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[01/12/1990; Family Court of Australia (Melbourne); First Instance]
In the Marriage of McOwan v. McOwan (1994) FLC 92-451

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**FAMILY LAW ACT 1975**

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

**BEFORE: Kay J**

**1 December 1993**

**No. DG3097 of 1993**

**BETWEEN**

**Craig Douglas McOwan (Appellant/Husband)**

**-and-**

**Jane Caroline McOwan (Respondent/Wife)**

**REASONS FOR JUDGMENT**

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**APPEARANCES:**

**Mr Bartfeld of Counsel instructed by MacPherson and Kelley, appeared on behalf of the Respondent/Wife.**

**Miss Stoikovska of Counsel instructed by Roberts and Roberts appeared on behalf of the Appellant/Husband.**

**Dr Griffith QC, Solicitor General, appeared on behalf of the Attorney-General for the Commonwealth.**

**Mr Staker appeared for the Commonwealth Central Authority.**

**Ms Sahinidis appeared for the State Central Authority, Health and Community Services.**

**JUDGMENT: Kay J: J. and C. M.O. are husband and wife. They married on 21 April 1990 and separated on 18 June 1993. They have two children S.M.O. born 10 December 1990 and A.M.O. born 15 April 1992.**

**The husband is a 33 year old Australian and the wife is a 27 year old English woman. She met the husband when she was visiting Australia in 1989.**

**On 18 June 1993 the wife returned to England with the children ostensibly for a holiday. She went to stay with her parents. Within one week of her arrival in England she had decided she wished to live permanently in England and not return to Australia. She alleged that the marriage was a violent one and that she had been seriously assaulted on a number of occasions. She alleged that the husband inadequately supported herself and the children, and that he was violent towards the children. She further alleged that the husband over indulged in alcohol on a regular basis.**

**On 2 July 1993 the husband filed a form 7 application in the Family Court of Australia at Dandenong seeking an order for sole custody and guardianship of the children, an order that the wife be directed to return the children to the husband's custody, and an order that a warrant issue to effect the return of the children to the husband. The matter came on ex parte before Justice Rourke on 6 July 1993 who adjourned its hearing until 23 July 1993 and directed that there be service of the documents upon the wife by fax.**

**Notification to the wife of the existence of the Australian proceedings led to a firm of solicitors in England faxing the Court on 13 July 1993, on behalf of the wife, asking for a four month adjournment of the application to enable the parties to give consideration to a reconciliation. It also led to the wife bringing an application before the Family Division of the High Court of Justice in England, seeking a residence order and a prohibited steps order in respect of each of the children.**

**She asked that the Court order that the children reside with her in Surrey, and that the respondent father be prohibited from removing the children from her care or the care of any person in whom she had temporarily placed the children, including both of her parents.**

**On 22 July 1993 Judge Callman sitting as a Judge of the High Court of Justice adjourned the further hearing of the wife's application of 2 August 1993, and made ex parte orders for the children to reside with the wife and prohibiting the husband from removing the children from the jurisdiction of the High Court of Justice in England.**

**On 22 July 1993 the English solicitors faxed the Family Court of Australia at Dandenong, notifying the Court that the Legal Aid Commission in Australia had refused their client legal aid, and as she had no money she could not afford to be represented at the Australian proceedings. Having just obtained ex parte orders in England, it was not without a degree of irony that they said in their letter:**

**"If the matter proceeds in her absence in the present circumstances, we would have thought it would amount to a breach of the rules of natural justice, and in such circumstances to protect our client's position for the time being, have obtained from the High Court in England a Residence Order, and a Prohibited Steps Order, a copy of which is enclosed herewith."**

**The matter came on before me at Dandenong on 23 July 1993. The husband indicated that he intended to make an application in England, pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, seeking the pre-emptory return of the children to Australia. In thosecircumstances I further adjourned his custody application to 30 August 1993, and ordered:**

**"In the event that the children are returned to Australia as a result of the husband's foreshadowed application for the return of the children to Australia in accordance with the Hague Convention on the Civil Aspects of International Child Abduction prior to that time, then there be liberty to apply to have the matter heard as soon as the children are so returned."**

**The jurisdictional race continued when on 2 August 1993, Miss E. Platt QC (sitting as a Deputy High Court Vacation Judge) in the High Court of Justice granted orders that the children should live with the wife and that the husband should be prohibited without the consent of the Court, from removing the children from the jurisdiction of the Court. Liberty to apply to vary or discharge the order on 48 hours notice, was also granted.**

