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[13/12/1994; Family Court of Australia at Brisbane; First Instance]
In the Marriage of Regino and Regino v. The Director General,
Department of Families Services and Aboriginal and Islander Affairs,
Central Authority (1995) FLC 92-587

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Lindenmayer J

13 December 1994

No BR7679 of 1994

IN THE MARRIAGE OF:

Michael Rueben Regino

(Husband)

-and-

Devie Maree Regino

(Wife)

-and-

The Director General Department of Family Services

and Aboriginal and Islander Affairs

(Central Authority)

REASONS FOR JUDGMENT

APPEARANCES:

Mr C. Forrest of Counsel (instructed by Mahoney and Hesford, Solicitors), for the Wife.

Miss M. Maloney of Counsel (of K.M. O'Shea, Crown Solicitor), for the Central Authority.

JUDGMENT: LINDENMAYER J:

1. This is an application by the Director-General of the Queensland Department of Family Services and Aboriginal and Islander Affairs, as the State "Central Authority", appointed under regulation 8 of the Family Law (Child Abduction Convention) Regulations, (hereinafter referred to as "the Regulations"), of the Commonwealth of Australia, for an order under those Regulations that a child, M, allegedly wrongfully removed to or retained in Australia by his mother, the respondent, (hereinafter referred to as "the wife"), be returned to the United State of America which, is said to have been his habitual place of residence immediately before such wrongful removal or retention. That application is made at the instigation of the child's father, M.R., (hereinafter referred to as "the husband"), who is a citizen and resident of the United States of America.

2. The Regulations pursuant to which this application is made were promulgated by the Governor-General, pursuant to s.111B of the Family Law Act 1975, in order to enable the performance of the obligations of Australia, and to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction, signed at The Hague on 25 October, 1980. That convention (hereinafter referred to simply as "the Convention"), entered into force as between Australia and the United States of America on 1 July, 1988: see schedule 2 and reg. 10 of the Regulations.

3. The relevant historical background to these proceedings is as follows:-

The husband was born at St Paul, Minnesota, USA, on 17 July, 1960 and he is therefore now aged 34. The wife was born in Brisbane, Australia, on 7 May, 1961 and she is therefore now aged 33. The parties apparently met in about May, 1991, when the husband was in Australia on a temporary posting with the United States Army, of which he was then and still is a member. They were married at Sandgate, Brisbane, in Australia, on 9 November, 1991.

4. Late in 1991 the husband returned to the United States as a member of the US Army. On 12 April, 1992 the wife joined the husband in Hawaii, USA, where he was then posted with the US Army. She applied for permanent residency in the United States and was granted temporary residency to 12 April, 1994.

5. The child, M, the subject of these proceedings, was born to the wife in Honolulu, Oahu, Hawaii, on 25 December, 1992. He is therefore now aged 1 year and 11 months.

6. On 29 May, 1993 the wife and M left Hawaii for Brisbane for a holiday with the wife's family. On that occasion the wife travelled on an Australian passport, and M.R. travelled on a United States passport. They arrived in Australia on about 31 May, 1993. At that time, M.R. had an Australian visa valid for 12 months, allowing multiple entries to Australia in that period for periods up to three months at a time.

7. The wife and M then remained in Australia with the wife's family from about 31 May until late July, 1993. During that period the husband was posted to Missouri in the USA.

8. Late in July, 1993 the husband was posted to Fort Rucker, Daleville, Alabama, USA, in the course of his employment with the United States Army.

9. On 2 or 3 August, 1993, the wife and M returned to the USA and joined the husband at Daleville.

10. In late August or early September, 1993, the wife applied for an Australian passport for M, after first applying for a certificate of Australian citizenship for him, by descent. All this was done with the husband's admitted full knowledge and consent, and he signed all

necessary papers. There is a dispute between the parties as to the wife's stated reasons for those applications.

11. In October, 1993 M's Australian passport was received by the wife. It was issued for 12 months only. The wife says that this was because M had not attended personally upon the Australian Consul.

12. The wife had planned to leave the United States of America for Australia on 12 October, 1993, however, this did not eventuate due to the late arrival of M's passport. When it first arrived, it was apparently defective and had to be returned for re-issue. The husband was aware of this proposed trip, but disputes some of the wife's allegations in relation to the reasons for it and the surrounding circumstances.

13. On 12 November, 1993 the wife and M departed Dothan Airport, Alabama, en route to Australia, via Atlanta, Georgia, Chicago, Illinois and Los Angeles, California, travelling on a one-way ticket. The husband knew of and consented to this proposed departure, and that the wife and M departed on a one-way ticket; in fact, he collected the ticket with the wife so that she could obtain a military discount. He drove the wife and M to Dothan Airport to facilitate their departure. The wife claims that this was intended by her, and known by the husband to be so intended, as a final departure from the USA and a marital separation of the parties. The husband disputes this and claims that the wife told him it was to be another temporary holiday trip.

14. The wife says that she paid for the discounted one-way ticket predominantly with moneys borrowed from her then friend and now de facto, Geoffrey Frew, who then, as now, lived in Australia. The husband says that the wife told him her parents provided the funds for the one-way ticket and that they would also provide the funds for her return ticket to the USA after the wife arrived in Australia. This is denied by the wife. The husband says that he paid some $300 for excess baggage for the wife on this occasion. The wife says that he contributed $300 towards the airfares, plus $100 for excess baggage.

