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http://www.incadat.com/ ref.: HC/E/AU 293
[12/10/1990; Full Court of the Family Court of Australia at Sydney; Appellate Court]
Director General of the Department of Family and Community Services v. Davis
(1990) FLC 92-182

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**FAMILY LAW ACT 1975**

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

**BEFORE: Strauss, Nygh and Rowlands JJ.**

**12 October 1990**

**Appeal No. 130 of 1990**

**IN THE MARRIAGE OF:**

**Director General of the Department of Family and Community Services**

**Appelland/Central Authority**

**-and-**

**Beverly Ann Davis**

**Respondent/Mother**

**APPEARANCES:**

**Mr Cummings, instructed by The Crown Solicitor for the State of New South Wales, Sydney, appeared for the appellant/central authority.**

**Mrs O'Connor, instructed by Messrs. Steve Masselos and Company, Solicitors of Sydney, appeared for the respondent/mother.**

**ORDER**

**That the appeal be allowed.**

**That Orders 1 and 2 of the orders made on 7 August 1990 be set aside.**

**That in lieu thereof it be ordered:**

**(a) that the child F., born on 16 May 1986, be returned as soon as reasonably practicable to the applicant, D.D.;**

**(b) that liberty be reserved to the Director General of the Department of Family Community Services to apply to a single Judge of this Court for further directions for the implementation of the order in sub-paragraph (a) hereof.**

**JUDGEMENT: Nygh J.:**

**1. This is an appeal from orders made by the Honourable Justice Lawrie on 7 August 1990 in which she made certain orders on review of a decision of Judicial Registrar Johnston made on 20 July 1990. The facts of the case can be briefly stated following the findings of fact made by Judicial Registrar Johnston.**

**2. The husband and wife were married in Sydney on 19 May 1978. The husband was born in the United Kingdom and the wife was born in Australia but both now have dual nationality. There are three children of the marriage, A. who was born on 6 November 1979 and would have been aged 10 at the time of the hearing, C. born on 13 July 1982 and who was then aged eight, and F. born on 16 May 1986 and now aged four years.**

**3. The parties met and married in Australia but in 1981 the parties travelled to the United Kingdom and lived there for a period. However, they returned to Australia approximately nine months later. The second child, C., was born while the husband and wife were residing in the United Kingdom. Towards the end of 1989 the husband and wife decided to leave Australia and to live in the United Kingdom for an indefinite period. They sold their home in Australia and their furniture, and got rid of the family pets.**

**4. The husband and the oldest child of the marriage, A., left Australia and arrived in the United Kingdom in November 1989 where the husband left that child so that she could commence school immediately after arrival. The husband then returned to Australia and came back with the wife and the two younger children to the United Kingdom in April 1990. They commenced living in the home of the husband's parents. It was the husband's evidence that they intended to obtain a home and that their residence with his parents was only a temporary measure.**

**5. Approximately four weeks after their arrival in the United Kingdom, the wife informed the husband that she was unhappy and wanted to return with the children to Australia. On 26 June 1990 the wife informed the husband that she was going to take the child F. on a picnic. The husband was at work. Instead, the wife took a flight to Australia with C. and F. As the learned Judicial Registrar found, the wife removed the children from the United Kingdom without the consent of the husband and in circumstances which could only be described as surreptitious.**

**6. On 27 June 1990, that is the next day, the husband obtained ex parte orders from the High Court of Justice in England. The effect was that the three children became wards of the Court during their minority or until further order. The Court further declared that the removal of C. and F. was wrongful within the meaning of article three of the Convention on the Civil Aspects of International Child Abduction and the Child Abduction and Custody Act 1985 of the United Kingdom. The wife was further ordered to forthwith deliver up and return C. and F. to the husband.**

**7. In early July 1990 the husband obtained leave from the High Court of Justice to take A. out of the Court's jurisdiction until 31 July 1990. He then travelled with that child to Australia. He also applied to the United Kingdom Central Authority under the Child Abduction and Custody Act 1985 for return of the children pursuant to the provisions of the Act and under the Hague Convention on the Civil Aspects of International Child Abduction.**

**8. It was that application which came before the learned Judicial Registrar for hearing on 19 July 1990 and in respect of which he delivered judgment the following day. He, after hearing the matter, made orders whereby the father was to be permitted to remove the children C. and F. from Australia for the purpose of taking them back to the United Kingdom pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction.**

