 1993, Mr M and the girls returned to Scotland to live in Dunbarton where Mr M had family.

Not surprisingly, it was Miss D's wish to hear as promptly as possible from Mr M that all had gone well and that the children had arrived safely. There is dispute as to what contact was either initiated or attempted upon Mr M's arrival in Scotland but for the first week no substantial contact occurred. Accordingly Miss D rang Mr M and spoke to his sister in Dunbarton. Later that same day she spoke to Mr M. There was no further telephone contact between the parties. Later in June Miss D telephoned and spoke to Mr M's sister again and was told that as of about 29 June Mr M and the girls had moved to live in Islay. It is common ground that from that time onwards there was no direct contact between Miss D and the children up until the end of 1993. Mr M confesses to not wanting any such contact and goes as far as admitting to wanting to punish Miss D by denying contact.

In July 1993, Miss D wrote to a mutual friend in Scotland, R B. It is a significant letter and on its face indicates that Miss D knew that the move by Mr M back to Scotland was permanent and was intended as being permanent. In September, Miss D sent some tape recordings for the children and on one of the tapes was a message to Mr M. There is dispute as to when the tapes arrived but I do not know that that is of such great importance. Exhibited to Mr M's affidavit of 14 June 1994 is a transcript of the relevant portion of the tape recording and Miss D accepts that the transcript is accurate. At one point in the recording she says:

I will continue to send the tapes to the address of P until you send me another address to get in touch with you at, whether that be your address or whether that be the address of a friend or a P.O. Box I don't care, I want to communicate with the girls.

Later on she says:

Things weren't that difficult to fix up with Immigration so that's cool but my priority now is because I am settling and I have got a lot to do here. My first priority is to make sure that my relationship in communication with the girls is still the most important. I don't necessarily want to communicate with you but I do with the girls so let them hear this tape.

The portion of the tape that I have just referred to contains no remonstration with Mr M other than a criticism of him discouraging communication. There seems to be a tacit acceptance of domicile. Miss D, in evidence, said that that may be so but that she was concerned that if she confronted Mr M in any way with her belief that he had failed to return the children he would have made life even more difficult for her.

Apart from the tape recording there was no other communication in the latter part of 1993 and I apprehend that largely because of that, and that there was no real contact at all as between Miss D and the children, she made the decision to travel to Scotland.

On 29 November 1993, Miss D arrived in Islay and saw the children. Some time later her partner, L R, also travelled to Scotland and thereafter Miss D stayed for some months. Contact was established between Miss D and the girls and was maintained on the basis of access over the ensuing months. The position then was that between Christmas and April 1994 the children remained in the prime care of Mr M but Miss D saw them on the basis of access. Pursuant to a specific access arrangement the children went to see their mother on 20 April 1994; it was to be for a weekend. Unbeknown to Mr M and agreed to be as the result of a quite unilateral decision Miss D left Scotland with the children and returned to New Zealand. She arrived on about 26 April 1994. She applied for interim custody and an order preventing removal of the children from New Zealand. The latter order only was granted.

It is against these basic facts that this case falls for determination.

Issues

There are two issues in this case which are put to me for determination. They are:

(i) Were the children habitually resident in the United Kingdom at the time that they were removed in April 1994?

(ii) Even if they were, was the removal in breach of the applicant's rights of custody?

The latter issue however gives rise to other interesting and important issues. Given that no orders as to custody were in existence in either Scotland or New Zealand, the relationship between Scottish law and New Zealand law as it applies to s 4 of the Guardianship Amendment Act 1991 falls for consideration.

Decision

The answer to the first issue relies on findings of fact. The answer to the second issue relies mostly on findings or rulings as to the law.

The applicant carries the onus to persuade the Court that the children were habitually resident in Scotland and that in breach of his rights of custody they were removed.

Habitually resident

Miss D's position bears repeating. She acknowledges that as a result of a discussion with Mr M in early 1993 she agreed that the children should return to Scotland to live permanently. She said that as the time for departure drew near and she mulled over the enormity of the situation she changed her mind and procured Mr M's agreement that that should not occur and that the trip should be temporary only. She says that although the children were undoubtedly resident in Scotland in April 1994 when she admittedly removed them, the children were not habitually resident in Scotland. It is her case that they should have been habitually resident in New Zealand and would have been habitually resident in New Zealand had Mr M not breached an agreement and not returned them some two to three months after they departed in June 1993.

The applicant's case is firmly that it was always intended as a permanent move to Scotland; that there was only one agreement; there was never any agreement amending the first one to that of a temporary move; and that the children were habitually living in Scotland in April 1994 by agreement.

