---

http://www.incadat.com/ ref.: HC/E/AU 259
[15/03/1991; Full Court of the Family Court of Australia (Launceston); Appellate Court]
Graziano v. Daniels (1991) 14 Fam. LR 697

FAMILY LAW ACT 1975

FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Launceston

BEFORE: BAKER, NYGH and GUN JJ

HEARD: 12, 15 March 1991

JUDGMENT: 15 March 1991

GRAZIANO v DANIELS

REASONS FOR JUDGMENT

_____

APPEARANCES:

Mr Paterson for the appellant (wife).

Mr Allston for the respondent (Director of Community Welfare/Central Authority).

Mr Woodberry as separate representative for the children.

JUDGMENT: Baker, Nygh and Gun JJ.

This is an appeal from orders made by Butler J on 29 January 1991 whereby he ordered that certain children be returned to the United States pursuant to the Family Law (Child Abduction Convention) Regulations.

The parties were married in Papua New Guinea on 10 December 1980. The husband is a United States citizen born in that country. The wife was born in Australia. Four children were born of that marriage: K born 1 March 1982; A born 15 May 1984; T born 8 July 1986; and AE born 29 February 1988. All children were born in the United States of America. K and A were born in the State of Florida and T and AE were born in San Bernardino, California.

The parties lived in a number of places during the course of their marriage including Florida, Belgium and Idaho, before settling down in San Bernardino, southern California. The final separation in May 1988 took place in San Bernardino. The wife left the former matrimonial home with the children and took rented premises in the same town some 3 miles away. Her mother, Mrs F., came from Australia to assist the wife in August 1988 and stayed there on a visitor's visa till the departure of the wife and children from that country.

Proceedings for custody were commenced in the Superior Court of California for the County of San Bernardino and on 14 September 1988 orders were made pending trial, providing for shared physical custody with the husband having the right to such custody on dates and times provided therein. Those

orders were subsequently modified on 15 September and 13 October 1988. On 1 December a further order concerning the access rights of the husband was made. The husband's access was supervised for the 2 1/21/2 months then varied to be unsupervised and the 2 elder children saw him from 9 am on Saturday till 6 pm on Sunday every second weekend.

On 1 December 1988 the wife first mentioned to that court her wish to travel to Australia. The application was at all times opposed by the father. On 28 February 1989 the wife filed with the Superior Court a document prepared by her Tasmanian solicitors in the following terms:

I, E.G. of *, California hereby agree to submit exclusively to the jurisdiction of the Superior Court in the State of California in relation to all disputes, actions and any other matters of whatsoever nature arising out of the marriage between myself and the respondent and in particular relating to the children of the marriage, namely K, born 1 March 1982; A, born 15 May 1984; T, born 8 July 1986; and AE, born 29 February 1988.

On 17 March 1989 following a contested hearing orders were made in that court whereby it was provided that the status of the children remained that of joint legal custody; that the husband's right to shared legal custody be temporarily interrupted by the wife's vacation in Australia which was to last no more than 7 weeks; and approval was given to take the children to Australia (but not any other country except in transit) commencing 3 April 1989 and to return them to San Bernardino County on or before the expiration of the 7 week period. That order was made "upon the express representations of E.G. that:

(1) She acknowledges the State of California, United States of America, as the home state and home country under the International Hague Convention, the USA Federal Parental Kidnapping Prevention Act, 28 USC s 27838A, and the Uniform Child Custody Jurisdiction Act. (California Citation Civil Code s 5150, et seq)

(2) Taking the children out of the State is for vacation purposes only, and no reason is known to her why the children should or could not be returned to this jurisdiction upon completion of the allowed period of visitation.

(3) This vacation is not for the purpose of interfering in any way with father's shared custody rights.

(4) She agrees that the United States of America is the home country and California is the home State for deciding all custody and custody-related issues. To the best of her knowledge, the submission to jurisdiction document prepared by her Australian attorney conforms to Australian law and is a valid stipulation on her part admissible in Australian courts that the United States of America is the 'home country' for child custody litigation in her proceedings.

(5) She shall not file any litigation in Australia or any other jurisdiction in relation to the custody of the children of the parties.

There was apparently a last-minute attempt by the husband to restrain the wife from leaving the country made on 31 March 1989. When that failed the wife and children and her mother left for Australia on 5 April 1989. It appears that shortly before she left she sold beds and other items of household use such as the vacuum cleaner and the lawn mower. She left behind jewellery, books, clothes, tapes and personal things and took with her a suitcase of clothes for each member of the family.