**9. Those orders were the subject of an application for review on the part of the wife which came before her Honour on 7 August 1990. Her Honour found for the reasons given by the learned Judicial Registrar, that the children were, at the time of their removal, habitually resident in the United Kingdom, and also further found that the removal of the children by the wife was wrongful**

**within the terms of the Convention and in breach of rights of custody vested under the law of England in the husband.**

**10. From those findings no appeal has been taken and therefore those findings, which in my view were rightly made, stand. Her Honour, despite her general agreement on those points with the findings of the Judicial Registrar diverged from his findings in relation to the exceptions found in Regulation 16(3) of the Family Law (Child Abduction Convention) Regulations. Those Regulations, I need not repeat, were passed pursuant to the statutory authority given in the Family Law Act to provide for the ratification and implementation of the Hague Convention on the Civil Aspects of International Child Abduction.**

**11. It is, as her Honour acknowledged, the intent and purpose of that Convention that states signatories to that Convention, and they include both Australia and the United Kingdom, should take all necessary steps to protect children internationally from the harmful effects of their wrongful removal or retention, and to secure the prompt return of children wrongfully removed to, or retained in, any contracting state. Without going through the details of the Convention, it is clear that once an applicant who complains that his or her rights have been infringed through a wrongful removal establishes that a child has been wrongfully removed in breach of his or her rights, there is an obligation on the Court hearing that application to order the prompt return of the child to the jurisdiction of habitual residence.**

**12. On such an application, the question of the welfare of the child as the paramount consideration does not apply. For the Convention is not directed to that question. It is directed to, in my view, two main issues: firstly, to discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal.**

**13. It is, therefore, the intention of the Convention and the Regulations which implement it to limit the discretion of the Court in the country to which the children have been taken quite severely and stringently. To that obligation, which the Convention and the Regulations impose upon the Court of the country to which the children have been taken, there is an exception and that exception is found in Article 13 of the Convention which is adumbrated and further defined in Regulation 16 (3) of the Regulations.**

**14. Article 13 provides:**

**"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or body which opposes its return establishes that."**

**And then follow two basic exceptions of which in the present case only the second one is relevant, namely:**

**"(b) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.**

**It must be remarked that it flows from the framework of Article 13 and Regulation 16(3), which uses similar wording, that the onus of establishing whether or not the ground set out in paragraph (b) is established rests upon the person opposing the return of the child, which, of course, would in most circumstances, be the person responsible for the wrongful removal or retention of the child, in this case the mother who is the respondent to the appeal. Her Honour considered the effect of the exception, namely, whether there existed in this case a grave risk that the return of the two children, the subject of the husband's application, would expose those children to physical or psychological harm or otherwise place those children in an intolerable situation. Her Honour also considered another possible exception which appears in Article 13, namely, that the Court of the requested State may refuse to order the return of the child if it finds that the child objects to being**

**returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.**

**15. Her Honour found in the circumstances that the latter exception was not applicable either to C. or to F. and, indeed, it is hard to say that the children, at their particular ages, eight and four, really would have attained such age and degree of maturity. However, her Honour did find, in relation to F., that the ground of grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation was established.**

**16. Her Honour referred, in her judgment at page eight, to the Family Report which had been ordered urgently for the purposes of the proceedings, and in that Family Report appeared, in relation to F., the following passage:**

**"F. avoided all attempts to discuss or draw his family, apart from asking several times if he would, `have to go away in a man's car'. F. was most anxious to ascertain at regular intervals Mrs D.s' whereabouts. This behaviour indicates F.'s awareness of some aspects of the current dispute and the consequent anxiety this has generated for him."**

**Her Honour inferred from that passage:**

**"In my view, that passage does indicate that there is a grave risk to this child that a return would expose him to psychological harm and that would be harm which would, in my view, place the child in an intolerable situation. That passage indicates that the child is both highly anxious and also that he is seeking his mother to provide him with security in this highly anxious time. As set out in the history provided in Judicial Registrar Johnston's judgment, this is a family which has had a number of major moves in this child's short life and he - more than most, if not all children who suffer the experience of a breakdown of their parent's marriage, is vulnerable to insecurity."**

**After considering various other aspects she concluded at page 12:**

**"I am satisfied that in this case this little boy will be psychologically harmed if he is returned to the United Kingdom and that factor balances the other very weighty factors, and does provide one of the rare exceptions to the operation of the Convention."**