All of the evidence is heavily persuasive to me that Mr M left New Zealand with the children on a permanent basis and that that was known to both parties. There is a great amount of evidence on the point, including the following significant areas of evidence:

(i) Mrs L

Mrs L was the caregiver to the children in the afternoons and had sworn an affidavit that she not only knew from Mr M that the return was intended as permanent but also that Miss D knew that that was so and acquiesced. I have the advantage of having heard Mrs L cross-examined. I found her an honest witness; I believe what she says. I believe her when she told me that as of early June 1993 she felt her ongoing role had been terminated because the children would no longer be in New Zealand on any sort of basis. She said that the "goodbyes" she had with Mr M, the children and with Miss D were final. She was well tested by Miss Heah but she would not shift from her view.

(ii) Mrs Miller

Mrs Miller was a friend of both parties and is Scottish. The parties stayed with her for a period when they first came to New Zealand. Mrs Miller deposed that she knew that Mr M and the girls' return to Scotland in June was intended as permanent. She was, cross-examined by Miss Heah. Under cross-examination she said that she had no impression from meetings with Miss D in May and July 1993 that Miss D had any apprehension that this was a holiday. She said that in July when Miss D came to visit her there did not appear to be any degree of misapprehension as to the course of events.

(iii) Other affidavits

Further evidence was submitted on the part of the applicant but witnesses were not required for cross-examination. The totality of that G further evidence called by the applicant is that as a result of farewell parties and various other communications most friends in Auckland knew that the M children were returning to Scotland permanently.

(iv) The tape recordings which Miss D sent to Scotland subsequently.

(v) The letter which Miss D sent to R B which was received in early July 1993.

(vi) Various other indicia such as the termination of the tenancy of the home in which Mr M and the girls were staying, the disposition of all of the furniture, the retention of one bank account for clean-up purposes, the purchase of a one way air ticket, and finally the fact of the expiry of the visitors permits with no steps to endeavour to procure re-entry for the future.

Against this evidence called by the applicant Miss D seeks to rebut it in a number of ways. An affidavit was filed on her behalf by Dr Tus Fernando, a general practitioner whom she consulted.

In that affidavit the doctor affirms:

4. When I saw Jessie as a patient again on the 29th of July 1993 I asked after her situation. I could still remember what she had told me on her last visit on 25 June 1993 about her husband and children. She stated that her situation was unchanged in that her husband who had taken her children on holiday had disappeared with them and she still did not know where they were.

Miss Heah accepts that this is a self-serving statement but nevertheless stresses that it is reflective of Miss D's thinking and state of mind at the time.

In the course of her evidence, Miss D referred in particular to the letter to R B and the tape recordings. I have already said that the letter to R B is important because it was a letter written at a time in which it would have been thought her views were important.

Miss D in cross-examination accepts that the letter indicates that she knew that the move back to Scotland was permanent. However, she says that the letter was written well before it was posted. The letter is undated. The most one can deduce is that the postmark appears to be 9 July 1993. Miss

D says that the letter could have been written a good one month before it was posted. She says that the new agreement wherein the departure of the children was to be temporary only was made very late and possibly in the two weeks or so leading up to the children's departure.

I agree with the thrust of Miss Casey's cross-examination that it strikes me as strange that Miss D would dispatch a letter all the same in which she conveys advice which by then, according to her, had wholly changed. If what Miss D says is correct I would have thought that she would have disposed of the initial letter and ensured that she wrote a new one, making clear the changed arrangements.

In relation to the tape recordings, again Miss Casey put to Miss D that she had failed to take any issue in the tape recordings with anything that Mr M had done by way of changing the agreement. Miss D conceded that that was so but, as I have said earlier, said she was concerned at not provoking confrontation. But a close reading of the transcript indicates that she not so much as hinted at any concern that Mr M was in breach of the agreement so far as temporary removal was concerned. Her focus was clearly on the need for contact and her concern that contact was being withheld.

I have to now indicate, though, that in other respects I am regrettably forced to the view that Miss D's credibility leaves me with unease. There are a number of areas which lead me to the view that Miss D puts forward a view which best suits according to the particular circumstances. I was particularly concerned at cross-examination focused on an affidavit

that she swore on 26 April 1994. That affidavit was in support of an ex parte application and it is well known to counsel who prepare such affidavits that an ex parte application must be accompanied by an affidavit which discloses all relevant facts.

The Court granted an order in favour of Miss D on, inter alia, the following sworn evidence:

4. The respondent and I separated in April 1993 and the respondent left for Britain for a holiday with the children.

5. I did not ever find out whether they arrived safely and all of my inquiries came to nothing. They just disappeared.

That evidence is plainly wrong and misleading.