On or about 12 April 1989 the wife enrolled the two elder children at the Summerdale Primary School near Launceston, Tasmania but did not tell the headmaster that the children were in Australia for 7 weeks only. On or about 19 April 1989 the wife decided to stay in Tasmania permanently. This followed a telephone conversation with the husband when he was alleged to have made death and other threats to her and her mother. Around about this time she moved into a rented house within the same suburb as her mother's premises and started to receive Social Security payments. She remained in the rented premises for approximately eight to nine months. In March 1990 she bought a block of land close to her mother's home with the intention to build a house thereon. She borrowed money to

do so. The building commenced in June 1990 and at the time of the hearing before the learned trial judge the house was not yet completed but habitable and the children lived partly in their grandmother's house and partly in the as yet incomplete house of the mother.

In the week of 22 May 1989, that is to say the week in which the original period of 7 weeks was due to expire on 23 May 1989, a Mr Nacsin who was the separate representative of the children appointed by the American court spoke to the wife in Tasmania by telephone in the course of which the wife indicated to him that she would not be returning to the United States and she would not be returning the 4 children. On 26 May 1989 the husband filed a Child Abduction Report with the district attorney of the County of San Bernardino. On 6 June 1989 a Ms Geri Graham of the Child Abduction Unit in the Office of the San Bernardino district attorney telephoned the wife and discussed with her the legal ramifications of her actions and possible criminal action against her if she did not return. She also notified the wife of the existence of the Hague Convention on the Civil Aspects of the International Abduction of Children and the powers which central authorities and the courts possessed under terms of that convention. Ms Graham again telephoned the wife on 9 August 1989. The husband's last telephone contact with the wife was on 31 January 1990.

On 11 May 1990 the husband filed an application in the Superior Court at San Bernardino for orders that the wife appear before that court and explain her failure to return to the United States and for a temporary total suspension of all her rights of custody and access. On 21 May 1990 he completed an application for assistance under the Hague Convention. On 31 May 1990 the Superior Court of San Bernardino awarded sole custody to the husband for the purpose of having the children returned to the jurisdiction. The children were represented by Mr Nacsin.

Initial instructions to commence proceedings under the Family Law (Child Abduction Convention) Regulations were given to counsel in Tasmania on 25 July 1990 and were confirmed on 2 November 1990. The proceedings were filed in the Family Court on 21 November 1990 which was almost 18 months after the failure of the wife to return the children on 23 May 1989. No argument was raised before his Honour or before us as to the reasons for the delay or that the delay should in any way adversely affect the husband's rights under the convention.

There was no issue before the learned trial judge that the children were, on 23 May 1989, habitually resident in California and that the wife's retention of the children at the expiry of the 7 week period was in breach of the husband's rights of custody. The retention of the children was therefore wrongful within the meaning of Art 3 of the Hague Convention and this was not disputed by or on behalf of the appellant before us.

The major issue before the learned trial judge and before us was whether the obligation under the convention to return the children was discharged pursuant to reg 16(2) of the Child Abduction Regulations. That subregulation provides:

Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that application was filed is a date that is at least one year after the date of removal of the child, unless it is satisfied that the child is settled in its new environment.

That provision corresponds with the first 2 paragraphs of Art 12 of the convention which read as follows:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

The fundamental issue therefore in this case is whether it could be said that the children, the subject of these proceedings, are settled in their new environment in Tasmania. In order to assist the court in assessing the degree to which the children had established themselves in Tasmania, all parties agreed that a family report was to be provided by Dr David McGeorge of the Oakrise Child and Adolescent Service, Launceston. Dr McGeorge is a clinical psychologist having a wide range of experience in his field, including experience in the United States of America of providing reports to courts relating to children in custodial, access and other disputes. All parties conceded that his United States practice and experience provided him with a valuable additional understanding of the issues for the children and for the parties. He interviewed the children on 21 and 27 December 1990 and reported in time to allow all counsel full consideration of his report after the Christmas public holidays and before the hearing opened before his Honour on 7 January 1991. Dr McGeorge was specifically requested to make an assessment in relation to each child of the degree to which the child had adapted to his or her new environment in Australia, including the child's attachment to people in Australia, whether family members or others, and conversely any remaining attachment to persons and places in the United States.

