---

http://www.incadat.com/ ref.: HC/E/AU 541
[03/09/2003;Family Court of Australia; First Instance]
State Central Authority v Maynard

ABDUCTION – HAGUE CONVENTION – GRAVE RISK – SEVERELY EPILEPTIC CHILD AT RISK OF DEATH IF REQUIRED TO TRAVEL BACK TO ENGLAND – RETURN REFUSED

FAMILY LAW ACT 1975

FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986

IN THE FAMILY COURT OF AUSTRALIA AT MELBOURNE

No. (P)MLF4286 of 2003

IN THE MATTER OF THE CHILD

H.M. BORN 8 MARCH 2003

BETWEEN:

STATE CENTRAL AUTHORITY

SECRETARY TO THE DEPARTMENT OF HUMAN SERVICES (Applicant)

and

K. MAYNARD (Respondent)

CORAM: THE HONOURABLE JUSTICE KAY

DATE OF HEARING: 3 September 2003

DATE OF JUDGMENT: 3 September 2003

REASONS FOR JUDGMENT

APPEARANCES:

Ms Bennet of Counsel, instructed by Victorian Government Solicitor, appeared on behalf of the applicant

Mr Ackman, one of Her Majesty's Counsel, with Ms MacMillan of Counsel, instructed by Hayes & Associates, Solicitors, DX 19930, Frankston, appeared on behalf the respondent

1. In 1980 the nations of the world gathered in The Hague to seek to reach agreement on attempting to eradicate the scourge children being removed from the country where the child was habitually resident without the permission all persons who had a right to determine where that child should live. To give effect to what the nations there gathered thought was the appropriate manner of passing their views into law they signed a convention known as the Convention on Civil Aspects of Child Abduction.

2. Australia was one of the original signatories to the Convention. It is now in operation amongst 74 countries. Its object is to secure the prompt and safe return of children who have been wrongfully removed from one contracting state to another and to ensure that the rights of custody and access according to the law of one contracting state are respected in the other contracting states.

3. Kirby J in DL v Director General of New South Wales Department of Community Services observed:

"Central to the purposes of the convention is the intention that, save in the most exceptional of cases, the child should ordinarily be returned quickly to the jurisdiction of habitual residence from which the child was abducted. Disputes about custody and access should be determined in that jurisdiction. Save in exceptional circumstances, the procedures for return under the convention should not be transformed effectively into a hearing about the custody of the child. Whenever that happens the fundamental objective of the convention will be defeated. The abducting parent then secures the fruits of conduct which not only offends international law, it is also highly disruptive to the wellbeing of the child involved and its relationship with the other parent."

4. The Convention sets out a basis by which countries can cooperate on an inter-governmental basis through organs described in the Convention as "central authorities". Australia has imported the Convention into its domestic laws through the Family Law (Child Abduction Convention) Regulations 1986 and established a Central Authority who in turn delegates to various State Central Authorities the tasks under the regulations.

5. In this case an application was brought on behalf of the State Central Authority for the State of Victoria seeking the return of the child H.M., born 8 March 2003, to England from where she had been unlawfully removed by her mother.

6. There is no dispute in these proceedings that the behaviour of the mother in taking the child from England was a "removal" within the meaning of the relevant regulations that attracted the operation of the Regulations. It was in breach of the father's custodial rights. It was done without his consent and without his acquiescence. These matters are not in dispute.

7. Once those facts were established the mother, providing the application is brought within a year of the time upon which the child was removed, the relevant regulations then provide that the Court must make an order for the return of the child.

8. In this case the removal occurred on 28 May 2003 and the application was filed on being dated 2 July 2003.

9. There are exceptions to the obligation to mandatory return. Under regulation 16(3)(b) the Court may relevantly refuse to make an order if the person opposing the return establishes that there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

10. If the exception created by regulation 16(3) is enlivened, the Court retains a discretion of whether or not to return the child.

11. Kirby J spoke of the exception to the regulations in his judgment in DP v Central Authority (2001) FLC 93-081 at paragraph 139 where his Honour said:

"The explicit inclusion of exceptions, and specifically the exception acknowledged in regulation 16(3)(b), reflects the acceptance as part of the law that cases will arise from time to time where an order of return should not be supported. In the extreme cases contemplated it is not therefore a departure from the scheme of the law but its fulfilment that allows the exception to be applied. Even where the grounds contemplated by the exception are established, it remains for the court in Australia in terms of the opening words of regulation 16(3) to exercise a discretion to refuse to make an order of return or to proceed to make it..."