**Her Honour based upon those findings, came to the conclusion that whereas she was obliged pursuant to the Convention to order the return of the child, C., she had a discretion in relation to the child, F. and, therefore, upon review of the Judicial Registrar's decision amended his order by removing the name of the child, F., from the order for return made by the learned Judicial Registrar.**

**17. It is from that order that the Director General of the Department of Family and Community Services, as the delegate of the Australian Central Authority, has appealed. We were informed that it was not a matter of dispute that following the decision by her Honour that the child, C., has indeed returned together with A., about whom there was no dispute at any time, and the father to the United Kingdom and that only F. remains with his mother in this country.**

**18. The main issue, as I see it, is whether there was evidence before her Honour on the basis of which she could arrive at the conclusion that she did. As I have said earlier, the onus of establishing the existence of the exception rests upon the respondent mother.**

**19. For the purposes of this decision I accept the reasoning of the Full Court in Gsponer v. Director General Department of Community Services of Victoria, (1989) FLC 92-001. In that case their Honours came to the conclusion that paragraph (b) should be read disjunctively and that, therefore, the exception would be established if the Court was satisfied that there would be a grave risk either of physical harm or of psychological harm or that the child otherwise would be placed in an intolerable situation.**

**20. However, as their Honours quite rightly pointed out and indeed as her Honour accepted, the words "otherwise" indicate that it is not sufficient merely to establish some degree of psychological harm but that that degree must be substantial and, indeed, to a level comparable to an intolerable situation.**

**21. In this regard reference was made to the statement made by Lord Donaldson of Lymington MR in the decision of the English Court of Appeal in C v. C (Abduction: Rights of Custody) (1989) 1 WLR 654, and I refer particularly to the passage which occurs at page 664, where his Lordship says:**

**"I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind."**

**22. If one tests her Honour's conclusion in the light of that, admittedly stringent test, then one can only come to the conclusion that there was no evidence before her Honour, from which her Honour could infer that a grave risk of psychological harm, of such a severe degree would occur if the child were returned to the United Kingdom.**

**23. The passage from the Family Report to which her Honour referred clearly establishes that the child, like other children in a similar situation, is in a state of anxiety and uncertainty following the physical separation of his parents. But, there is no evidence to suggest what, if any, the consequences would be on the long term psychological welfare of the child should the child be returned to the United Kingdom, even if he were, in consequence thereof, separated from his mother.**

**24. In any event since the Convention is concerned with the allocation of judicial responsibility for determining issues regarding the welfare of the child, that issue, as the Full Court also pointed out in Gsponer is a matter for the appropriate Court which, under the terms of the Convention, is the English Court not in this country.**

**25. It was also alleged before her Honour and before this Court that the child, as a result of the order for return, would be separated from the mother because the mother would not be able to accompany the child. To a certain extent, that is a situation which presents some analogy to the situation which was before the Court of Appeal in C. v. C. As her Lordship, Lord Justice Butler Sloss pointed out at 661, that is obviously a serious consideration. But it is a factor which, if it exists, and in this case I stress that there is no evidence that it does exist, which was created through the unilateral conduct of the applicant, and it would ill behove a party to rely on the fact that he or she has created the very situation which would prevent compliance with the Convention. That would, as her Lordship pointed out: "drive a coach and four through the Convention at least in respect of applications relating to young children".**

**26. In my view, there is no difference in principle between a person who feels psychologically unable to return to the country of habitual residence and a person who is financially unable, as is alleged in this case, to return to the United Kingdom. It is clearly desirable and I hope that it can be arranged, either through the Central Authority or in other ways, that the child should return to the United Kingdom in the company of his mother. But it is my view that if it were not possible to arrange this, and I sincerely hope it will be, that the fact that the mother cannot accompany the child is no reason for non-compliance with the clear obligation that rests upon the Courts of this country under the terms of the Convention.**

**27. For those reasons, in my view, the appeal should be upheld and in essence the order made by the learned Judicial Registrar be restored.**

**28. I agree with the reasons given by Mr Justice Nygh that the child must be returned to the United Kingdom so that the appropriate Court there may determine what the best interests of this child, F., and indeed of all the three children of the marriage, require. I might say that the precise interpretation of clause 16(3)(b) does not really arise, but it may have to be considered further in the light of the original Convention documents and the working papers.**

**Rowlands J.:**

**I agree that the appeal should be allowed for the reasons given by Justice Nygh.**

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