

## FAMILY COURT OF AUSTRALIA

**STATE CENTRAL AUTHORITY &  
QUANG**

*[2009] FamCA 1038*

FAMILY LAW – CHILDREN – Access application under the Family Law (Child Abduction Convention) Regulations 1986 – Appointment of an independent children's lawyer – Exceptional circumstances found to exist

Convention on the Civil Aspects of International Child Abduction (entry into force 1 December 1983) Art 1, Art 21

*Family Law Act 1975* (Cth) ss 60CC, 68L(3), 68LA(4), 68LA(5)

Family Law (Child Abduction Convention) Regulations 1986 (Cth) r 24, r 25

United Nations Convention on the Rights of the Child (entry into force 2 September 1990) Art 12

*Baker v The Queen* (2004) 223 CLR 513

*Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961

*R v Kelly (Edward)* [2000] QB 198

*State Central Authority and Peddar* [2008] FamCA 519

*State Central Authority & Ustinov (No. 4)* [2008] FamCA 987

<b>APPLICANT:</b>	State Central Authority
<b>RESPONDENT:</b>	Ms Quang
<b>FILE NUMBER:</b>	MLC 9548 of 2009
<b>DATE DELIVERED:</b>	26 October 2009
<b>PLACE DELIVERED:</b>	Melbourne
<b>PLACE HEARD:</b>	Melbourne
<b>JUDGMENT OF:</b>	BENNETT J
<b>HEARING DATE:</b>	26 October 2009
<b>REPRESENTATION</b>	
<b>COUNSEL FOR THE APPLICANT:</b>	
<b>SOLICITOR FOR THE APPLICANT:</b>	Ms T Porritt STATE CENTRAL AUTHORITY

**FOR THE RESPONDENT:**

**IN PERSON**

## **ORDERS**

### **IT IS ORDERED:**

1. That this matter be adjourned for mention before me at 9.00 am on Tuesday 24 November 2009 for directions for trial.
2. That on or before 4.00 pm on 16 November 2009 the mother file and serve any response to the application of the State Central Authority filed 23 October 2009.
3. That pursuant to section 68L(3) of the *Family Law Act 1975* the interests of the children L born ... August 2005 and C born ... January 2007 be independently represented by a lawyer AND IT IS REQUESTED that Victoria Legal Aid arrange such representation and the independent children's lawyer be appointed in sufficient time to have had an opportunity to familiarise himself/herself with the matter prior to the next mention date.
4. That forthwith upon appointment by the said Victoria Legal Aid or otherwise the independent children's lawyer file a Notice of Address for Service.
5. That within 48 hours of notification of such appointment the solicitor's for the respective parties provide to the independent children's lawyer copies of all relevant documents relied upon.
6. That until further order, the respondent mother MS QUANG date of birth unknown, Australian Passport Number ... by her servants or agents be restrained by injunction from causing or permitting or suffering the said children L born ... August 2005 and C born ... January 2007:-
  - a) to be removed from the Commonwealth of Australia and in this regard all officers of the Australian Federal Police be directed to enforce, if required, the provisions of such order;
  - b) to be removed from the State of Victoria; and
  - c) to reside at any other than their present residential address of K Street, B, or any other residence at which the Applicant State Central authority has agreed in writing that the said children may reside.

7. That the prohibition against removal of the children L born ... August 2005 and C born ... January 2007 from Australia, out of Victoria and from their current residence applies mutatis mutandis to the requesting parent, MR G born ... October 1963 of ..., Spain.
8. That the respondent mother, her servants or agents forthwith deliver up to the Registrar of the Family Court of Australia at Melbourne for safe custody any and all passports held in the name of the said children or upon which the said child appears and be and is hereby restrained from applying for any further or other passports for the said child pending further orders of this Court.
9. That a sealed copy of these Orders be provided forthwith to the Marshal of the Family Court of Australia, the Commissioner of the Federal Police and the Secretary of the Commonwealth Department of Foreign Affairs and Trade.
10. That by 4.00 pm on 16 November 2009 the respondent mother file and serve a financial statement.
11. That by 4.00 pm on 16 November 2009 the State Central Authority file and serve any financial statement upon which it proposes to rely from the requesting parent.
12. That liberty be reserved to the requesting parent, Mr G, to apply to vary or set aside paragraph 7 of this Order or as he may be advised.