15. Upon her arrival in Atlanta, Georgia, on that same date (12 November, 1993), en route to Australia, the wife had a change of heart and decided to cancel the trip and return to Alabama to resume cohabitation with the husband. She says that she did so because she felt guilty that the marriage was breaking up and, whilst at the Atlanta airport, telephoned a girlfriend in Australia who persuaded her to reconcile with the husband instead of continuing her journey to Australia. She thereupon cancelled the balance of her ticket, obtained a refund, and flew back to Dothan with M to resume cohabitation with the husband.

16. The husband admits the wife's change of heart and her return to Alabama, but claims that she told him the reason she changed her mind and returned home was that she felt guilty about leaving him with a $US4,400 unpaid telephone bill, most of which related to calls by her to Australia, and about, "maxing out his deferred payment plan account at Fort Rucker to $US2,000." He says that the airline ticket refund obtained by the wife was used to pay some of these debts. The wife denies all this, except that she concedes that upon her return home there was an argument about the outstanding telephone bill and that most of this related to her calls to her family. She claims that the husband said he would prefer her to be in Australia and not have to pay the large telephone bill, rather than for her to stay in the United States and incur such large bills. The husband, of course, denies this.

17. On 25 November, 1993 (Thanksgiving Day, USA) the wife and M again departed the USA for Australia, travelling on a one-way ticket. On this occasion, the husband drove them to the Atlanta airport to catch their flight. Again, he was aware they were travelling on a

one-way ticket. The wife says that again she informed the husband prior to her departure, that she considered the marriage over and that it was her intention that she and M thenceforth live in Australia permanently. She claims that the husband knew and accepted the fact that, so far as she was concerned, the marriage was over, and consented to her leaving the United States with M permanently, which consent he signified by not seeking to prevent her from leaving after she had told him her plans, and volunteering to drive her and M to the Atlanta airport for their departure.

18. The husband denies this and says that the wife told him she and M were going to Australia only, "for the Thanksgiving holidays and would be back well before Christmas." The wife, in addition to denying that she told the husband any such thing, points out that the Thanksgiving holiday in the United States is for only one day, making a long weekend, and that it is therefore ludicrous to suggest that she would be going to Australia, "for the Thanksgiving holidays."

19. Again, the husband claims that, although to his knowledge, the wife and M departed the United States on a one-way ticket to Australia, she had told him that her parents agreed to purchase her return ticket from Australia when her visit came to an end. The wife says that on this occasion her mother provided the funds for the balance of the cost of her ticket above and beyond what she had been able to put towards it from the refund obtained in respect of the earlier ticket.

20. The effect of her evidence is that she purchased her ticket on this second occasion almost immediately after she returned home following her first aborted trip of 12 November. She says that she did so because, as soon as she arrived home on that first occasion, she was confronted with a display, in the living room, of sexually explicit magazines (the habitual reading of which by the husband was one of the causes of her initial decision to leave him) and she thereupon realised that she had made a mistake to return to him. All of this is denied by the husband. The wife says that for the balance of the period that she remained with the husband between 12 and 25 November, 1993, they slept apart and spoke little. The husband has not denied this allegation.

21. After her arrival in Australia on 27 November, 1993, the wife renewed her acquaintance with Mr Frew, who was then attached to the Enoggera army base in Brisbane. She lived with him for a period in a house at McDowall, an outer Brisbane suburb, until he was transferred to Singleton in New South Wales. When that occurred, the wife, too, moved to Singleton and took up residence, with M, in a caravan park there. She and Mr Frew remained in Singleton, although, she says, not cohabiting, for about six months. He was then posted to the Jungle Warfare Training Centre at Canungra, in southern Queensland, and the wife and M thereupon moved to Canungra also. From about June of this year they have cohabited in a de facto relationship and are continuing to do so.

22. The wife did not contact the husband immediately after her arrival in Australia because, she says, she was disgusted with him, she regarded the marriage as over and saw no point in contacting him. She did telephone him, however, just before Christmas, and she did so, she says, "just to let him know we had arrived safely and for M's sake for Christmas." She says that in this conversation she told him again, as she had before she left the United States, that she intended to remain permanently in Australia. The husband claims that this was the first time she had told him this and that it caught him by surprise.

23. He says that the wife refused to give him an address or telephone number at which he could contact her, except the address of her parents, which he knew, but with whom she was not residing. This is not denied by the wife, but she says he could have contacted her, without

difficulty, through her parents, and that he subsequently knew her address in Singleton, to which he posted her some documents in March, 1994, as evidenced by annexure B to her affidavit filed on 5 October. The husband denies that he was given the wife's address in Singleton, but the annexure just referred to makes it clear that he was aware of that address, at least by March of 1994.

24. The parties were in agreement that after that first telephone contact they spoke regularly on the telephone, at least once per week initially and later, after the wife's move to Singleton, at three to four weekly intervals. The wife says, and the husband does not deny, that she repeatedly told the husband during these telephone calls that she intended to stay in Australia with M and that if he wanted to migrate to Australia, she would do all she could to assist.

25. The wife says, but the husband denies, that, during these calls, the husband "regularly" threatened to commit suicide, and that, on one such occasion, she heard a gun click. The wife also says that, on some occasions, the husband said to her that he wanted M to stay with her in Australia, but that, on other occasions, he said he wanted them both to return to him in the United States. The husband denies the former. She further says, and the husband has not denied this, that he told her that if she and M had not returned by the time he went to Louisiana he would commence proceedings.

