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[30/04/1997; Full Court of the Family Court of Australia (Sydney); Appellate Court]
In the Marriage of G.R. and B.J. Colbourne, 30 April 1997, Full Court of the Family Court of Australia (Sydney)

FAMILY LAW ACT 1975

FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Ellis, Finn and Kay JJ.

HEARD: 30 April 1997

JUDGMENT: 30 April 1997

In the Marriage of:

G R and B J COLBOURNE

REASONS FOR JUDGMENT

APPEARANCES:

Conner instructed by Abbott Tout for the appellant husband.

Lethbridge instructed by Slade Manwaring for the respondent wife.

JUDGMENT: Ellis J.

This is an appeal by the husband against an order of Rowlands J made on 19 February 1997 whereby he ordered that:"(1) The application by the husband for interim residence and residence (custody) of the parties' children B born 13 July 1989, and R born 10 September 1985, be struck out. "

On that day, the trial judge made other orders, which are not the subject of this appeal, and declined to make a recovery order pursuant to the provisions of s 67Q of the Family Law Act 1975 (Cth). Again, there is no appeal against his Honour's refusal to make that order.

Background

The parties to the application met in Oregon in the United States of America, married in Nevada, United States of America in 1978 and came to reside in Australia in the late 1970s. They separated in Sydney in 1993. There are two children of the marriage, both of whom were born in Sydney and who, at the date of the hearing before the trial judge, were aged approximately 14 1/2 years and 11 1/2 years.

On 21 March 1995, consent orders were made in this court , the wife was granted custody of the two children and the husband access to them. Thereafter, he enjoyed contact. However, on or about 17 December 1996, the wife took the children to Oregon from where she posted a letter to him advising him of that fact. In addition, she informed him of her then address and telephone number. The trial judge described her movement on that occasion as secret and deceptive. The actions of the wife in so moving the children from Australia and away from the husband demonstrate that she did not act in the best interests of the children. I condemn, as forcibly as I can, her secret and deceptive actions in so removing the children who were the subject of both a custody and access order in this court from Australia to another country.

Following that removal, the husband made application for a return of the children pursuant to the provisions of the Convention on the Civil Aspects of Child Abduction, (hereinafter referred to for the sake of convenience as "the Convention"), to the United States District Court for the District of Oregon. Following a hearing, which apparently lasted some 3 1/2 hours, during which the presiding judge interviewed the children in his chambers, the husband's application was dismissed.

On 18 December 1996, the husband filed an application in this court, amended on 30 January 1997, in which he sought for present purposes:

> **"(9) An order that the two children of the marriage namely B born 13 July 1982 and R born 10 December 1995 (sic) reside with the husband."**

Notwithstanding the form of the order sought, the application was for an interim order.

On 10 February 1997, the husband filed an amended final application in which he sought a number of orders, including the following two:

1. **An order that the Orders of 21 March 1995 be set aside.**
2. **That the two children of the marriage, namely B born 13 July 1982 and R born 10 September 1985 reside with the husband.**

It would appear from the court record that the date on which that amended application was filed was in fact the return date of the original application. The wife filed a response on 4 February 1997 which clearly was a response only to the husband's application for interim orders. The only order she sought in that response was an order that the application for interim orders be dismissed.

Judgment of the trial judge

After referring to the relevant background material, the trial judge noted that, at least in part, the decision in the District Court for the District of Oregon appeared to have been based upon the strongly stated views of mature children that they wished to stay where they were, namely with their mother in the United States of America.

The trial judge went on to say:

> **"It is apparent, then, that the appropriate court to deal with the residence (custody) issue, including any interim request, is the competent American court.**
>
> **Accordingly I strike out the husband's applications for interim and final residence as the forum for these issues has been effectively determined by the rejection of the application under the convention by the District Court in Oregon."**

He then referred to three other applications which were before him, namely applications under ss 112AD, 117A and 79A of the Family Law Act 1975 (Cth), before finally saying,:

"The venue for residence (custody) hearing is in Oregon."

Thereafter he made the order against which the husband has now appealed.

Grounds of appeal

The amended grounds of appeal on which the husband relied are as follows:

1. **His Honour erred in holding that the forum for issues had been effectively determined by the rejection of the application under the Hague Convention by the United States District Court for the District of Oregon.**
2. **His Honour erred in holding that the appropriate court to deal with the residence (custody) issue, including any interim request, was the competent American court.**
3. **His Honour erred in failing to hold that this court had either exclusive or alternatively concurrent jurisdiction to hear the residence (custody) issues.**
4. **His Honour erred in failing to exercise the welfare jurisdiction of the court in that he failed to make any independent judgment as to the welfare of the children.**
5. **His Honour erred in striking out the applications in the absence of any application by the wife for strike out.**

During the course of the hearing of the appeal, it was submitted by both parties that, if the appeal were successful, it would be appropriate, in relation to the application of the husband for interim orders, for this court to exercise the discretion vested in the trial judge on the material which was before him.