**On the same date the husband issued an originating summons in the High Court of Justice Family Division seeking an order that the wife return the children to the jurisdiction of Victoria, Australia, forthwith. That matter came on for hearing on 20 August 1993 before Sir Robert Johnson J, sitting as a High Court Vacation Judge. After a contested hearing and after obtaining undertakings from the husband that he would:**

**(1) make available to the wife and to the children the sole use of the property situated at *, Victoria Australia**

**(2) not to visit or enter the said property without the prior leave of the wife**

**(3) not to enforce the Australian custody order in respect of the children until the matter was brought back inter-partes before the Australian Family Court**

**His Honour ordered:**

**(1) That the defendant do return with the said minors to Australia forthwith**

**(2) Undertakings (1) and (2) given this day to continue until further directions are given in this matter by the Australian Family Court**

**(3) Liberty to either party to apply as to the implementation of this order**

**(4) That there be no order as to costs, save that the costs of both parties to be taxed in accordance with the Legal Aid Act 1988.**

**The wife and children returned to Australia on 25 August 1993, five days before the date fixed for hearing by me in the proceedings that were before me on 23 July.**

**According to the wife she was met at the airport by the husband and informed by him that he would not be keeping his undertaking, in respect of her being able to live at the * property.**

**On 27 August 1993 the husband filed a Form 15A. Notice of Discontinuance of the proceedings in the Dandenong Registry.**

**According to the wife she attended the Court on the 20th (sic) day of August 1993, when it was confirmed by the Court that the proceedings had been withdrawn. In September she consulted solicitors in Dandenong and lodged an application for assistance from the Legal Aid Commission, to enable her to obtain orders from the Court which would see her and the children returning to England. She says her legal aid application was refused.**

**On 10 November 1993 Johnson J wrote from the Royal Courts of Justice to the Chief Justice of the Family Court of Australia saying that he had had a Convention case, and as there was really no answer to the application he had made an order accordingly. He went on to say:**

**"I have now had a rather sad letter from the maternal grandmother and I enclose a copy of her two letters, and my brief acknowledgment, together with copy of my order.**

**I wonder if you could pass this on to someone who might be able to give the matter some attention. These Hague Convention cases do sometimes seem to produce harsh results, but the policy is clear. Obviously I am not suggesting there is anything amiss in the way the matter is being handled in Australia; my intervention is simply as a matter of humanity, and to show that we do care."**

**The letters referred to were apparently written by the maternal grandmother. She told a distressing story of her daughter and her grandchildren having to return to Australia without funds and without accommodation, there to be exposed to a violent and drunken husband. She felt frustrated that her daughter's applications for legal aid in Australia were being continually refused.**

**At the direction of the Chief Justice a summons was issued by the Registrar of the Family Court of Australia at Dandenong in the following form:**

**"IN THE MATTER OF C.M.C.**

**and**

**J.M.O.**

**and**

**THE CENTRAL AUTHORITY**

**HEALTH & COMMUNITY SERVICES VICTORIA**

**IN THE MATTER OF THE HAGUE CONVENTION**

**Take Notice that the Court will sit in its welfare jurisdiction at Melbourne, 570 Bourke Street, Melbourne, on Tuesday 30 November 1993 at 10.00 a.m. for the purpose of enquiring whether proper arrangements have been made for the welfare of the children:**

**S.M.O. and**

**A.M.O.**

**You and your legal advisers are required to attend at the Family Court at Melbourne on the said day for the purpose of this enquiry."**

**The summons was addressed to the former solicitors for the husband, to the present solicitors for the wife, and to Health and Community Services Victoria, who act as the State Central Authority within the State of Victoria, under the provisions of the Hague Convention and the Family Law (Child Abduction Convention) Regulations.**

**At the request of the Solicitor-General for the Commonwealth of Australia the hearing was re-scheduled to take place on 1 December 1993. On 30 November 1993 the wife issued an application on a Form 8 naming the husband as the respondent and seeking orders that the parties have joint guardianship of the children, that she have sole custody of the children, and that she be granted leave to take the children from Australia to reside in the United Kingdom. She supported her application with an affidavit setting out the history of the matter.**

**When the matter was called on for hearing before me, Counsel announced appearances for the wife, for the husband, the Attorney-General of the Commonwealth of Australia, for the**

**Commonwealth Central Authority and for the State Central Authority. Counsel for the State Central Authority sought leave to withdraw expressing the view that her client's interests would be appropriately catered for by submissions that were to be put forward on behalf of the Attorney-General and the Commonwealth Central Authority. Counsel for the husband and wife advised that the parties thought they would be able to resolve the matter between themselves and indicated that during the day they would be seeking consent orders.**

