---

http://www.incadat.com/ ref.: HC/E/NZ 413
[31/08/2001; Family Court at Taupo (New Zealand); First Instance]
C. v. T. [2001] NZFLR 1105

C. v. T.

FP 069/64/01

Family Court Taupo

6 August 2001; 31 August 2001

JUDGE P WHITEHEAD

[1] This application pursuant to the Guardianship Amendment Act 1991 seeking an order for the return of a child to Australia has been narrowed by counsel to two issues.

a)Was the child habitually resident in Australia immediately before his retention in New Zealand -- s 12(l)(d) of the Guardianship Amendment Act 1991; and

b) Whether the mother consented to or subsequently acquiesced in the child's retention -- s 13(1)(b)(ii) of the Guardianship Amendment Act 1991.

[2] The parties met in Australia in 1989 and in November of that year moved to reside in Kerikeri, New Zealand, where they spent some one and a half years before moving to live in Taupo. They married on 2 June 1991.

[3] J., the child subject to this application, was born on 13 November 1992. His sister A. was born one year later but died from Sudden Infant Death Syndrome in April 1994.

[4] Approximately one year later the parties intended to resettle in Australia with the mother returning to Australia with J. where she gave birth on 1 April 1995 to D. The husband returned to Australia in mid-April and the parties separated in July 1995 with the applicant wife moving to Brisbane and the respondent husband returning to Taupo, New Zealand.

[5] In December 1996 there was an agreement that the parties would reconcile with the applicant and children intending to return to New Zealand. This never eventuated.

[6] Contact between the father and the children was limited and by telephone only although he did visit the children at Christmas 1996. Arrangements were made in September 1999 for J. to travel to New Zealand for access but when the time came J. refused to go with his father. The applicant married her new husband on 23 September 2000.

[7] In mid-2000 it was apparent to the applicant mother that J. wished to have closer contact with his father. He had in May 2000 been diagnosed as Attention Deficit Hyperactivity Disorder predominantly inattentive type and was prescribed Dexamphetamine. There is

independent evidence that J. had been suffering from behavioural problems and the applicant acknowledged her frustration at this behaviour.

[8] As a result of J. wishing to see his father, the applicant mother rang the respondent father and told him that J. was asking to visit and that she felt this would be good as it would allow him to develop a relationship with his father. The father then agreed that he would travel to Australia to collect J There is direct conflict as to the terms of that agreement.

Findings of fact

[9] This case proceeded on affidavit evidence only with no cross-examination of the deponents as is usual in Hague Convention cases -- refer Fisher v Fisher (District Court, Whangarei, FP 60/99, 15 February 2000, Judge Mahony).

[10] Her Honour Butler-Sloss LJ in Re F [1992] 1 FLR 548 at 533 para (g) on the issue of resolving irreconcilable affidavit evidence stated:

If the issue has to be faced on disputed non-oral evidence, the Judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the Judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the Judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on the other side, the applicant will have failed to establish his case.

[11] The mother's position is that J. was to stay with his father in New Zealand for a maximum period of 6-12 months on the basis that if J. was not able to settle and missed home, then the father would send J. back immediately. This was first raised in her affidavit of 15 May 2001. Previously she had stated that the arrangement was on "a trial basis" and if J. wanted to come back to Australia the father would not stop him.

[12] Two supporting deponents for the mother, that is the mother's husband and J.'s maternal grandmother, both stated that in the event that J. wanted to come home he would be allowed to do so. The arrangement was referred to as "a trial".

[13] The evidence of these two witnesses varies slightly from that of the mother as there is no reference to a maximum period of 6-12 months. Furthermore, if the arrangement was a trial, the conclusion to be drawn from the use of that term is that if the arrangement was going well, it would be a permanent arrangement; not one that terminated by a period of time arbitrarily imposed.

[14] The respondent's recollection of the discussion is that the applicant rang him saying she could not cope any longer with J.; that she and her husband were at their wits' end; and J. had made it clear that he wished to live with his father. The reference to the period of 6-12 months was described as a minimum period to see if J. would settle in to his new home situation in New Zealand, and the father expressed to the mother that he did not want to play "Tasman ping-pong" with his son.