26. She says that, before she left the United States, it was constantly discussed that the husband would be transferred to "Fort Pope" (presumably a reference to Fort Polk) Louisiana. The husband has not denied this, and, in fact, the material reveals that the husband is currently residing in Louisiana and that he was there at least by 10 May, 1994 (see annexure B to his affidavit, filed on 14 October). The material does not reveal, however, when he was first posted there, although it is apparently a temporary posting for training purposes.

27. On 2 February, 1994, the husband made application to the US Department of State for assistance under the Convention to secure the return of M to the United States. On 3 February, 1994, he swore an affidavit verifying a "Complaint for Divorce", and for "full care, custody and control" of M, which was filed in the Circuit Court of Dale County, Alabama, on 8 February, 1994. In paragraph 6 of that compliant, he alleges that the "defendant" - that is, the wife -

> **"has wilfully and wrongfully removed the minor child of the parties" - that is, M - "from the United States, has taken the child to the country of Australia, and has refused to return the minor child to the jurisdiction of this court."**

28. On 22 August, 1994, the Director-General of the Department of Family Services and Aboriginal and Islander Affairs of the State of Queensland, the "Central Authority" for the State of Queensland under the Convention, filed an application in this court under the Regulations seeking an order for the return of the child, M, to the United States. That is the application presently before me.

29. In the affidavit of the husband, sworn on 24 June, 1994, and filed with that application, the husband swears the following:

> **"My son, M, was wrongfully removed from Alabama and the United States and wrongfully retained in Australia by D.R." (that is, the wife) "Shortly before November 24, 1993, D. expressed her desire to visit her family in Australia. I made no objection and helped them prepare for their departure. Upon their reaching Australia and hearing nothing from them, I called and tried to reach**

> **family members. Soon thereafter, D. called me and let me know that she had no intentions of returning back to the United States. This action was not condoned or authorised by me and caught me by surprise. I immediately made application for assistance under the Hague Convention on Child Abduction through the United States Department of State seeking the prompt unequivocal return of my child to this court's (i.e. the Circuit Court of Dale County, Alabama) jurisdiction."**

30. Given the husband's acknowledgment, both in that affidavit and in subsequent more detailed affidavits, that he consented to and assisted the wife's departure with M from the United States for Australia on or about 25 November, 1993, his assertion in that affidavit - and in his divorce complaint previously referred to - that the wife "wrongfully removed" M from the United States, is not sustainable, and this was conceded before me by counsel for the Central Authority, Miss Maloney. However, it was contended on behalf of the authority that, on the husband's version of the facts, this is a case of "wrongful retention" of the child, M, in Australia, by the wife, within the meaning of Article 3 of the Convention, and, therefore, of a "removal" of the child, as defined by reg. 2 of the Regulations.

31. Counsel for the wife, Mr Forrest, conceded that, if the husband's version of the facts relating to the departure of the wife and child from the USA is correct, then this is a case of "wrongful retention", but contended that, on the wife's version of those facts, namely that the husband consented not only to the wife's removal of the child from the United States but also to her retention of him in Australia permanently, which consent was given prior to her departure from the United States, then there has been neither a "wrongful removal" of the child from the United States nor a "wrongful retention" of him in Australia, within the meaning of Article 3 of the Convention. This, in turn, was conceded by Miss Maloney for the Central Authority.

32. The basis of that contention and its concession, as I understand it, is that, if the husband consented to the permanent relocation of the child from the United States to Australia before the wife's departure with the child, his subsequent retention in Australia by the wife could not be "in breach of" the husband's rights of custody under the law of the United States (whatever those rights may have been), including his right to determine the place of residence of the child, as required by Article 3 of the Convention. In my opinion, that concession was appropriately and properly made.

33. Thus, the first and most crucial question for my determination in this case is one of fact, namely whether, prior to the wife's departure from the United States with M on 25 November, 1993, the husband and wife had agreed that the wife should take the child to reside permanently in Australia, and, at the time of that departure, the husband remained in agreement with that course. If I find that as a fact, then it is conceded by Miss Maloney for the Central Authority that this is not a convention case at all, because there has been no "wrongful removal or retention" of the child, within Article 3.

34. On the other hand, if I find that the husband did not agree, before the wife's departure, to the child's remaining in Australia permanently, then, as conceded by Mr Forrest for the wife, this is a convention case, and I would find a "wrongful retention" within the Convention. In that event, it is further conceded that I should make an order for the return of the child to the United States under reg.16(1) of the Regulations, unless I am satisfied, as it is contended for the wife that I should be, that one of the exceptions to that mandatory requirement, prescribed by Article 13 of the Convention -reg.16(3) of the Regulations - applies.

35. On the facts of this case, in the latter event, the only relevant exception which I need to consider is that provided by reg.16(3)(b) (mirroring Article 13(b) of the Convention), namely that "there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

36. In paragraph 18(v) of an affidavit filed on 13 September, the wife challenges the husband's assertion in his affidavit sworn on 24 June in support of his application that he applied for assistance under the Convention "immediately" after the first telephone conversation which she made to him from Australia in which he claims to have been told by her, for the first time, that she intended to remain permanently in Australia with M.