12. In DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services (2001) 27 Fam LR 569; (2001) FLC 93–081, Gaudron, Gummow and Hayne JJ said at par 40

"So far as reg 16 (3) (b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "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". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced."

13. Thus we have a Convention that says if a parent abducts a child the child goes back unless the Court is satisfied that an exception exists in which case the child may still be sent back.

14. Three propositions were argued as to why H. should not be sent back. Before turning to those it is necessary to provide just a small amount of background.

Background

15. H.'s parents were married in August 2000. Her father is English. He is now 35 years of age. The mother is an Australian. She is 38 years of age. They appear to have met in England where the mother was working as a teacher.

16. According to the mother's material, they travelled to Australia to undergo a ceremony of marriage and then returned to live in England on the basis that ultimately she could come to live in Australia whenever she wanted to. It is not necessary for my purposes to traverse the strength of her belief as to the promise. The reality is this Australian mother working in England married an Englishman. They made their home in England and they had a child born in England.

17. Tragically for the parties, and the child, H. was born with a serious illness. Since birth she has suffered from neonatal seizures. They are present almost all of the time and the best attempts of some of the finest paediatric doctors, both in the United Kingdom and Australia, have failed to stem the extent of the seizures. I quote from the current treating paediatrician, E.J. Lowther, in a report about H. of 28 July 2003.

"The above-named four-and-a-half-month old infant suffers from intractable epilepsy which is proving impossible to control. At the time of writing this letter she has been in an inpatient in the children's ward at the Frankston Hospital for five days with adjustments to her medication. She is currently having a major seizure two to three times an hour. At the time of admission she was having seizures every 10 minutes.

Technically, Status Epilepticus Partialis Countinuans."

18. It was Dr Lowther's opinion that following an intensive investigation by the neurology unit at the Royal Children's Hospital

"Video EEG monitoring showed continuous multifocal abnormal electrical activity on both sides of the brain. It was interpreted as showing severe bilateral cerebral dysfunction with almost continuous sub-clinical seizure activity and tonic seizures arising from either the right or left hemisphere. Her MRI scan shows diffuse abnormalities in the right cerebral hemisphere and deeper structures and remains the subject of investigation. The differential diagnoses from the neurologists includes Krabbe's lucodystrophy, GMI Gangliosidosis, cortical migration disorder and other equally rare possibilities have not been discounted. The child's clinical state in the differential diagnosis indicates that she has an extremely poor prognosis for control of her seizures and is likely never to have her seizures adequately controlled. In conjunction with this epileptic encephalopathy she is most likely to exhibit severe developmental delay."

19. The doctor concluded by saying that:

"H. is absolutely unfit to travel anywhere in an aircraft at this time and is likely to remain unfit to travel until seizure control is considerably improved which is likely to be a long time."

20. H. has also been seen by Andrew Kornberg who is currently the director of the Department of Neurology at the Royal Children's Hospital and holds an associate professorship at the Department of Paediatrics, University of Melbourne. His summary of her situation is as follows:

"it is very likely that H. has a neurodegenerative disorder, the specific cause not yet found. She has profound abnormalities on neurological examination and has continuous seizure activity on EEG and frequent clinical seizures throughout the day. The seizures are tonic in nature. The seizure pattern and her abnormal neurologic examination are associated with a very poor long-term outcome for neuro- developmental progress. In addition to the presence of frequent tonic seizures at this stage of life, it is also associated with a significant risk of death."

21. The Professor goes on to observe that:

"The mother, Mrs M., requires ongoing support so she can provide optimal care for H. Without these things in place I believe that H.'s condition could be detrimentally affected."

22. When the Central Authority was given details of the nature of the mother's case and the state of health of the child the Central Authority arranged to have H. examined by Lindsay Smith, the head of the Monash Medical Centre, paediatric neurology unit. He also holds a post as a paediatric neurologist at the Royal Children's Hospital and various other visiting paediatric neurological positions. He has been consulting in paediatric neurology for nine years.