**IT IS NOTED** that publication of this judgment under the pseudonym *State Central Authority & Quang* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 9548 of 2009

**STATE CENTRAL AUTHORITY**

Applicant

And

**MS QUANG**

Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. This matter is brought pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth) and concerns the children L born in August 2005 and C born in January 2007. The matter comes before the court on the application of the State Central Authority on request from the State Central Authority of Spain. The requesting parent is the children's father, Mr G, of Spain. The respondent is the children's mother, Ms Quang, who resides in B, Victoria, Australia.
2. The State Central Authority seeks, inter alia, that the mother do all acts and things necessary to ensure that the children have contact with their father pursuant to the terms of the Regulatory Agreement signed by the parents on 4 December 2006 and approved and signed by sentence on 13 March 2007.
3. Earlier today I pronounced orders which included an order that the children's interests in the proceedings be independently represented by a lawyer. Section 68L(3)(a) of the Act provides that in proceedings that arise under regulations made for the purpose of the *Convention on the Civil Aspects of International Child Abduction*, the court may order that a child's interests in proceedings be independently represented by a lawyer only if the court considers that there are exceptional circumstances that justify it doing so. The order was not opposed by the applicant and the respondent.
4. To the extent that s 68L(3)(b) requires that I provide reasons which specify the exceptional circumstances to which I have regard in making the order, these are my reasons.

## The law

5. Australia and Spain are contracting states to the Convention on Civil Aspects of International Child Abduction which was concluded at The Hague on 25 October 1980 ('the Convention'). The Convention is given effect in Australia pursuant to Family Law (Child Abduction Convention) Regulations 1986 ('the Regulations'). The Regulations make provision for all cases under the Convention. Wrongful removal and retention cases, often referred to as abduction cases, are dealt with in Parts 2 and 3 of the Regulations. Requests to central authorities and court applications for enforcement or facilitation of rights of access are dealt with in Part 4 of the Regulations.
6. Regulation 24 of the Regulations provides as follows:-
  - (1) The Commonwealth Central Authority must take action to establish, organise or secure the effective exercise of rights of access to a child in Australia if:
    - (a) it receives a request from a Central Authority on behalf of a person who claims:
      - (i) to have rights of access to the child under a law in force in a convention country; and
      - (ii) that those rights have been breached; and
    - (b) it is satisfied that the request is in accordance with the Convention.
  - [...]
  - (4) For subregulation (1), the action taken may include any of the following:
    - (a) transferring the request to a State Central Authority;
    - (b) applying to a court under regulation 25 for an order that is necessary or appropriate to establish, organise or secure the effective exercise of the rights of access to which the request relates;
    - (c) seeking an amicable resolution in relation to the rights of access to the child.
7. Regulation 25 provides that the applicant State Central Authority may apply to the court for, inter alia, orders specifying with whom a child is to spend time or communicate as well as any other order that is appropriate to give effect to the Convention. On the determination of the matter, it will be within the court's discretion to make any of the following orders:-
  - an order for the children to spend time or communicate with their father (Regulation 25A(1)(a));
  - any order which the court consider is appropriate to give effect to the Convention (Regulation 25A(1)(b));

- such order imposing conditions on the children spending time or communicating with their father as the court is satisfied is appropriate to give effect to the Convention (Regulation 25A(1)(c)).

8. Article 1 of the Convention describes one of the objects of the Convention as being to ensure that rights of access under the law of one Contracting State are effectively respected in the other Contracting States. Article 21 of the Convention provides:-

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

9. In the matter of *State Central Authority and Peddar* [2008] FamCA 519 I held that whilst the Regulations provided the framework within which the State Central Authority could prosecute and participate in parenting proceedings, the principles for determination of time to be spent with and communication between a child resident in Australia and a parent in another Convention Country were the same principles that generally apply to children in Australia. In deciding whether to make a particular parenting order, the best interests of a child is the paramount consideration. This is articulated in Part VII of the Act and the relevant primary and additional considerations are set out in s 60CC:

- (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

- (2) The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

#### Additional considerations

(3) Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents,

and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j) any family violence involving the child or a member of the child's family;

(k) any family violence order that applies to the child or a member of the child's family, if:

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

10. Furthermore, s 60CC(4) provides that:

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child; and

(b) has facilitated, or failed to facilitate, the other parent:



(i) participating in making decisions about major long- term issues in relation to the child; and