The report is reproduced at p 258-61 of the appeal book. He based it on an interview with each of the children: K then being 8, A then being 6, T then being 4 and AE then being almost 3 years of age. The report, however, focuses mainly on the 2 older children; due to the young ages and level of verbal functioning of the younger children no formal psychological testing was completed in respect of them. His conclusions as they appear on p 261 of the appeal book are as follows:

All 4 children on interview and observation appear quite settled in their current environment. Their attachment to people, places and things seems to lie in their current environment in Australia. There, in fact, is little attachment or interest in America other than the 2 older children missing 'Disneyland'. The 2 boys are experiencing some difficulties in coping and are experiencing low self-esteem and confidence, feelings of social isolation and have an increased need for closeness and/or dependency on others that may be related to the initial parental separation and current court involvement. This would be exacerbated by being returned to San Bernadino County, California. The older boys may be being affected by comments regarding their father and former environment and these need to cease. Their comments alluding to alleged drug abuse on the part of the father need to be explored further. They would also benefit from some supportive counselling.

It is clear that Dr McGeorge in using the word "settled" was not attempting to determine the ultimate issue before the court. In the course of cross-examination, Dr McGeorge defined at transcript p 159 what he meant by "settled in their new environment" as "functioning in as close to a normal manner as possible, being comfortable with their home environment, their school environment, ability to adjust and adapt to the area." This definition took into account their home environment and their relationship with their mother.

The latter 2 of the factors were of special importance for the girls. From the cross- examination which appears at transcript p 161, it would appear that the girls have not made local friends (as opposed to playmates) and that the home environment and their mother were of the greatest importance to them. So far as the boys were concerned, they did appear to have made local friends but still had problems of adjustment. As Dr McGeorge said at transcript p 173:

But, the stories they told talked of feeling sad and lonely and worried about conflict between adult authority and parent figures. I think there is a component of -- especially the older two children -- there's a number of adjustments going on and one is adjusting to the fact that they no longer have two parents and living in a typical family situation. Then there is the adjustment of being here.

And they seem to have adjusted quite well in terms of being in Australia for the past almost 2 years and fitting in with a new peer group and a new education and a new physical environment. I still think there may be some difficulty with them adjusting to the fact that mom and dad aren't together.

His Honour, in a very careful and extensive judgment, first considered the law to be applied. He stated the test to be in the following terms at pp 46-8 of the appeal book:

I conclude there are 3 considerations. Firstly the concept of a passage of time, and that probably the longer a child is in one place the more it will be settled, although that must necessarily be subject to exceptions; secondly, there arises an attachment to a new place, including an attachment to new people, to a new home and new surroundings and including as well an emotional stability; thirdly there is the concept of the relinquishment of an attachment to an old place; a fourth implication was argued viz; that any interference with or even a disruption to the child's state would not be in its best interests. However this is clearly a matter for domestic law and not part of the Convention considerations and I reject it.

The first provision requires that the environment must have attained a significance for the child. Thus, very young children, for example babies and toddlers, for whom the environment is not significant are not included given their attachments to the primary care giver, generally the mother, who is unrelated to the place of living.

Secondly, the environment does not include the primary care giver nor other significant adult, or the parent who would have access if the child were returned. Any person with whom the child is constantly in contact is part of its environment wherever the child may be.

Thirdly, the environment will include people the child did not know before coming to the new place and in particular will include schools in which the child has been placed, and how far the child is integrated into those associations and institutions.

After considering the position of each of the children in accordance with the test so laid down he came to the conclusion in the case of each child that he or she was not so emotionally and physically integrated as to be "settled" in Tasmania within the meaning of the regulations. In relation to the girls he concluded that the evidence of Dr McGeorge showed that they were attached to the wife and grandmother and "not attached to the place or to others" (at appeal book p 49). In relation to the boys he found that their internal confusion indicated a failure to come to terms with their present environment (at appeal book p 50). He therefore concluded that under the terms of the convention he was obliged to order the return of the children to the United States. He made the following orders so far as relevant:

(3) THAT the children, K, A, T and AE be returned to Ed.G. under the Convention.

(4) THAT at the expiration of 7 days from 29 January 1991 and within a period of 30 days from that date or from the final determination of any appeal herein, the wife shall cause the children to be directly returned to the State of California by air passage approved by the central authority or failing such approval by the court on application by either party.

