---

http://www.incadat.com/ ref.: HC/E/NZ 248
[29/05/1995; Family Court of New Zealand at Levin; First Instance]
H. v. H., 29 May 1995

H. v. H.

Family Court Levin FP 031/073/95

29 May 1995

Judge Inglis QC: In this Hague Convention application the applicant father seeks the return to Victoria, Australia, of his son C.H. who was born on 29 April 1993. The application was filed on 11 May 1995. At a pre-trial conference on 16 May I directed that the application be set down for hearing at a special sitting of this Court on 29 May. The mother had secretly left Australia with the child on about 27 April. While preparations were being made for the child's birthday on 29 April the mother told the father that she would be away for a few days visiting a cousin who lives not far from Melbourne. Instead she travelled by air to New Zealand, knowing that there was in force an order of a competent Court (made on 30 January 1995 and served personally on the mother on the same day) restraining her from removing the child from Australia. Having left Australia with the child she later told the father that she would not be returning and that if he wanted to see the child he should save his money and fly over.

Although the mother had filed on 16 May a notice of opposition to the father's application on the ground that there was a grave risk that the child's return to Victoria would expose him to physical or psychological harm or would otherwise place him in an intolerable situation (Guardianship Amendment Act 1991, s 13), that ground for opposition was not in the event pursued. The mother filed no affidavits as directed in the course of the pretrial conference of 16 May and by the time of the hearing it had been accepted that all the requirements of the 1991 Act had been met and that there could therefore be no obstacle to the child's return to Victoria.

However the mother, through counsel, sought to suggest that her consent to an order under s 12 that the child be immediately returned to Victoria was conditional. She wished, first, to have written assurance from the father that neither he nor his friends nor his family would approach her on her return with the child, and that the father would not pursue against her any proceedings for contempt of the Court's restraining order already referred to. She also wished the s 12 order to be made subject to two conditions: (a) that the father not be informed of the date of arrival in Australia of her and the child, and (b) that the Crown pay for the cost of her and child's travel to Australia. In support of this she relied on an order against the father which she had obtained ex parte on 7 April 1995 from the Magistrates' Court at Preston, Victoria (Preston is in the greater Melbourne area). The order resembles what we in New Zealand would describe as a non-molestation order, though it is not expressed as relating to the child, and itexpired on 24 April 1995, three or four days before the mother abducted the child. It is to be noted, from the copies of the Preston Magistrates' Court papers supplied to this Court, that the allegation made in support of the mother's ex

parte application were apparently not required to be verified by either oath or declaration and did not suggest any likelihood of harm to the child. There is no evidence that the father was ever served with that order and the uncontested affidavit evidence of him and a variety of other Melbourne witnesses is to the effect that the mother had never complained of his treatment of her. The parties were living under the same roof, at the mother's request, at the time the mother and child left Australia.

It was urged on behalf of the mother that I should hear oral evidence from her in support of her claim that the s 12 order should be made conditional. Counsel for the father strenuously opposed that course. In M. v M. (1995) 13 FRNZ 27 at 30 Judge von Dadelszen reviewed the authorities, drawing attention to the decision of the Full Court of the Family Court of Australia in Gsponer v Johnstone (1988) 12 Fam LR 753, 769, which shows that the practice of the Family Court of Australia is generally against the calling of evidence in this type of case. For my own part I am content to follow with respect the authority of the Full Court of the Family Court of Australia, a specialist Court in Family Law of high standing. In the present case the mother has not pursued the substantive defence forecast by her notice of opposition. If she had wished any relevant evidence on her side to be considered it was open to her to file affidavits in response to this Court's earlier direction; then at least the father would have had an opportunity, even if limited by time constraints, to reply by affidavit. For those reasons I declined to receive oral evidence from the mother. As to the conditions which the mother seeks to have incorporated in this Court's order, two questions arise: first, whether this Court has jurisdiction to incorporate conditions in a s 12 order; second, whether, if there is jurisdiction, this Court should exercise its discretion in favour of including the conditions sought.

As to jurisdiction to incorporate conditions, counsel for the mother relied, among other cases, on A. v W. (1993) 11 FRNZ 270 (Hammond J), D. v D. [1993] NZFLR 548, M v H [1994] NZFLR 825. In Re E. (Child Abduction) (Family Court, Napier FP 041/153/93, 21 September 1993) I ruled that there was neither jurisdiction nor discretion to make the order for the return of the child subject to elaborate heads of agreement which the parties had proposed. In none of the three latter cases is the issue discussed in any detail, but before coming to Adams v Wigfield it is necessary to deal with s 12 itself.