Miss D had said in evidence that on 30 June 1994 she telephoned R B and had a conversation with her as to where Mr M might be. Under cross-examination and when faced with contrary evidence she agreed that she had not called R B as earlier said on 30 June 1994. It may be a small matter but it adds to a picture of unease that I have.

There was cross-examination by Miss Casey of Miss D in relation to a conversation that Miss D had with Mrs Miller in July. Under cross-examination Miss D said that she had intentionally said a number of things to Mrs Miller which were incorrect and that she had lied to Mrs Miller about those areas because she did not want to reveal a true situation. I have to say I did not find her reasons for being untruthful persuasive.

The final area of some unease for me letter exhibited to Miss D's affidavit of 30 June 1994. In para 40 of that affidavit she says:

When I was in Scotland John handed me a piece of paper which is annexed hereto and marked with the letter "A" which he asked me to sign. I refused and never did sign it. However it has a signature on which purports to be mine but is not.

A very different picture emerged under cross-examination. In fact the exhibit to the affidavit was not the note at all but was a copy of a facsimile of a draft which had been found by Miss D's partner, Miss R, in K's notebook. If that appears to be a difficult explanation, I set it out to make it clear that it certainly was not and could never have been the note in question that Miss D refers to in para 40. In fact it appears that the note that she is referring to was lost. Miss D seeks to allege that the draft which is attached to her affidavit was drafted by Mr M and that he forged her signature. I rather think the purpose of the exhibit is to try and demonstrate that he wished to force the question of custody and that furthermore he could not be trusted because he forged her signature.

I believe Mr M when he says that he did not draft the note exhibited as "A" to Miss D's affidavit and that he did not forge Miss D's signature at the foot. I am unable to say who drafted the note and who signed Miss D's name at the foot. What I am able to do is to find that Miss D is wrong when she alleges in paragraph 40 that this was the work of Mr M and that it was done to deceive.

These findings of credibility are important because I have looked throughout the case for threads which might assist me in deciding who of the parties is the more correct in the conflicting evidence which they have given. For all of the reasons which I set out I prefer the evidence of Mr M. It is my view that when the children left New Zealand in June 1993 it was done so with the intention of permanency.

I think in reality that Mr M committed an error of judgment when upon his arrival he made the decision to attempt to cut the children's mother out from their lives. I believe it more likely than not that faced with increasing frustration as to contact, Miss D was forced to travel to Scotland to see the children. Faced with further complications in establishing easy contact with the children in Scotland and in particular some disagreement over access in April 1994 she made the decision that notwithstanding an earlier agreement that the children should live in Scotland the only meaningful relationship she was likely to have with them meant that she had to remove them and bring them back to New Zealand.

Both in fact and in law I am of the view that prior to their removal the children were habitually resident in Scotland.

Breach of custody

As plainly the children were removed from Scotland by Miss D, was that in breach of Mr M's rights of custody? Although it appears that in the course of divorce proceedings Mr M had applied for custody, as at April 1994 no custody order was in place. Given that no such order was in place both parents had rights of custody pursuant to Scottish law and the position appears to me to be very similar to that which it would have been in New Zealand. Both the applicant and respondent procured legal opinions from lawyers in Scotland. For the applicant an opinion was sought from Professor Joseph McGeachy Thomson, the Regius Professor of Law at the University of Glasgow. Professor Thomson's opinion was set out in an affidavit filed on 17 June 1994. He said:

Mrs M has parental rights under s 2(1)(a). As Mr M is presumed to be the father of the children and was married to the mother at the dates of their birth he has parental rights under s 2(1)(b). Accordingly under Scots Law Mr M and his wife have the rights of custody in respect of the children by virtue of Sections 2 and 5 of the Law Reform (Parent and Child) (Scotland) Act 1986. Thus, both have the right to physical possession and care and the right to determine where the children live.

He went on to say:

Before there is a wrongful removal for the purposes of Article 3 of The Hague Convention the removal must be in breach of Mr M's right of custody. However, s 2(4) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that where two or more persons have any parental right each of them may exercise that right without the consent of the other. The issue therefore arises whether the removal of the children is in breach of Mr M's right of custody given that Mr M has also a right of custody.

The respondent filed an affidavit from Francis Collins, of Glasgow, a solicitor who has practiced in law for ten years including family law.