(5) THAT of the orders of 27 November 1990

(1) Orders (1) and (2) continue in their force and effect;

(2) That order (3) shall continue in its force and effect unless the Director of Community Welfare shall direct or permit the children to live in another place in accordance with order (7) hereof, but subject to the alteration of that order to refer to '4 Lila Drive, Prospect', in substitution for '10 Pamela Court, Prospect'.

(6) THAT until further order

(1) neither the said E.G. or any person authorised or permitted by her shall remove the said children out of the State of Tasmania;

(2) all common carriers to whom notice of this order be given are hereby restrained from carrying the said children or any of them out of the said state whether by air or sea.

(7) THAT until further order and pending the return of the said children to California, the said children be placed with and shall remain in the custody of the said Dennis William Daniels, the

Director of Community Welfare for the State of Tasmania who without limiting any statutory or other powers he may have generally as to the welfare or custody of the said children or to direct the children to live at any place or with any other person is at liberty to permit the children to remain living with E.G. at *, Launceston in the State of Tasmania or such other place in Tasmania as the Director shall direct or approve.

(8) THAT until further order the said wife shall report with the children to the Director or his nominated officer daily in a manner directed by the Director.

(9) THAT orders (3) and (4) of these orders be stayed for seven days.

(10) THAT orders (3) and (4) of these orders be stayed pending the determination of any appeal filed herein.

From those orders the wife has appealed. The notice of appeal attacked both the test applied by his Honour most notably his Honour's exclusion of the continuance of existing attachment and the application of that test to the facts.

Starting with the excellent exposition of Mr Allston, senior counsel in the Tasmanian Crown Law Department who argued the case for the respondent Director, a few general points can be made:

(1) While it is true that the law to be directly applied is to be found in the Family Law (Child Abduction Convention) Regulations made pursuant to s 111b of the Family Law Act 1975, those provisions must be interpreted purposively as required by s 15AA of the Acts Interpretation Act 1901 (Cth). The purpose of the regulations is to implement the convention which is attached as a schedule to the regulations and unless the clear and unambiguous language of the regulations gives the court no other option, the regulations must be read so as to achieve the intended purpose of the convention.

The general purpose of the convention was stated by Nygh J on behalf of the Full Court in Director General of Family and Community Services and Davis (1990) 14 Fam LR 381 at 383-4;[1990] FLC 92-182 at 78,226 in the following terms:

It is directed to, in my view, 2 main issues: firstly, to discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal.

It is, therefore, the intention of the convention and the regulations which implement it to limit the discretion of the court in the country to which the children have been taken quite severely and stringently. To that obligation, which the convention and the regulations impose upon the court of the country to which the children have been taken, there is an exception and that exception is found in Art 13 of the convention which is adumbrated and further defined in reg 16(3) of the regulations.

In this case, of course, the relevant exception is found in reg 16(2) which is based on Art 12. However, that also states an exception to what is described in the report on the convention para 109 as a "real obligation to return the child" which is maintained "indefinitely", that is, it does not expire at the conclusion of the 12 month period. There is no reason why it should be treated as being in any way different from the exceptions set out in Art 13.

(2) The burden of establishing that the children are settled in their new environment must rest upon the party opposing the return of the children, in this case the mother. This was established in relation to sub-reg 16(3) by the Full Court in Gsponer v Johnstone (1988) 12 Fam LR 755 at 766;[1989] FLC 92-001 at 77158. It also accords with the intention of the drafters of the convention as appears from para 109 of the report which indicates that the task of proving the relevant facts which constitute settlement in a new environment should fall upon the abductor: see also the remarks of Sir Stephen Brown P in ; Re Mahaffey (a minor) (High Court of Justice England, CA910/90, 8 October 1990, unreported) reproduced at appeal book 334 at 340, where his Lordship ordered the return of a child in the absence of adequate evidence from the mother that he was settled in his new environment in

England.

(3) The test must therefore be more exacting than that the child is happy, secure and adjusted to his surrounding circumstances: see *Mahaffey*, ibid. We respectfully agree with the statement made by Bracewell J in Re Novak (minors) (High Court of Justice England, CA1219/90, 4 December 1990, unreported) reproduced from appeal book 342 at 349, that the abductor must "establish the degree of settlement which is more than mere adjustment to surroundings." It is clear from the definition given by Dr McGeorge that he was primarily concerned with the question of adaptation and adjustment to the new surroundings.

As Bracewell J concluded, the word "settled" has 2 constituent elements:

Firstly, it involves a physical element of relating to, being established in a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.