Submissions on appeal

The respective submissions of the parties have been reduced to writing and form part of the court record. In the circumstances of this case, I do not propose hereafter to refer to them at all.

Conclusions on appeal

I note that the wife, in the proceedings before the trial judge, did not file a response objecting to the jurisdiction of the court -- see O 8 r 19 -- nor did she file an application seeking that any of the applications of the husband be stayed. Indeed, it has been conceded by her counsel that the matter proceeded before the trial judge on the basis that the question of the interim residence of the children should be decided on the merits.

In addition, as a preliminary observation. the following provisions of the Convention should be noted, namely Arts 18 and 19, which provide:

"Article 18

> **The provisions of this Chapter [Chapter III, Return of Children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.**

Article 19

> **A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."**

The jurisdiction of this court to hear the husband's application for a residence order and an interim residence order is conferred upon the court by virtue of the provisions of s 69H of the Act. Section 69C provides for the person or persons who may institute proceedings under the Act in relation to a child or children, while s 69E provides that such proceedings may only be instituted as set out therein. It was not disputed that the husband was a parent of both children and that he was present in Australia on the day on which the respective applications to which I have referred were filed in this court on his behalf. It is not alleged that there were any proceedings on foot or existing orders relating to the children in the United States of America other than the proceedings instituted by the husband under the Convention and his appeal from the decision of the primary judge refusing to order the return of the children, nor was it asserted that any relevant overseas child order was registered in this court under s 70G. Counsel for the wife indeed conceded that this court has jurisdiction to make an order in relation to residence and contact and that the husband's application for an interim order proceeded before the trial judge on the basis that that application would be considered on its merits.

In my view, the refusal of the District Court for the District of Oregon to order that the children be returned to Australia, pursuant to the Convention, was not a basis for striking out the husband's application for the reasons given by the trial judge, namely because the forum for those issues had been effectively determined by the rejection of his application under the Convention. In so concluding, the trial judge, in my view, misunderstood the effect of the dismissal of the proceedings in the United States and that misunderstanding amounts to an appealable error calling for review by this court. In my judgment, the refusal of the District Court to order the summary return of the children does not prevent the husband from instituting proceedings for residence or interim residence in Australia provided, as it is conceded that he does, he satisfies the requirements of the relevant sections of the Family Law Act Div 12 Pt VII. Thus, in my view, the trial judge erred in striking out the two applications of the husband. It should also be noted that if a final order were made by this court that the children live with the husband, he could seek to enforce the order in Oregon: see ss 4(1), 70M and 70N of the Act and regs 14 and 24 of the Family Law Regulations and Sch 1A thereto.

I would thus set aside the order striking out the two applications of the husband.

Re-exercise of the discretion

As I mentioned earlier, both counsel requested that, it the appeal were allowed in relation to the application for an interim order, this court re-exercise the discretion of the trial judge on the basis of the material which was before him. In my judgment, that material before him disclosed that the children desire to continue residing with the mother and that she has been their primary caregiver since birth. There is conflicting medical evidence as to the capacity of the husband to care for the children because of his health, a factor to be weighed in the balance in determining the issue of interim residence. The evidence also disclosed that the children have been residing with the wife in Oregon since December 1996 and with her since the date of separation of the parties and that they have settled into new schools and into the new environment in Oregon. Accordingly, I am not satisfied that their interest would best be served by making an interim residence order in favour of the husband. I would thus dismiss his application that, until further order, the children reside with him.

Accordingly, I would order:

1. **That the appeal be allowed.**
2. **That Order 1 made on 19 February 1997 be set aside and in lieu thereof order:**
3. **That the application of the husband for an order that the children reside with him pending the determination of his application for a permanent order be dismissed.**
4. **That the amended application of the husband filed on 10 February 1997 for an order that the children reside with him be adjourned to a registrar's list for a directions hearing.**

I would grant the parties liberty to apply to the Contested List Clerk for the allocation of the earliest possible date for that directions hearing.

Finn J.

I agree with what has been said by the learned presiding judge and with the orders he proposes and I have nothing further to add.

Kay J.

I agree.

ORDER:

The orders will be as indicated by Ellis J.

We are of the view that the circumstances justify the making of an order for costs in favour of the husband and not in favour of the wife. Accordingly, we order that the respondent wife pay the appellant husband's costs of and incidental to the appeal assessed in the sum of $ 4000; such costs are to be paid within 14 days of today's date by the wife out of the $ 50,000 held on behalf of the wife by her solicitors.

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