In large part Mr Collins agrees with what Professor Thomson says as to the interpretation of the relevant parts of the Law Reform (Scotland) Act. The debate though as between Professor Thomson and Mr Collins centres on the interpretation of, in particular, two cases and whether or not the unilateral removal by Miss D could have been in breach of Mr M's rights of custody given that no order was in force. Professor Thomson and Mr Collins refer to two cases. In relation to those Professor Thomson says:

9. In Taylor v Ford [1993] SLT 654, Temporary Judge Horsburgh QC held that for the purpose of Article 3 there was no wrongful removal when *both* parents] had the right to

custody. On the other hand, in H v N [1990] 2 ELR 654, the High Court in England took the opposite view and held that there was a wrongful removal for the purpose of Article 3 even where both parents had custody, if the child was removed by one parent without the consent of the other. In my opinion the purpose of s 2(4) is to allow one parent to exercise parental rights without the need to defer to the other on every day-to-day issues: but it was not intended to allow one parent to exercise parental rights in such a way as to prevent the other exercising his parental rights at all. Since the removal of the children to New Zealand by Mrs M prevents Mr M exercising his right of custody, it is thought that for the purposes of The Hague Convention, the removal is a breach of his right of custody and thereby a wrongful removal. On this point, *Taylor v Ford* is unsound: Anton & Beaumont *Private International Law* (2nd ed) at 531 (where *H v N* is followed); Wilkinson and Norrie *Parent and Child* p 275. However, this is ultimately a question for the New Zealand court.

Mr Collins does not accept Professor Thomson's interpretation of what might constitute a breach of custody rights and does not accept Professor Thomson's interpretation of those cases. He says:

4. Professor Thomson is correct in his analysis of the custody rights situation as set out in paragraphs 3 to 8 of his affidavit. Where we diverge in our opinions is in relation to the effect of the case of *Taylor v Ford*....

A reading of Mr Collins' affidavit indicates that while he disagrees with Professor Thomson's interpretation of the two cases cited he does not attempt to argue why Professor Thomson is wrong when the latter says that a removal is in breach of a right of custody.

Implicit in Mr Collins' opinion is the submission that because both parents retained a right of custody both could act as they wished without the consent of the other. The suggestion therefore is that a removal could not be in breach because Miss D acted within her rights according to the Law Reform (Parent and Child) (Scotland) Act 1986. Mr Collins goes on in his opinion to indicate that there were further considerations which Professor Thomson had not addressed, including the welfare principle. He says:

10. There are also considerations which are of importance here and that relates to the welfare principle ie the Court in New Zealand should be asked to take into account the effect the return of the children to this country would have on them...

It may be that Mr Collins did not mean to be that simplistic but save as is expressly provided for in The Hague Convention and as provided for in s 13 of the New Zealand Guardianship Amendment Act 1991, welfare is not relevant to an application for return of children.

Whether there has been a breach of Mr M's rights of custody pursuant to s 12(1)(b) of the Guardianship Amendment Act 1991 requires an interpretation of Scottish law.

Section 4 of the Guardianship Amendment Act states:

4. Rights of Custody - (1) For the purposes of this part of the Act a person has rights of custody in respect of a child if *under the law of the contracting state* in which the child was immediately before his or her removal habitually resident that person has either alone or jointly with any other person or persons:

(a) *The right to the possession and care of the child; and*

(b) To the extent permitted by the right referred to in paragraph (a) of this subsection the

right to determine where the child is to live.

The emphasis above is mine, and is to reinforce the need to consider the Scottish provisions.

The first inquiry is whether there is a right to possession and care of a child. If there is not but there is a right to determine where a child lives the effect of the latter right is circumscribed by s 4(1)(a). This is particularly important in cases where, for instance, one party has a custody order, and another party merely has an access order. If in New Zealand law a party only has an access order in a foreign state, irrespective of any right concerning place of residence, it is doubtful that the Guardianship Amendment Act 1991 will greatly assist the parent who has such an access order (see Freeman v Tayler (High Court, Napier AP 10/94, 24 May 1994, Gallen J.)

Here there was no order in force and neither had a right of custody superior to the other. It is necessary to closely consider the provisions of the Scottish Act when considering whether or not here there has been a breach of Mr M's rights custody. Section 2(4) of the Scottish Act says:

Where two or more persons have any parental right each of them may exercise that right without the consent of the other person or, as the case may be, any of the other persons unless any decree or deed conferring the right otherwise provides.

Section 8 of the Act defines parental rights as follows:

"parental rights" means tutory, curatory, custody or access, as the case may require, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law;....

It appears that the two cases relied upon by Professor Thomson and commented on by Mr Collins are less helpful than might first have been helpful. In both cases it now appears that custody orders were in force and that consequences flowed from that fact. I do not believe that the cases greatly assist me in my interpretation of the Scottish law as it relates also to s 4 and s 12 of the New Zealand Guardianship Amendment Act.