**Indeed eventually the husband and the wife agreed to an adjournment of the wife's application to 3 March 1994 and for an order that the husband have alternate weekend access to the children, and that otherwise the parties attend confidential counselling pursuant to the provisions of Section 62(1) of the Family Law Act. It was thought probable that the parties would reconcile, but the issue of whether that reconciliation took place in Australia or in England was something that the parties wished to discuss in the meantime.**

**As I felt that this case raised several very important issues I invited the Solicitor-General and Counsel for the Central Authority to address me in respect of the procedure that had been adopted to bring the parties to the Court in the absence of the inter partes application. Given that events have overtaken proceedings, and that the matter is now regularly before the Court, I do not propose to rule on the submissions made, but merely to set them out (hopefully doing justice to the Solicitor-General and to Counsel for the Commonwealth Central Authority), and to highlight the possible need for some urgent legislative or regulatory attention.**

**The Hague Convention is now part of the law of some twenty six countries. At the time of writing this judgment the Convention had been ratified by the following countries:**

**Argentina Luxembourg**

**Australia Netherlands**

**Canada Norway**

**Denmark Portugal**

**France Spain**

**F.R. Germany Sweden**

**Greece Switzerland**

**Ireland United Kingdom**

**Israel United States**

**Additionally, several States had acceded to the Convention. Of these the Convention was in force with Australia and:-Belize, Burkina Faso, Ecuador, Hungary, Mexico, and New Zealand.**

**The Convention's objects set out in Article 1 of the Convention are:**

**(a) to secure the prompt return of children wrongfully removed to or detained in any Contracting State, and**

**(b) to ensure that rights of custody and of access under the law of one Contracting State, are effectively respected in the other Contracting States.**

**The Convention places a mandatory obligation upon a Contracting State (subject to certain exceptions) to order the return of a child to another Contracting State where the child is said to have been wrongfully removed or retained within the meaning of the Convention.**

**In Gsponer v Director General, Dept. Community Services, Vic (1989) FLC 92-001 at 77,157 the Full Court cited with approval Nourse LJ who said in Re A. (A Minor) (Abduction) (1988) 1 Fam L.R. (Eng.) 365, at page 368:**

**"These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in specified circumstances, the judicial and administrative authorities in a country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise."**

**The mandatory requirements for return apply to the first twelve months after the wrongful removal or retention. The exceptions to the mandatory return are very limited (see Article 13), and have been consistently narrowly interpreted by the Courts of the nations who are signatories to the Convention.**

**It seems implicit in the Convention that the appropriate place for disputes concerning the custody of children is their country of habitual residence. The preamble to the Convention states that signatories are:**

**"desiring to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of their habitual residence..."**

**The Convention seems to pre-suppose that the State to which the child is returned will be able to adequately protect the rights of the child, and will be able to advance the interests of children. In Gsponer v Director General CSV (1989) FLC 92-001 at 77,160 the Full Court said:**

**There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare.**

**There is however no mechanism within the Convention that enables the Contracting State which is ordering the return of the children, to ensure that the State to where the children are returned actually provides the mechanism to enable a proper hearing to take place. This is not necessarily limited to the provision of a forum for the hearing of the dispute. It may also require the provision of appropriate legal representation.**

**Issues concerning the welfare of children are no less important in a civilised legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court of Australia to be essential to the administration of justice (Dietrich v R. (1993) 67 ALJR 1). The provision of appropriate legal assistance in children's custody cases is equally as vital.**

**There does not appear to be any express provision in the Hague Convention that would enable a Court to require the provision of an undertaking such as was required in this case, before ordering the return of a child. It is unfortunate that the habit of requiring undertakings has become common place since the decision of the Court of Appeal in C. v. C.**

**(Minor: Abduction: Rights of Custody Abroad) (1989) 2 All ER 465. This matter has been recently discussed by the Full Court of the Family Court of Australia in Police Commissioner of South Australia v Temple (Appeal SA 10 of 1993 25/6/93 unreported) where the Court held that Regulation 15(3) of the Child Abduction Convention Regulations did not empower the Court to place conditions on the return of a child. That ruling did not however preclude the Court from directing the applicant father to give an undertaking to a court in England that he would pay air fares and put the mother in funds to enable her to live in England pending a hearing there.**

**If undertakings are to be given it is important to make sure they can be enforced. There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the Court of the State in which the child has been returned, can require compliance with an undertaking given to another Court.**