The provisions of s 12 are very clear. Subsection (1) sets out the circumstances proof of which is required to activate a s 12 order. If those circumstances are proved (as they are here) and if s 13 (setting out various matters of defence) does not apply (which it does not here), s 12(2) provides expressly:

> **...the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.**

The italics are supplied. On the face of it, therefore, the only discretionary areas in this provision relate to the specification in the order of the person or country to whom or which the child "shall" be returned "forthwith". This provision clearly reflects the intent of the International Convention on the Civil Aspects of the International Child Abduction: see in particular art 1 (objective to ensure the prompt return of children wrongfully removed from or retained in any contracting state, and respect for the legal rights of custody and access in contracting states), art 2 (most expeditious procedures to be used), art 16 (merits of rights of custody not ordinarily to be determined). It is, I think, clear that once the elements of s 12(1) have been established and those in s 12(4) and s 13 (if raised) excluded, an order for return of the child "forthwith" is automatic, the only matters left for determination being whether the child is to be returned to a particular person (for instance, the applicant if present in

New Zealand) or a specified country, ordinarily the country from which the child was abducted. Neither of those matters affects the imperative statutory direction that the Court must order the child's return "forthwith" to a designated person or country. On that view of s 12 it is not possible to suggest that an order under s 12(2) can lawfully be limited or circumscribed by conditions or made conditional in any way. Take, for example, one of the conditions proposed in this case, that the applicant undertake not to pursue against the respondent any proceedings for her contempt of Court. Suppose the applicant declines to give any such undertaking? Does that mean that the s 12(2) order does not become effective unless or until he complies? Any such view negates the imperative operation of s 12(2). Take another of the suggested conditions that the applicant not be informed of the respondent's arrival in Australia. Suppose there is a breach of that condition. Does that breach nullify the order which must be made requiring the child to return?

I consider, therefore, that the imposing of any conditions inconsistent with the operation of the s 12(2) order "forthwith" must, by their nature, be unauthorised. Similarly with any attempt to make the terms of the order that the child be returned forthwith conditional upon the happening of some event. A conditional s 12(2) order which can operate only if the condition is met, cannot be an order that the child be returned forthwith. In fact the only prerequisites for a s 12(2) order are those set out in s 12 itself. If those are not met a s 12(2) order cannot be made. If they are met a s 15 order must be made. The section says so. It was submitted that a different view had been taken in A. v W. (supra). But there, unlike the present case, an affirmative defence under s 13 had been mounted, and what was argued was the need to ameliorate particular consequences for the child if the s 13 defence were unsuccessful and the child had to be returned. The learned Judge held, in the end, that if there was jurisdiction to impose undertakings, no undertakings should in fact be imposed: see at 278. However the learned Judge had earlier addressed the question of jurisdiction to impose undertakings in order to ameliorate perceived disadvantages in terms of s 13 in this way (at 276):

> **...Mr Geoghegan's objection that there is nothing specific in the legislation allowing undertakings is not, I think dispositive of that issue. Indeed, I would have said that the general principle is precisely the opposite: unless a statute specifically provides that an order cannot be made on terms or with certain undertakings, then such can be required. That has always been the equity principle: and it is a principle which has routinely been invoked in family law matters...**

In so holding the learned Judge relied on C v C (Abduction: Rights of Custody) [1989] 1 WLR 654 (CA) where the applicant had in fact offered a number of undertakings designed to overcome what in New Zealand would have been a s 13 opposition, and it was on the basis of those undertakings that the English Court of Appeal ordered the return of the child.

In the present case it is not necessary for this Court to consider s 13 at all, for as I have indicated the respondent mother has not relied on it. There is, however, a clear difference between a s 12 case in which s 13 defences are not relied upon and a s 12 case in which they are. In the latter class of case the making of a s 12(2) order becomes, not mandatory, but discretionary, for s 13(1) (to which s 12(2) is made subject) expressly provides that the Court may refuse to make a s 12(2) order if a s 13 ground for opposition is established to its satisfaction. Where s 13 applies and the making of a s 12(2) order is thus discretionary, it must follow that there is jurisdiction at least to accept undertakings from the applicant (as in C v C (Abduction: Rights of Custody)) designed to neutralise a s 13 defence which would otherwise have prevented the making of a s 12(2) order. Whether in such a case undertakings may be imposed by the Court on an applicant for the same reason is a

somewhat different issue which need not be pursued here because in this case the issue does not arise.

For those reasons A. v W. cannot in my respectful opinion be extended beyond a case in which a s 13 defence is mounted and pursued and where appropriate undertakings are capable of neutralising that defence, so leaving it open to the Court to exercise its discretion in favour of making a s 12(2) order.

With respect I do not consider that the principle enunciated by the learned Judge in the passage set out above can be applied in a case where there is no s 13 issue and where the result depends solely on whether the criteria for a s 12(2) order are met. Where those criteria are met the Court is left with no discretion. The wording of s 12(2) is mandatory. That wording leaves no scope for the Court to water down the imperative direction by making the order subject to terms or conditions or by determining that the making of the order is dependent upon the applicant accepting or complying with terms or conditions.