(4) Furthermore, the settlement must relate to a "new environment" as Bracewell J said at 350:

The word 'new' is significant and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not per se the relationship with mother, which has always existed in a close, loving attachment. That can only be relevant in so far as it impinges on the new surroundings.

It is this aspect which was the subject of contention before us. Whilst counsel for the appellant did not directly demur from the generality of the above statement, he did stress that the relationship with the mother could not be overlooked. The mother, however, is not the new environment. While her presence is part of that environment and may help to make the transition easier, the children's bonds must reach out beyond the already familiar.

During the course of argument the homely analogy of the potted plant was used. Such a plant may be transferred into a garden. As long as the roots remain within the confines of the original pot, it cannot be said to have settled in that garden. It can be pulled out and replanted elsewhere with relative ease. But once the roots leave its original confines and spread beyond into a garden, it can be said to be settled into that garden. In the same way a child whose main relationship is with its mother and does not have a lasting relationship beyond the mother, cannot be said to have settled in the mother's new environment. To that extent we agree with the learned trial judge that the environment must have attained a significance for the child. That environment is a community in a geographically defined place, in this case the suburb of Prospect, Launceston Tasmania. It is not the mother.

(5) The fact that a child has lived in a country for more than 1 year does not by itself raise a presumption that the child has become settled in its new environment: Re Mahaffey ; ; Re Novak, supra. The fact that a child has lived in one place for a long time will no doubt tend to support the conclusion that it is settled there, but as the cases of ; Re Mahaffey and ; Re Novak show, that conclusion will be less easily reached where the children have in their short lives moved about a great deal, as have the children also in this case.

The wish of a child to remain in a new place while undoubtedly relevant, as would be a wish to return to its original home, is not determinative for it may indicate an attachment to the abductor rather than to the new environment: see Re S (a minor) (Court of Appeal England, CA146/90, 18 May 1990, unreported) reproduced at p 296 appeal book. Nor is it determinative that the child objects to being returned to the former residence or that it lacks attachment to that place. The test should not be made to conform with the old rule of domicile which required an abandonment of a former domicile. The child may as a result of the upheavals not be settled in any place, conversely, it may easily adjust to any new environment. Leaving aside the question of whether the test requires the relinquishment of an attachment to an old place, which it is not necessary in the circumstances of this case to determine, we agree with the statement of the principles by his Honour. Nor do we discern any error in the application of those principles by him to the facts of this case.

As regards the younger children, there was clear evidence indicating that the bonds of the 2 girls had

not moved far beyond their mother and grandmother, both of whom were part of their environment as it existed prior to their departure from California. They are in no different situation to the 3 year old boy in Re Mahaffey, supra, who had spent his formative years with his mother in England but where it had not been demonstrated that he had established any bonds beyond her in England.

The position of the boys is more complex. There is evidence to suggest that they had adapted well at school and had made local friends. However, the evidence of Dr McGeorge, as cited earlier in this judgment, indicates that there appears to be still a question mark as to the stability of their adjustment. Furthermore, the children at the time of the hearing had not yet fully established themselves into the new residence which the mother was still having built. His Honour considered the evidence very carefully. In our opinion it was open to him to come to the conclusion that they had not yet reached the degree of physical and emotional integration within the new environment as to be able to be described as having settled. We conclude, therefore, that his Honour's conclusion was open to him on the evidence and the appeal must therefore fail.

This makes it unnecessary for us to consider what his Honour should have done had he come to the conclusion that the younger 2 children were not settled in Tasmania but the boys were. We agree that in the case of a conclusion that the child has become settled in its new environment, there is no obligation to keep the child in this country. The effect of such a conclusion is merely to discharge the obligation under the convention to return the child. But we leave open for future determination the question of whether in such a case the court could summarily order the return of the child based on considerations of international comity, as appears to be suggested by Purchas LJ in Re S, supra, or whether the court should then first consider the merits of the custodial dispute as seems to be suggested in para 107 of the report where it is stated that in such a case "its return should take place only after an examination of the merits of the custody rights exercised over it".

The dismissal of the appeal will mean that the stay of ords (3) and (4) is automatically discharged and the wife will be obliged to cause the children to be returned to California in accordance with ord (4).

ORDER:
The order of the court will be:

(1) That the appeal of the wife from the orders made by Butler J dated 29 January 1991 be and the same is hereby dismissed.

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