37. On both parties' accounts, that conversation occurred shortly before Christmas 1993. She challenges that assertion on the basis that his application for assistance under the Convention was not signed until 2 February, 1994 - that is, some six weeks' later. The husband, however, responded to that challenge by deposing, in his affidavit, filed on 3 October, that he contacted his attorney on 28 December, 1993, who "immediately enlisted the aid of the Australian embassy in Washington DC", which was to send the necessary forms for his application for assistance under the Convention, but that those forms "were not received until late January, at which a prompt application was made".

38. There is no basis for me to reject the husband's evidence on this point, and accordingly I draw no inference adverse to the husband's credit from the fact that his application for assistance under the Convention was not signed until 2 February, 1994. I take notice of the fact that the Christmas/New Year period intervened, and it is notoriously difficult to galvanise bureaucrats and lawyers into urgent action during that period, interrupted as it is by holidays with consequent delays in mail deliveries and the like.

39. The resolution of the crucial factual issue in this case, which I have earlier identified, essentially involves a determination by me of the relative credibility of the parties' conflicting accounts of the events immediately preceding the wife's departure from the United States with M on 25 November, 1993, and particularly of their differing accounts of what the wife then informed the husband about her intentions as regards her future residence.

40. Before attempting that resolution, it is appropriate to acknowledge that it is particularly difficult for any court to resolve contested issues of fact on the basis of affidavit evidence only where the court does not have the opportunity, which the taking of viva voce evidence provides, of seeing and hearing the witnesses give their evidence and thus being able to assess their credibility in the light of their demeanour and general consistency, particularly when subjected to a searching cross-examination in the forensic context. Nevertheless, in a case such as this, where, by the very nature of the proceedings, one of the parties resides overseas, and it is therefore impracticable to secure his or her attendance before the court to give oral testimony, the court must necessarily undertake that difficult task and do the best it can to resolve the factual issues upon the material which is before it. In doing so, I believe that the court must be cautious not to unfairly disadvantage the absent party by presumptively giving greater credit to the testimony of the other party who happens to be within the jurisdiction and before the court.

41. In this regard, it was submitted by counsel for the wife, Mr Forrest, that I should give more credence to the wife's testimony than to the husband's because she had attended court and was expressly offered by him for cross-examination by counsel for the Central Authority, which offer was declined. However, I indicated at the time that I was disinclined to accept that submission, because cross-examination of one party only, in the context of the

other's practical inability to offer himself or herself for assessment or to give specific instructions to his counsel in relation to issues arising from answers given by the first party during that cross-examination, would be unlikely to be of any great assistance to the court in resolving fundamental issues of credit between the parties.

42. Further reflection upon this point, since I reserved my decision, has not caused me to take any different view. Accordingly, I reject the submission of counsel for the wife, and, in the particular circumstance of this case, I draw no inferences adverse to the husband or favourable to the wife from the mere fact that the wife made herself available for cross-examination whilst the husband did not.

43. In addition to her testimony which I have already outlined in relation to the circumstances leading up to her departure from the United States, the wife deposes to some additional facts which, she contends, support her case that the husband knew it was her intention to remain permanently in Australia with M and consented to her doing so before she left the United States on 25 November, 1993. Those additional facts, as alleged by her, are as follows:-

> **In her affidavit sworn and filed on 14 October, she says that she has, in her possession, a set of the husband's US army "dog tags" attached to a chain (which I take to be the neck-chain to which such tags are customarily attached by soldiers in order to wear them as required) together with one of the husband's two gold wedding bands, also attached to the neck-chain previously referred to, and a photograph album containing photographs of the child, M, and the parties, taken shortly after M's birth. At the hearing of these proceedings, those items were produced to the court and, by consent, admitted as exhibits 1 and 2.**

45. She says further that the "dog tags" and wedding band were both presented to her by the husband in precisely the same form as they now are - that is, interconnected by the neck chain - on or about 14 November, 1993 - that is, prior to her departure for Australia - and that as he did so, the husband said that he wanted her to give them to their son, M, when he was older, so that he would have something of his father's.

46. She produced and annexed to her affidavit, two photographs of M, taken soon after his birth, in which he appears in the husband's arms, which photographs clearly depict a plain gold wedding band on the ring finger of the husband's left hand, which is certainly strikingly similar to that contained in exhibit 1, which the wife says is, in fact, one and the same wedding ring. The same wedding band also appears to be evident on the husband's hand in some of the photographs contained in exhibit 2.

47. She says that upon being given these items by the husband, she placed them in her jewelry box, which she then brought with her to Australia.

48. With further reference to the gold wedding band, the wife says, in paragraph 5 of the same affidavit, that this is one of two wedding bands which the husband had, and wore at different times following their wedding. She says that at the time of the wedding, she and the husband had matching wedding bands of platinum and gold with inset diamonds, but that two or three days after the wedding, they bought a second plain gold band for the husband for everyday wear, which he thereafter invariably wore on all occasions except "dress occasions", when he would wear the more ornate diamond inset ring. She says that the band which is part of exhibit 1 is the cheaper, everyday wear ring, which was so purchased after the wedding and generally worn by the husband throughout their subsequent cohabitation. However, she adds that from about mid-October, 1993, the husband did not wear any wedding ring, the absence of which left a visible white mark on his ring finger.

49. In relation to the photograph album, exhibit 2, the wife says that this was one of two such albums which had been compiled soon after M's birth, containing photographs taken by a professional photographer who was a friend and army colleague of the husband. She says that when she came to Australia with M in May, 1993, she brought both albums with her to show to members of her family and friends, and that she took them both back with her when she returned to the United States late in July or early in August of that year.