23. Dr Smith saw H. and said:

"H. presented to the rooms somewhat unwell. The mother arrived late because of a sudden increase in seizures over the previous 24 hours. During the period of the 35-minute consultation somewhere between six and 10 seizures of a focal nature with eye deviation to the right, right arm extension with jerking of the right arm and leg were noted. This was associated with redness of the face. There was no loss of colour. There was no convincing fixing or following during the consultation. There was no convincing awareness of my presence."

24. In a written report the doctor, when asked of his view of the other doctors' written diagnoses said that it was not yet appropriate to describe H.'s situation as suffering from 'neurodegenerative disorder' because the cause had not yet been located. He opined that there would be circumstances in which it might be appropriate for H. to travel; namely, if her seizures could be stabilised to one to three per day. Even then if she was to travel she would need oxygen on board and sufficient medication to cope with the problem of seizures.

25. The Family Law Rules require experts to hold a joint conference to see if they can reach a consensus view or at least identify their differences. Dr Smith and Professor Kornberg held some discussions. Those discussions were reduced to writing and then in order to give some clarification Dr Smith came and gave evidence before me.

26. It appears that Dr Smith and Prof Kornberg are in heated agreement that

for the foreseeable future H. cannot travel;

a flight to England in the foreseeable future might be fatal;

there is no reasonable expectation in the foreseeable future that the precondition necessary for fitness to fly, namely the control of her seizures down to zero, one, two or three day, is likely to occur, nor is there any reason to believe that is likely to occur in the next 12 months.

27. Dr Smith, in his viva voce evidence, went so far as to say that if the parents were visiting Australia or were Australians who wanted to travel with the child or felt some necessity to travel with the child, he would contact the airlines and tell them to refuse carriage of this child until such time as the child's condition could be stabilised. He was firmly of the view that travel could result in significant and serious damage to H. or her death.

28. Given the state of the evidence, which is agreed upon by the Central Authority and the respondent, I am compelled to find that the mother has established that there is a grave risk that the return of the child to England would expose the child to physical harm. I have made a cursory search of the world's jurisprudence on the operation of Article 13(b) of the Convention [which finds itself enacted in regulation 16(3)(b)] and I have not been able in the short time available to locate any case in which it is the issue of travel that enlivens the exception. None of the cases that I have been able to identify has the physical event of actually moving from the place where the child is back to the place from whence the child was abducted being a life threatening action.

29. The case that found its way to the High Court in DP v Central Authority involved the removal of an autistic child from Greece. The argument there was that the child was now settled in Australia and was having the affects his autism properly met. Any move might be severely unsettling for the child. Ultimately after the High Court had dealt with the matter, when it was remitted for retrial the child was returned to Greece notwithstanding that health issues were raised. But that case did not raise the effect of the operation of regulation 16(3)(b) in the extreme circumstances of this case.

30. Two other side issues were raised by the mother in her attempt to enliven 16(3)(b) in the event that she failed in respect of the first one. She asserted that her experiences with the English medical system have been such, when compared to her experiences with the Australia system, that returning the child back into the clutches of the English medical system would of itself expose the child to physical harm. The evidence does not support such a conclusion and I am certainly not persuaded by any of the evidence before me that the mother has established that proposition.

31. Indeed one of the very witnesses that she seeks to rely on in these proceedings, Dr Barbara Buckley, a community paediatrician who saw H. in the neonatal unit shortly after her birth and saw her on a couple of occasions thereafter, said:

"I am aware that the health service in England and Wales is completely able to cope with the problem and that H. would be offered all the appropriate therapy and support in this country."

32. I am not going to canvass the entirety of the evidence that supports ground 2 of the defences, other than to say that I am not satisfied that it is established on the material that is before me.

33. The third ground is a little bit more subtle. H. requires a 24 hour a day watch. Dr Buckley said "Her wellbeing would therefore obviously depend on the parenting ability of the parent." The mother, being unhappy with the English situation, desperately needs to feel confident in herself and desperately needs assistance in the care of H. She is best going to be able to do that if she is surrounded by the warmth of her family and other support groups that she feels most comfortable with.