(ii) spending time with the child; and

(iii) communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

11. The role of an independent children’s lawyer is to form an independent view, based on available evidence, of what is in the best interests of the children and then act in these proceedings in what they believe to be the children’s best interests.<sup>1</sup> The independent children’s lawyer is not a legal representative retained by L and C and he/she cannot be bound by instructions from the children or either of them<sup>2</sup> The independent children’s lawyer is required to deal impartially with the parties. The legislation requires that any views expressed by the children be fully put before the court, to analyse documentary, expert evidence and reports and to distil from that evidence significant matters for the purpose of properly drawing them to the court’s attention. The independent children's lawyer is also under a specific duty to take steps to minimise for the children the trauma associated with proceedings<sup>3</sup> and to facilitate an agreed resolution of matters in issue in the proceedings to the extent that it is in the best interests of the children to do so.<sup>4</sup>

12. Section 68L(3) provides that there must be exceptional circumstances justifying an order for the independent representation of a child’s interests. As was cited by Dawe J in *State Central Authority & Ustinov (No. 4)* [2008] FamCA 987 at [12], and referred to with approval by Callinan J in *Baker v The Queen* (2004) 223 CLR 513 at 573, Lord Bingham of Cornhill CJ stated in *R v Kelly (Edward)* [2000] QB 198 at 206:

We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

13. This definition is helpful in determining whether exceptional circumstances exist in the appointment of an independent children’s lawyer in proceedings arising under the Convention regulations.

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<sup>1</sup> s 68LA(2) *Family Law Act 1975* (Cth).

<sup>2</sup> s 68LA(4) *Family Law Act 1975* (Cth).

<sup>3</sup> s 68LA(5)(d) *Family Law Act 1975* (Cth).

<sup>4</sup> s 68LA(5)(e) *Family Law Act 1975* (Cth).

## Discussion

14. These proceedings were initiated by the application of the State Central Authority under Part 4 of the Regulations. I am informed that the mother was only served with the application this morning but that she has been aware that it would be issued having been in negotiations with the State Central Authority since about May 2009. She takes no objection to short service.
15. The mother appears in person and has indicated that she may not seek legal representation. It is agreed that she have three weeks in which to file and serve a response to the present application together with the evidence upon which she proposes to rely.
16. When the mother's response is before the court, it will be possible to identify the factual and other issues for determination. In the meantime, I observe that the applicant's information (from the requesting parent) and comments by the mother today from the bar table indicate that:-
  - (a) the requesting parent is a Spanish national employed in a profession in Spain;
  - (b) the mother is an Australian national employed by a large firm in sales and marketing;
  - (c) the mother and requesting parent were in a relationship but did not marry;
  - (d) on 4 December 2006 the parents entered into an agreement which has the force of Spanish law. The agreement enabled the mother to relocate to Australia with the parents' then only child, L, and for the requesting parent to spend time with L and her brother each year in Spain for 60 consecutive days and in Australia for 14 consecutive days, although there was no compulsion on the father to avail himself of the latter;
  - (e) L and the mother left Spain, bound for Australia, on 23 December 2006. L was then about 16 months old. The mother was heavily pregnant. L has not seen the requesting parent since;
  - (f) The parents' second child, C, was born after the mother's arrival in Australia in January 2007. The requesting parent has not spent time with C;
  - (g) The applicant and the mother have been in negotiations since May 2009. There has been some attempt at a mediated resolution;
  - (h) Amongst other things, the requesting parent seeks the implementation of his rights to spend time with the children in Spain for 60 consecutive days each year.
17. This case has a number of features which are out of the ordinary.