**Submission on behalf of the Attorney-General for the Commonwealth focused on the proprietary and efficacy of the summons issued on behalf of the Court, requiring the attendance of the parties:**

**"... For the purpose of enquiring whether proper arrangements have been made for the welfare of the children..."**

**It was submitted that the Court could not exercise its welfare jurisdiction in the absence of an application made to it, and that it could not make an application to itself of its own motion.**

**Whilst the Court undoubtedly has a welfare power (see Section 64) (query whether this may equate to be parens patriae power of the Supreme Courts), the Court could only exercise judicial power which by its very definition requires a request from some other party for relief (Huddart Parker v. Moorehead (1908) 8 CLR 330 at 357).**

**It was submitted that the Child Abduction Regulations confer no special role or jurisdiction in the Family Court of Australia or any other Australian Court in respect of a child removed from Australia following his or her return under the Hague Convention. As soon as the child was back in Australia the Child Abduction Convention had served its purpose. Custody and guardianship of the child was then to be determined by the ordinary domestic law of Australia.**

**It was submitted that the jurisdiction in respect to custody and welfare matters was to be exercised in accordance with the powers given to the Family Court of Australia under Part 7 of the Family Law Act. It was submitted that such jurisdiction could only be exercised in "proceedings", and that such proceedings could only be instituted if the jurisdictional basis contained in Section 63B. of the Act existed.**

**The term "proceedings" is defined in Section 4(1) of the Family law Act, to mean "a proceeding in a Court whether between parties or not, and includes cross proceedings or an incidental proceeding in the course of, or in connection with a proceeding."**

**It was submitted that as all extant proceedings before the Court had been discontinued prior to the issue of a Court summons, it could not properly be said that the action taken by the Court was "a proceeding in a Court ... in connection with a proceeding".**

**It was further submitted that the correct meaning of "proceedings" was "the invocation of the jurisdiction of the Court by process other than writ" or "any application by a suitor to a**

**Court in its civil jurisdiction for the intervention or action" (see Herbert Berry Associates Ltd. v. IRC (1977) 1 WLR. 1437 and Cheney v. Spooner (1929) 1 CLR 532 at 538-539 per Starke J, re Healey; Re Enquiry into Election in Australian Workers Union, South Australian Branch (1992) 40 IR 110, 118; and Re Federated Furnishing Trade Society of Australasia (1993) 113 ALR 137, 149 per Gray J.**

**Section 63C(1) of the Family Law Act provides that: Proceedings under this Act in relation to a child may be instituted by**

**(a) either or both of the parents,**

**(b) the child, or**

**(c) any other person who has an interest in the welfare of the child.**

**Without determining the issue as to whether those provisions are words of limitation, it would seem desirable in the interests of comity, that the Central Authorities of the various contracting states were empowered to ensure that once a child is returned to the jurisdiction of a contracting State by an order made under the Hague Convention, that the contracting State would make available, adequate resources to ensure that issues relating to the welfare of the child were properly investigated. There seems little doubt that the various States' Central Authorities in Australia could probably be classified as "any other person who has an interest in the welfare of the child" so as to give them status to bring an application before the Family Court, touching and concerning issues relating to the welfare of a child. (See in Re S. (1990) 13 Fam LR 660 at 667 per Simpson SJ).**

**The provisions of the Hague Convention appear however to limit the role of the Central Authority to securing the safe return of the child, and for making arrangements for organising or securing the effective exercise of rights of access (see Article 7).**

**It would also seem appropriate that the Central Authority should be required to enquire whether appropriate arrangements are made for the welfare of the child once the child is returned in accordance with a Hague Convention order.**

**Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that contracting States and Courts will become reluctant to order the return of children.**

**In FOXMAN (Case Number: M.A. 2898/92 Nov 1992 available through the reporting service of William Hilton, California) Justice Hayim Porat of the Tel Aviv District Court said:**

**Responsibility for the child's welfare in the usual meaning of the word is mainly the responsibility of the legal court cases in the country to which the child will be returned, and we must assume that there, the court will do its utmost to minimize harm to the child.**

**A more liberal view of the exceptions to mandatory return as set out in Article 13 may become common. This outcome would seem unfortunate given the successful operation of the Convention to date.**

**As I already indicated I do not propose to finally determine the issues raised by the Solicitor-General on behalf of the Attorney-General, but merely to draw attention to the dilemmas raised by this case in the hope that appropriate legislative or administrative measures may be taken to prevent its repetition. It may be that the matter needs international attention. I**

**request that the Central Authority bring this judgment to the attention of the Hague Secretariat.**

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