50. She says that on or about 14 November, prior to here final departure of the United States, she and the husband "made arrangements" for the disposition of the two albums. She says that the husband initially gave her the other main album, with an indented heart shape on the cover, but that she found she was unable to fit it into her luggage because it was too large and bulky. Accordingly, so she says, "by arrangement", she took the smaller flip-style album, which became exhibit 2. Although she does not say so specifically, the inference which she seeks to have drawn from this, is that the agreement of the parties for each to retain one of the two baby photograph albums, is indicative of their common intention and understanding at that time that they were separating finally.

51. The fact that the wife proposed to depose to the matters relating to the husband's wedding band and "dog tags", as outlined above, was apparently conveyed to the husband, via his American attorney, by counsel for the Central Authority, prior to the swearing and filing by the wife of her affidavit of 14 October. Accordingly, the husband swore a further affidavit on 6 October, which was eventually filed on 14 October, in which he sought to anticipate and deal with her allegations in respect of those matters.

52. In the second paragraph of that affidavit, after referring to the fact that he understood, from conversations between Ms Maloney and his attorney, that the wife claimed that he had given the wedding ring and "dog tags" to her, "to hold until M became old enough to have them", he swears that he "adamantly denies that this was the circumstances under which she" - that is the wife - "gained possession of these items."

53. The third paragraph of this affidavit by the husband then reads as follows"-

> **"Attached to this affidavit are exhibits A through C. You will find evidence of my wedding bank, exhibit A, that was photographed while in my possession on September 5, 1994, by Touch of Class Photography as is evidenced by exhibit B, the receipts for said photograph and their business card. This ring was part of a three ring set purchased on August 10, 1991 (exhibit C). Unbeknownst to me, D. had already purchased a set of wedding bands that were much less expensive. We never returned either set of bands, but we began wearing, after the marriage, the set that had been purchased in Hawaii. Her representation to this Court that the rings in her possession was given to her to hold for M is a blatant falsehood. As to the dog tags, I just like every other military serviceman, has several sets of dog tags. M had been given, some time prior to their having left the United States, a set of dog tags which he played with and it was more or less given to him as a toy."**

54. Exhibit A to that affidavit is a sheet upon which appear photocopies of three photographs of a ring. Although the reproduction is poor, it is clear that the ring depicted in those photographs is not the ring which is part of exhibit 1, nor that which appears on the husband's hand in the photographs annexed to the wife's affidavit of 14 October, or in the other photographs in exhibit 2, but a more ornate ring. This conforms with the husband's evidence, supported by exhibit C to his affidavit, that it is the ring purchased in Hawaii prior to the parties' wedding as one of a trio of rings set with "small white diamonds". It also

conforms with the wife's evidence about the husband's "dress" ring. However, the fact that it is clearly not this ring which appears on the husband's hand in any of the other photographs before the court, in which the husband is holding the child, M, is inconsistent with the husband's statement in the paragraph from his affidavit which I have previously quoted, that after the wedding, he and the wife began wearing "the set" of wedding bands that had been purchased in Hawaii, a clear reference to the diamond set of rings.

55. I have no doubt that what the husband was meaning to infer in the paragraph above quoted, without saying so explicitly, is that the cheaper rings, which he claims were purchased by the wife before the wedding, were never worn, and were simply retained by the wife and brought with her to Australia. The photographs to which I have referred clearly establish otherwise.

56. In relation to the husband's assertion, in the paragraph previously quoted, that the "dog tags" were only one of several sets which he had, and that he gave them to M "more or less as a toy", the wife responds, in her affidavit filed on 19 October, that as far as she was aware the husband only ever had one set, which he gave to her along with the ring, and denies that they were given to M as a toy. She further says that at no time did M ever play with them. She also relies upon an affidavit by her current de facto, Mr Frew, a member of the Australian Army, in which he give some evidence about the practice of the Australian Army in relation to the issue of "dog tags". In my view, that evidence is of no probative value on this issue in the absence of evidence that the practice in the United States Army is the same.

57. However, Mr Frew's affidavit does confirm that on the only two occasions on which he has seen the husband's "dog tags", prior to their production by the wife to her solicitors for the purposes of these proceedings, they were in the same state as they appear in exhibit 1 - that is, interconnected with the wedding ring by the neck chain - and they were being either removed from or replaced in the wife's jewellery box. He also says that he has never seen M play with them.

58. My own examination of this article, exhibit 1, leads me to conclude that, even without the addition of the ring, it is a most unlikely item to be given to an 11-month-old child (as M was at the relevant time) or even to a two-year-old (as he now is) as a plaything. For a start, it appears to me to be an article which could be quite dangerous in the hands of such a young child, particularly the long, thin, beaded metal neck chain, which could quite easily become entangled around a small child's neck, or even sucked down into its throat, with possibly dire consequences if the child were left to play with it unsupervised for any time. Furthermore, it appears to me that it would have no inherent attractiveness to such a young child. For example, it makes no significant rattling or jingling noise when handled or "juggled" such as do many toys which children of that age find attractive.

59. Having regard to all of the foregoing matters, I find the husband's account of the circumstances in which the wife came to retain possession of the ring and dog tags, when she departed the United States on 25 November, 1993, inherently incredible. By contrast, the wife's account of those circumstances is quite credible, and inherently far more probable than the husband's. I accordingly accept the wife's account and reject the husband's.