Miss Heah submits that as Miss D had a right of custody and as that included a right to determine residence she could not be said to have breached Mr M's rights by simply exercising the rights she had. She submits that unless there was an order in place, or unless there had been some challenge or objection by Mr M, Miss D had acted legitimately. She cites C v C [1989] 2 All ER 465 at 473, where Lord Donaldson says:

If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention. I add for completeness that a "right to determine the child's place of residence" (using the phrase in the convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, eg "within the Commonwealth of Australia".

The portion that Miss Heah seeks to emphasise is that Mr M must have a right to object. She says that implicit in the interpretation of the Scottish legislation is that he had no right to object to what Miss D did in unilaterally removing the children because that was her right according to Scottish law. Miss Heah also calls in aid the Child Abduction Act 1984 (UK) where at s 6 it is said:

6. - (1) Subject to subsections (4) and (5) below, a person connected with a child under the age of sixteen years commits an offence if he takes or sends the child out of the United Kingdom -

(a) without the appropriate consent if there is in respect of the child -

(i) an order of a court in the United Kingdom awarding custody of the child to any person; or

(ii) an order of a court; in England, Wales or Northern Ireland making the child a ward of court;

(b) if there is in respect of the child an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it.

Miss Casey submits on behalf of Mr M that what the Scottish law means when it refers to s 2 (4) is that neither parent who has the right of custody needs consult the other of day to day business. She says it cannot be interpreted as bestowing a right for either parent to act unilaterally on any matter at all. She argues that on Miss Heah's interpretation of the Act The Hague Convention would be rendered nugatory. Her submission is that if there was no order in force and if it was always open to a parent who had a right of custody to change residence and go to another country without such decision being in breach of the other parent's rights, then it would be impossible to ever invoke The Hague Convention.

Miss Heah concedes that that may be so but submits that that is a problem of interpretation of the Scottish Act.

Miss Casey places reliance on the decision of Perrin v Perrin [1993] SCLR 949 when it was said:

....a decision on the question of "wrongful removal" within the meaning of art. 3 means something less than a full legal determination of the custodial rights of parents and whether they had been breached; if the removal is prima facie wrongful this, in the absence of a more specific determination, may be sufficient to bring into effect the provisions of the Convention.

I decide this case, firstly, on the basis of my best interpretation of the Scottish Act, and secondly on my view of how it fits alongside New Zealand law. I cannot accept the logic of the proposition that a right of custody according to the Scottish Act bestows upon the parent having it, any right at all without the consent of the other party also having a right of custody. In my view the right of custody is circumscribed.

The right of custody may be exercised without the consent of the other parent in the broad fashion referred to in s 8 of the Scottish Act. The right cannot be exercised in such a fashion as to render nugatory the other parent's rights. The rights may accordingly be exercised as long as they are reasonably consistent with the other parent's rights. Where they are plainly inconsistent and place at threat the integrity of the other parent's rights, I do not consider the Scottish law legitimises any unilateral action. I do not think that the UK Child Abduction Act does anything other than make it clear when a criminal offence might have been committed. It does not assist in interpreting when in terms of civil law a breach of custody might have occurred.

My approach is consistent with New Zealand law which is that if each parent in New

Zealand is a guardian of a child and each is caring for a child in accordance with such rights then neither may act unilaterally in relation to the other's guardianship rights. Such rights are the fundamental rights as set out in s 3 of the Guardianship Act itself and of course involves such question as country of residence.

My conclusion on the interpretation of the law is that the respondent is in breach of the applicant's rights of custody, both in Scotland and pursuant to s 12(1)(b) of the Guardianship Amendment Act 1991.

Summary

My finding is that the children were habitually resident in Scotland at the time that they were removed.

I furthermore find that each parent had the right of custody at the time of removal and that the unilateral removal by Miss D without the consent of Mr M was in breach of his custody rights and that the removal was accordingly wrongful.

It follows that the application brought by the applicant must succeed.

Orders

(1) Orders as sought in terms of (a) and (b) of the application are granted.

(2) I will make an appropriate order in relation to (c), that is an order for costs of the return of the children upon receiving memoranda from both counsel as to the costs which are involved and the means of Miss D.

(3) The respondent's application in this Court for a custody order is declined.

(4) The order preventing removal of the children from the jurisdiction of New Zealand is discharged.

(5) I will entertain an application for costs upon that being reduced to a memorandum by Miss Casey and upon receiving a memorandum in reply by Miss Heah.

(6) I direct that the passport of Mr M and the two children be released. The order that Miss D's passport remain on the file remains until discharged upon further application.

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