But even if, contrary to the view expressed, it were open to this Court to impose terms and conditions on the applicant, this is not a case in which that should be done. Not one of the conditions which the applicant seeks is related to any possible defence under s 13. The undisputed evidence from Australia is that the applicant always had a good relationship with the child, and indeed that when he was given the opportunity he undertook a major role in caring for the child. If the child had to be returned to the applicant's care in terms of the s 12(2) order there is, as the evidence stands, little room for suggestion that the child would be exposed to or suffer any physical or psychological harm or would be placed in an intolerable situation: those were the only s 13 grounds which were raised, but not pursued, by the respondent. In fact the evidence as it stands suggests that the child might well benefit from being in the applicant's care. The respondent's desire that conditions be imposed on the applicant relate only to her own situation and proceed on the assumption that she will be obliged to return to Victoria with the child. Even if there were jurisdiction to impose conditions, I would have taken the view that no case has been made out for them and I would have declined to do so.

The last topic that needs to be covered is the cost of returning the child. The respondent seeks the Court's direction that the Crown pay the air fares for both her and the child. It is of course obvious that the child will have to be escorted by an adult: in any event an adult air fare will be required for an airline employee as escort, or if the father is to be the escort, a return adult air fare. It is provided by s 28 as follows:

28. Cost of returning child - (1) Where a Court makes an order under section 12(2) of this Act for the return of a child, the Court may, if it thinks just, make an order directing that the whole or part of any costs of or incidental to returning the child in accordance with the order, including the cost and travelling expenses of any necessary escort, shall be paid by the person who removed the child to New Zealand.

2) Where a Court makes an order under section 12(2) of this Act for the return of a child, and the whole or any part of any costs of or incidental to returning the child in accordance with the order (including the cost and travelling expenses of any necessary escort) are paid by the Crown, the Court may, on the application of the [Central] Authority, order the person who removed the child to New Zealand to refund to the Crown such amount as the Court specifies...

It has been submitted on the mother's behalf that the mother has no money, and some doubt was expressed in the course of argument whether the effect of s 28 was to impose the initial liability for the cost of the return of the child on the Crown. It seems to me that when s 28 is

read with the Convention, particularly art 7, it is quite clear that the Crown is liable both for the administrative arrangements for travel and its cost, subject to any order made under s 28(1) that the parent who removed the child to New Zealand pay or contribute to the cost, and to the right of the Central Authority to apply for an order to the same effect under s 28 (2).

There is no evidence as to the respondent mother's asset or income position and counsel for the applicant did not press for an order under s 28(1). However the right of the Crown to apply under s 28(2) remains available and is reserved.

By the end of the hearing I had reached a clear view that a s 12(2) order had to be made and that it was necessary to ensure that the return of the child to Australia - with or without the mother - could be immediately enforced.

I therefore directed that a warrant issue in terms of s 26: see in particular s 26(2). It will of course be for the Central Authority to make the arrangements for the child's immediate return to Australia, and it will also be for the Central Authority to decide who is to escort the child. By s 7 the Central Authority has all the powers and functions conferred by the Convention: see in particular art 7. It is no part of the Court's function to intervene in administrative detail which is the prerogative of the Central Authority.

For the reasons which I have now stated I made the following orders at the end of the hearing:

(1) The child C.H. (born 29 April 1993) is in terms of s 12(2) of the Guardianship Amendment Act 1991 to be returned forthwith to the State of Victoria in the Commonwealth of Australia.

(2) A warrant is to issue to a constable and/or social worker authorising such constable or social worker to take possession of the child and to deliver the child to a person appointed by the Central Authority to take charge of travel arrangements, ticketing, etc, for the child's return to Australia, and the Registrar is authorised to release the child's passport and/or travel documents to the constable, social worker, or the Central Authority.

(3) No order is made under s 28(1), but the Crown's right to recover under s 28(2) is reserved.

(4) The CAPPS entry relating to the child is cancelled to enable the child's return to Australia.

(5) The fees of counsel appointed to represent the child, as approved by the Registrar, are to be paid from the consolidated fund without contribution from either parent.

A copy of this judgment is to be sent to the Central Authority and a further copy, as a matter of courtesy, is to be sent to the Family Court of Australia in Melbourne which is already seized of proceedings between the parties. The Family Court of Australia is admirably equipped to deal with the merits of any custody or access issues between the parties or with protection issues (if they exist) affecting the mother. The Family Court of Australia may however feel that there should be an expedited hearing on matters of custody and access, since there is some evidence before this Court to suggest that the child has been pining for his father.

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