60. Whilst the wife's account of those matters does not itself necessarily establish, as a matter of certain fact, that the husband knew of and consented to the wife's intention to remain permanently in Australia before she left the United States, it certainly points strongly in that direction.

61. More significant to my fact-finding process in relation to that crucial issue, is that, in my opinion, the husband has given, on oath, a false account of what he obviously considered to

be a relevant matter, which casts considerable doubt upon the credibility of his evidence overall, and in particular on that crucial issue. By contrast, the wife's evidence remains before me untainted by any similar blot upon her general credibility.

62. Other undisputed facts, in my view, tend to support the wife's evidence that the husband knew from the start of her intention to remain permanently in Australia, and consented to her departure from the United States with M on that basis.

63. The first of these is the fact that the husband facilitated the departure of the wife and M from the United States when he knew they were travelling on a one-way ticket, and that the wife, with his co-operation, had earlier obtained an Australian passport and Australian citizenship for M. In that context, his contention that he believed she was going to Australia only for "the Thanksgiving holidays", and would return "well before Christmas", thus envisaging an absence of less than one month, totally lacks credibility.

64. The second matter which undermines the credibility of his account even further, is the circumstance of the wife's previously proposed but aborted trip to Australia on 12 November, 1993.

65. His account of her reasons for aborting that proposed trip, in my view, is inherently incredible, given that she departed again for the same destination less than two weeks later. His contention, in effect, is that she departed from Australia twice, on one-way tickets, within the scope of 13 days, on each occasion, so he believed, for a holiday, and that on each occasion her parents provided the funding, and had undertaken to provide the funding for her return journey after she arrived in Australia. In my view, that simply defies belief.

66. The aborting by the wife of her first proposed trip, followed so soon after by her second and completed trip to Australia, is far more consistent with the wife's evidence that she returned on the first occasion because she had second thoughts about separating from the husband, but almost immediately after her return, realised that she had made a mistake, and determined to go through with her original plan. Given that concatenation of events, I find it inconceivable that the husband could have believed otherwise.

67. In my opinion, therefore, on any objective view of the evidence, the only proper conclusion open to me is that when the wife departed the United States with M on 20 November, 1993, with the husband's consent and active assistance, her intention, known and accepted by him, was to remain permanently in Australia, and I so find.

68. Accordingly, as conceded by counsel of the Central Authority, and in my view, correctly, neither the wife's removal of M from the United States on that date, nor her retention of him in Australia at any subsequent time, was "wrongful" within the meaning of that expression in Article 3 of the Convention, and there was therefore no "removal" by the wife of M from the United States, as defined in reg.2 of the Regulations. Thus, in my opinion, this is not a case to which the provisions of Article 13 of the Convention, or reg.16 of the Regulations, apply. Accordingly, the application of the Central Authority must be dismissed, and I propose to so order.

69. Were it not for the concession made by counsel for the Central Authority, to which I have already referred, I perceive that it would have been capable of being argued that, having regard to the wording of the Regulations, and in particular, regs.13, 15(1)(d), 16(1) and 16(3), it is not open to this court, upon the hearing of an application by the Central Authority pursuant to reg.15(1)(d), for an order under reg.16(1), to entertain and determine, adversely to the applicant, a submission to the effect that the application is not one to which the provisions of the Convention apply, whether on the grounds that, on the facts as found

by the court, there was no "wrongful removal or retention" within Article 3 of the Convention, or otherwise.

70. Whilst that proposition appears remarkable, I perceive that it could be advanced on the following basis:

> **(1) By reg.2, "'removal' in relation to a child", is defined, for the purpose of the Regulations (unless the contrary intention appears) as meaning, "the wrongful removal or retention of a child within the meaning of the Convention".**
>
> **(2) Regs.3 to 9 provide for the appointment of, and prescribe the duties, powers, functions and immunities of Commonwealth and State Central Authorities. Amongst the functions of such Central Authorities prescribed by regulation 5(1)(a), are, "to do, or co-ordinate the doing, of anything that is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention".**
>
> **(3) Reg.9 provides, in effect, that a State Central Authority has, and may exercise, all the duties, powers and functions of the Commonwealth Central Authority.**
>
> **(4) The Convention applies only to the "wrongful removal or retention" of children from one Convention country to, or in, another (see the preamble to the Convention, and Articles 1(a), 3, 7(a), 12, 14, 15 and 16).**

(5) Regulation 13 provides:

> **"Where the Commonwealth Central Authority receives an application in respect of a child removed from a Convention country to Australia, and is satisfied that the application is an application to which the Convention applies, and is in accordance with the requirements of that Convention, the Commonwealth Central Authority shall take action under the Convention to secure the return of the child to the applicant."**

(6) Reg.15(1)(d) provides:

> **"The responsible central authority may, in relation to a child removed to Australia, apply to a court having jurisdiction under the Act, (that is, the Family Law Act, 1975) for -**

(d) an order for the return of the child to the applicant."

> **(7) The word "removed" in regs.13 and 15(1) has a corresponding meaning to "removal" as defined in reg.2, that is, "wrongfully removed or retained", within the meaning of Article 3 of the Convention.**

(8) Reg.16(1) provides:

> **"Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1), if the day on which the application was filed is a date less than one year after the date of the removal of the child to Australia."**
>
> **(9) Sub-regulation 16(3) then prescribes some exceptional circumstances in which the court may, in its discretion, decline to follow the mandatory**

requirement of sub-reg.16(1) to order the return of the child "pursuant to an application under sub-regulation 15(1)". Amongst those exceptional circumstances is the circumstance referred to in paragraph (a) of that sub-regulation, namely, that the court is satisfied that "the person, institution or other body having the care of a child in the Convention country from which the child was removed, had consented to or acquiesced in the child's removal".