34. She is now estranged from the father. He says that he is willing to help and that they have other friends who will come to their assistance and extended family in the United Kingdom. The mother says that they will not meet her needs and that in those circumstances because she will not be able to adequately care for H. and because she will effectively run out of strength without proper assistance, that the welfare of the child will be compromised if she is sent back to England without the support system that she has in Australia. She asserts there will be a grave risk that will expose the child to physical harm or place the child in an intolerable situation.

35. It has to be remembered the nature of what the return would be about. It is a return back to the jurisdiction of the child's habitual residence so that the English courts can determine how and where the child should live. It is a return which would be for a limited period of time in the sense of limited to the time the court becomes seized of it. Whether the court would then conclude that H. was best living in Australia with the mother far away from H.'s father or whether notwithstanding the limitations to the mother's capacity to provide appropriate care, H.'s welfare would best be advanced in England is the issue that the English court would have to determine.

36. In order to be satisfied of the existence of this third basis for relying on the exception I would need to be satisfied that at least on a temporary basis that the mother had established that the return would expose the child to a grave risk of physical harm or place the child in an intolerable situation because the mother would find it very stressful to have to return to England to an unhappy relationship with the father and far from the place where she wanted to be surrounded by doctors with whom she had more faith or confidence.

37. That line of argument needs to be evaluated in light of the evidence of Mr Papaleo, a psychologist, who saw the wife at the request of the Central Authority and concluded as follows:

"I share unequivocally that H.'s care will require extensive unrelenting parental input and the emotional and physical health and wellbeing of H.'s carers will contribute directly to H.'s health. I caution against the presumption that Ms M. and her family are automatically the best choice, albeit that it may eventuate that they are and clearly so. Even though Ms M. is obviously under enormous stress, is anxious, worried and burdened by her daughter, her daughter's health, as well as these looming proceedings, she impresses as a psychologically healthy, extremely competent and capable parent, who under extreme and adverse circumstances is doing everything possible to care for her child. I do not consider her to be incapacitated in the same manner as the mother in JLM and it is my opinion that even in the eventuality that she is required to return to England that her level of motivation, commitment and devotion to her child will remain unchanged, albeit that this may also entail a significant and even enormous emotional burden and especially so if she is unable to access supports ... a prolonged stay in England will probably have a significant and negative impact upon Ms M. in the longer term and contributed to a more adverse outcome for H., but this will be comparatively less so if proceedings in the Family Court in England are expedited and/or if she did receive support and respite from Mr H., his family and/or friends. These are supports in England that Ms M. may not want, value or perceive them as such."

Then:

"In conclusion, H. currently receives an excellent level of care. Her mother feels supported, has confidence in the health system in Australia and enjoys the support and respite offered to her by her family. If required to return to England with H., depending on her own family circumstances, she may not have the support of her family and in the longer term and depending on her networks in England, this may compromise her ability to cope and ultimately compromise the welfare of H. I do not, however, share a view that H.'s long-term psychological health would be compromised by such a decision and that H.'s welfare would be compromised by a decision to return her to England at least until the matter is heard in England by the appropriate court which can then take into consideration all issues objectively and which will then be in a position to make a fully informed decision when all factors are considered in totality. This course of action will undoubtedly distress Ms M., but there is support in England including Mr H. and his family."

38. Whilst this case will be decided on the basis that the physical risk to the child is so grave that the return of the child to England really remains an impossibility, I should have it noted that if it was not for that ground this is a case in which, in my view, the defences made out under regulation 16(3) would not have been established. Even if they were established, the circumstances of the removal of this child would have enlivened my discretion to return the child.

39. However, for all of that, as already indicated, this case ultimately decided itself on the basis of the evidence that H. cannot now be reasonably expected to fly back to England and as such I may refuse to make an order. I turn to the issues of discretion that would still remain enlivened.

40. Given the very nature of the reason why I am not sending the child back I think has been appropriately conceded by the State Central Authority that the exercise of the residual discretion is a non-event.

41. I remain extremely critical of the manner in which this child was removed from England. It has severely hampered the child's right to have a meaningful relationship with her father. It has allowed the law of the jungle to triumph over the rule of law. It was carried out in blatant disregard of legal advice. However it seems to me that the result must be that the application is dismissed. That is the formal order I now make.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