18. First, the substantive application is for parenting orders. The mother is the primary carer of the children. However, the applicant is a statutory body which relies on information from the central authority in Spain which, in turn, obtains information from the requesting parent. Many of the matters to be considered (pursuant to s 60CC) are matters upon which the requesting parent could or should provide evidence and yet he is not a party to the proceedings.
19. Second, whilst it appears that the respondent and the requesting parent entered into an agreement about, amongst other things, what time the children would spend with the requesting parent the provisions relating to face to face time have not been implemented. C has never spent time with the requesting parent. L has not seen her father since December 2007 when she was 16 months old. She is now four years old. The Regulatory Agreement will be relevant to establishing the context in which the mother relocated with L to Australia. However, given that the relevant provisions of the Regulatory Agreement have not been implemented, it is likely that the most relevant evidence is yet to be adduced. The independent children's lawyer can and should play a valuable role in obtaining and testing that evidence, particularly as the respondent mother is likely to be unrepresented and that requesting parent is not a participant.
20. Third, whilst it is not apparent at this early stage, there may be a distinction between the children vis-à-vis rights of access. The Regulatory Agreement purports to provide for what time the requesting parent will spend with L and an unborn male child. It is not immediately clear to me that an Agreement can confer responsibility and obligations on the parties in relation to a child who was not then born. It may be that nothing turns on the point. However, in proceedings between a statutory authority (not the requesting parent) and a mother who is a litigant in person, I suspect that an independent children's lawyer may be of assistance to the Court.
21. Furthermore, the appointment of an independent children's lawyer is broadly consistent with Article 12 of the *United Nations Convention on the Rights of the Child* (UNCROC):
  1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
  2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'
22. The children in the present case are too young to articulate their views. However, it cannot be the case that their interests are less deserving of independent representation than a child who can articulate views.

23. In *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961, at para [60], Baroness Hale of Richmond (with whom the balance of the presiding members of the House of Lords either expressly agreed or did not disagree) indicated that children ought to be heard far more frequently in Hague Convention proceedings and discussed the various ways in which children can be heard:

There are three possible ways of [hearing a child]. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional [in Australia a family consultant] to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is, therefore, an interview with a CAFCASS officer, who is not only skilled and experienced talking with children but also, if practising in the High Court, aware of the limited compass in which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child.

24. Australia has progressed similarly to the United Kingdom. Since 1976, family consultants, who are qualified and experienced social workers and psychologists, have been incorporated into the family court system in Australia. Whilst judges can, and occasionally do, interview children personally, with or without the presence of a family consultant, it is usual for evidence to be gathered from and about children by family consultants. In Australia, we are well served by family consultants and independent children's lawyers and the discrete roles which they play in parenting proceedings.
25. *Re D (A Child) (Abduction: Rights of Custody)* concerned the objections of a young child to being returned to Romania consequent on a wrongful removal from Romania to England. The child was only four and a half years old when the proceedings commenced and seven and a half when the matter went to a final hearing. Baroness Hale of Richmond observed that courts in the United Kingdom were moving away from a restrictive approach to separate representation of children and toward the presumption<sup>5</sup> from within the European Union that a child will be heard unless it appears inappropriate to do so. Her Ladyship observed at par [60] that an interview of the child by a welfare officer may well be a sufficient mechanism to obtain a child's views in an abduction case but -

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<sup>5</sup> Provision for this is also contained in Article 11.2 of Brussels II Revised which provides that "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during proceedings unless this appears inappropriate having regard to his age or her age or level of opportunity."

[..] whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which adult parties are not putting forward, then the child should be separately represented.

26. Furthermore, the authorities dealing with the circumstances in which independent representation can be justified by "exceptional circumstances" involve the alleged wrongful removal or retention of a child or children which are proceedings of an interim nature and determinative only of forum. Here, the court will determine substantive rights and responsibilities in relation to L and C. The proceedings will not be dealt with summarily. Due regard will be had to the fact that it is an international case and that the requesting parent may not be able to attend Australia to participate but there is no justification for anything other than a proper investigation and thorough evaluation of the matter such as is required in any parenting case in Australia.
27. I am mindful of the fact that the independent representation of the children's interests will likely prolong the final hearing. However, there is a significant difference between a parenting case brought by the State Central Authority, such as the present proceeding, and abduction proceedings under the 1980 Convention which are a hot pursuit remedy in which time is of the essence. The present proceedings do not need to be, and should not be, conducted under the same imperatives of time. These proceedings will be determinative of significant matters for L and C including the benefit to each of them of having a meaningful relationship with both of their parents and, if necessary, how that may be achieved having regard to their best interests as being the paramount, but not the only, consideration.
28. It is likely that a family consultant employed by the court will be required to prepare an assessment, a family report or both. I am yet to hear submissions or to consider how the requesting parent will be able to participate in that process. However, the expert evidence which may be provided by a family consultant is very different from, and no substitute for, the independent representation of children's interests by a trained and experienced lawyer.

### **Conclusion**

29. For the aforementioned reasons, I am satisfied that the circumstances of this case justify the appointment of an independent children's lawyer.

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**I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Bennett.**

Associate:

Date: 26 October 2009