(10) Since reg.13 requires a Central Authority to "take action under the Convention to secure the return of the child to the applicant", when "it" - that is, the Central Authority - "is satisfied that the application is one to which the Convention applies", and since sub-reg.16(1) requires the court, subject only to the one year limitation period, and the exceptions prescribed by sub-reg.16(3), to order the return of the child "pursuant to an application under sub-regulation 15(1)", that is, an application by a Central Authority, the Regulations cast upon the Central Authority, rather than the court, the power and the obligation to determine whether the application received by it is one to which the Convention applies, including whether the removal to or retention in Australia of the child, was "wrongful" within the meaning of Article 3 of the Convention.

(11) If the Regulations had intended that the court, rather than the Central Authority, have the power to determine whether or not a removal, including a retention, was "wrongful", sub-reg.16(1) would have commenced with words such as: "Where a child has been wrongfully removed to or retained in Australia, in terms of Article 3 of the Convention"; or (drawing upon the definition of "removal" in reg. 2): "Where a child has been removed to Australia". (Compare Article 12 of the Convention). The absence of such introductory words from the sub-regulation, and the inclusion in reg.13 of the requirement that the Central Authority be satisfied that the application is one to which the Convention applies, leads to the conclusion that, once a Central Authority is so satisfied, and makes an application to the court under sub-reg.15 (1), the court must determine the proceedings upon the basis that the application of the applicant parent is one to which the Convention applies, and therefore involves a "wrongful removal" to or "retention" in Australia.

(12) Further, and in the alternative, the inclusion in sub-regulation 16(3), amongst the group of exceptions to the mandatory requirement of sub-reg.16(1) to order the return of a child, of consent to or acquiescence in the removal to or retention in Australia of the child by the overseas applicant parent, indicates that, for the purposes of the Regulations, such consent or acquiescence does not affect the wrongfulness of the removal or retention, but merely gives rise to a discretion to refuse to order the child to return, notwithstanding that wrongfulness.

71. If the argument which I have outlined above is a valid one, it gives rise, in turn, to the question whether the Regulations - which thus purport to preclude a court, before which proceedings under the Regulations come for determination, from examining and determining a fundamental preliminary question of fact relevant to that determination - are a valid exercise of the regulation-making power by the Executive Government of this country. As I have earlier indicated, it seems a remarkable proposition that a court, exercising the judicial power of the Commonwealth, should be precluded by the administrative decision of some bureaucrat sitting either in Canberra or Brisbane, from considering and deciding such a fundamental question of fact. It seems equally remarkable that a citizen or resident of this country - in this case, the wife - should be precluded from

litigating such an important preliminary issue of fact in the court charged with the responsibility of deciding whether to order the return of his or her child to a foreign country.

72. Fortunately, because of the concession that was ultimately made by the Central Authority in this case, I do not have to consider or express a concluded opinion upon the question of construction of the regulations which I have outlined above. For that reason, and for the additional reason that neither counsel nor I adverted, at the time of the hearing, to the possibility of any invalidity in the regulations arising from the adoption of the argument which I have outlined in relation to that construction, it would be quite inappropriate for me to express any opinion upon that troublesome question in this judgment.

73. However, I perceive the possibility that an appeal could be launched by the Central Authority against my decision upon the basis that its concession was erroneous and, therefore, wrongly or inadvertently made by it, and wrongly accepted by me, and that the Full Court might entertain such an appeal, notwithstanding that concession, on the basis that it raises a pure question of law, the determination of which would not have been affected by any additional evidence which either party might have seen fit to adduce at the hearing.

74. I, therefore, consider it appropriate that I indicate the result which I would have come to had I decided that the convention does apply to the facts of this case, and that the question of consent or acquiescence by the husband fell for consideration only under subreg.16(3)(a), that is, as an exception to the mandatory requirement of subreg.16(1). I consider it appropriate to do that because, if such an appeal were lodged and were successful, the result, in the absence of such an indication by me, would almost inevitably be a remittal to me for further consideration and exercise of my discretion under subregul.16(3), with the possibility of a further appeal against that exercise of discretion. Accordingly, I propose to indicate how I would have exercised that discretion, and the reasons therefor, had I considered the application of subreg.16(3)(a).

75. That sub-regulation, like Article 13 of the Convention, lays down no criteria for the exercise by the court of the discretion, which the sub-regulation grants to the court, of refusing to order the return of a child wrongfully removed to or retained in Australia, where the court is satisfied that the person, in the position of the husband, in this case, consented to or acquiesced in that removal or retention. The discretion is therefore unfettered except by the obligation of the court to act judicially in its exercise.

76. As I have previously indicated, I am quite satisfied, on the balance of probabilities that, before the wife departed from the United States with M on 25 November, 1993, she intended that,_ thenceforth, she and the child would reside permanently in Australia and that the husband knew of and accepted that intention, and signified his agreement with the course proposed by the wife in various ways, including his giving to the wife his "dog tags" and wedding ring in the circumstances deposed to by the wife, and his voluntarily conveying his wife and child to the airport for their departure on a one-way ticket to Australia. I am therefore satisfied that the husband consented, not just to the removal of the child to Australia by the wife, but to his retention there by her subsequently. In my view, that consent, once given in those circumstances, could not be subsequently withdrawn by the husband, so as to be considered inoperative for the purposes of the sub-regulation, in relation to the wife's retention of the child in Australia after the husband changed his mind and demanded the child's return.

77. Whilst the giving of consent by the husband does not automatically entitle the wife to a favourable exercise of the court's discretion under the sub-regulation, I think it appropriate to ask: what circumstances would, or might, lead to an unfavourable exercise of that discretion?

78. Without intending to be exhaustive, I would think that circumstances of duress, undue influence, or deceit by or on behalf of the wife, inducing or significantly influencing the giving of consent by the husband, would certainly militate against an exercise of that discretion in the wife's favour.

79. Likewise, evidence, that such consent was given at a time when the husband was suffering from such emotional distress or other instability of mood or temperament, whether as a result of the breakdown of the marriage or otherwise, that he was incapable of giving a rational and informed consent, would also present strong grounds for the exercise of discretion adverse to the wife. However, none of those circumstances exist or are even claimed to exist in this case.

80. In addition to those circumstances relevant to the strength and validity of the consent of the alleged consenting party, I would think that circumstances relevant to the welfare of the child in question have a bearing upon the exercise of discretion under this sub-regulation.

81. For example, if the court were of the view that the welfare of the child would be clearly advanced by an order for its return, it would be unlikely to exercise its discretion in favour of the retaining spouse merely because the other spouse had consented to the removal or retention. Again, however, that is not the case here. Indeed, on the contrary, considerations relevant to the welfare of the child in this case, in my view, clearly support an exercise of discretion favourable to the wife.

82. On the evidence before me, I have no doubt that, of the two parents, the wife has always been the primary care-giver of this very young child and that it would be to her that the child is primarily bonded. In addition, the wife has extended family in Australia with which the child had, even prior to her arrival here in November last year, a degree of familiarity and that familiarity and attachment has, no doubt, increased over the intervening months.

83. Furthermore, this child, at his age, can have no particular attachment to the United States of America as distinct from Australia. When he left America at the age of only 11 months, he had spent the first 5 months of his life in Hawaii, the next 2 months in Australia, and the next 4 months in Alabama, all, primarily, in the care of his mother. He has now spent the last, almost, 12 months of his short life in Australia, exclusively in the care of his mother pursuant to an arrangement to which his father, as I have found, initially consented.

84. Also relevant for consideration, in my view, in the exercise of discretion under this paragraph of the sub-regulation, are the practical consequences for the child of an order for his return to the United States.

85. Notwithstanding some offers by the husband of provision of shelter and sustenance for the wife and child in the United States, and notwithstanding that the order, in that event, would be for the return of the child, not to the husband personally but to the United States Central Authority (see: Gsponer v Director-General, Department of Community Services, Victoria (1989) FLC 92-001 at 77,155) I believe that the practical effect of such an order would be for the child to be removed from his mother's immediate care, if not indefinitely then, at least, temporarily, at some stage pending the resolution of the custody proceedings in the Alabama Court.

86. Given that the child has been in his mother's care throughout his short life, and has not been in the sole or principal care of his father at any time, and has not been in his care nor had contact with him at all in the last 12 months, one does not need expert testimony to conclude that such a separation, even for a relatively short period, would cause the child considerable emotional trauma. However, in this case, there is expert testimony, in the form of the affidavit and annexed report of Ms Denise Britton, clinical psychologist, to the effect that M is securely attached to his mother and that any separation of him from her, in the circumstances of this case, would be likely to cause him to suffer "unacceptable psychological trauma at least in the short term."

87. In my opinion, in considering the exercise of discretion under paragraph (a) of subreg.16 (3), the court is not required, as it would be if considering the exercise of discretion under paragraph (b) of that sub-regulation, to conclude that there is:

> **"A grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."**

88. In circumstances where the moving parent - in this case, the husband - has consented to the removal to and retention in Australia of the child, the fact that the return of the child to the applicant would be likely to expose the child to some risk of psychological harm is, in my view, highly relevant to the exercise of the court's discretion, even if the court is not able to be satisfied that the risk is of the substantial and weighty kind referred to by the Full Court in Gsponer's case (supra) at 77,159.

89. Having regard to all of those matters, I am of the opinion that, even if I am wrong in concluding, as I have, that the provisions of the Regulations and of the Convention have no application to the facts of this case because of the husband's initial consent to the permanent removal of the child from America to Australia, I would conclude that, in the proper exercise of my discretion under reg.16(3)(a), the order sought by the Central Authority for the return of the child to the United States should be refused. For that additional reason, therefore, the application will be dismissed.

90. These are the orders I make:

> **(1) That the application of the Director-General of the Department of Family Services and Aboriginal and Islander Affairs, filed on 22 August, 1994, be dismissed;**
>
> **(2) Upon the wife's undertaking, in writing, in Form 41A, that she will keep the husband, M.R., advised of her residential address and that of the child, M, at all times including any change of either address it is further ordered that the orders of this court made herein on 24 August, 1994 and 14 September, 1994 be discharged;**
>
> **(3) That until further order, each of the husband and wife, their servants, and/or agents, be restrained and an injunction is hereby granted restraining them from removing or attempting to remove the said child, M, from Australia;**
>
> **(4) That the exhibits be returned to the solicitors for the wife forthwith upon the giving to the court of an undertaking to produce them to the court again, if required, for the purposes of any appeal.**

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