[15] The respondent's sister and new partner also talked to the applicant about the arrangements and both these witnesses supported the evidence of the father that J.'s behaviour was causing considerable difficulty for the applicant and her husband, and notwithstanding that the applicant would miss J., she nevertheless wished for J. to live with his father in New Zealand. The respondent's sister described the applicant as saying that she was at her wits' end because of J.'s tantrums and yelling and screaming.

[16] In support of the respondent's position, there is produced in evidence a note written by the applicant under her birth name dated 6 July 2000 which states:

To Whom It May Concern

I K.C. do hereby give permission for G.T. to care for our eldest son J. This being a mutual agreement.

K C.

[17] The respondent requested some evidence of his future care of his son and as a result this note was provided to him by the applicant. The applicant states that the note was provided at the respondent's request to enable him to obtain medical treatment or assistance for J. whilst he resided in New Zealand and further that the document was to be used for no other purpose.

[18] The respondent is a guardian of J. and required no such authority. The evidence of the respondent and of his witnesses is strong and consistent compared to the evidence of the applicant and her witnesses which varies as to the intention of the parties and her statements about J. returning in 6-12 months make little sense given the background of her difficulties with J., the reason for J. going to his father, the note that the mother provided to the father, the use of the statement "trial period" and the father's expressed intention that he did not wish his son to be the subject of "Tasman ping-pong". I find therefore on the evidence that is available to the Court that there was an intention between the parties for J. to be trialled living with his father, a permanent arrangement that might be determined if J. did not settle. The minimum period of 6-12 months is, in these circumstances, understandable whereas sending a child for a period of 6-12 months being a finite period for "a trial" makes no sense at all. Furthermore, there was as between the parties no mechanism where the parties would discuss and agree to the return of J. to his mother in the event that he did not settle. The mother's demand that the child be returned to Australia could not therefore unilaterally determine the agreement reached between the parties.

[19] On the particular evidence before me, I therefore prefer the evidence of the respondent which is compelling in its logic as to the arrangement agreed between the parties.

Submissions and the law

[20] Both counsel generally rely upon the same decisions and the law but their submissions seek to have the law applied differently because of the different perceptions of the factual background.

[21] It is agreed that the purpose and effect of the Guardianship Amendment Act 1991 is to implement in New Zealand the Hague Convention of the Civil Aspects of International Child Abduction and as submitted by counsel for the respondent, the preamble of the convention and art 1 set out the principles and objects of the convention which include:

(a)the interests of children are of paramount importance;

(b) children must be protected from the harmful effects of their wrongful removal or retention;

(c) children wrongfully retained in any contracting state are to be promptly returned;

(d) the law relating to the rights of custody and access in the country of habitual residence must be respected in all other convention countries.

[22] It is clear therefore that in this case before the provisions of the Guardianship Amendment Act 1991 can be utilised to protect J. it is necessary for the applicant to establish that J. was habitually resident in Australia but for his wrongful detention in New Zealand in March/April 2001. The date or dates when it is alleged that J. was unlawfully detained highlight the applicant's difficulties as it was first alleged that J. had indicated he was unhappy living in New Zealand in December of 2000, and again, in March 2001. It is alleged by the mother that the father refused to return J. when she requested his return on 1 and 9 April 2001. For the purposes of this hearing therefore, 9 April 2001 would be the date at which any unlawful retention arose.

[23] Section 12 of the Guardianship Amendment Act 1991 provides:

12. Application to Court for return of child abducted to New Zealand

Where any person claims –

(a)that a child is present in New Zealand; and

(b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) that the child was habitually resident in that Contracting State immediately before the removal, --

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

Subject to section 13 of this Act, where –

(a) an application is made under subsection (1) of this section to a Court; and

(b) the Court is satisfied that the grounds of the application are made out, --

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.

(3) A Court hearing an application made under subsection (1) of this section in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a Court of that state, or a decision of a competent authority of that state, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that state, and may adjourn the proceedings for that purpose.

(4) Where –

(a) an application is made to a Court under subsection (1) of this section in respect of a child; and

(b) the Court –

(i) is not satisfied that the child is in New Zealand; or

(ii) Is satisfied that the child has been taken out of New Zealand to another country, --

the Court may dismiss the application or adjourn the proceedings.

[24] The respondent submits in terms of s 12(1)(d) that the child was not habitually resident in Australia at the time of the alleged retention. It is necessary for the applicant to establish that the preconditions in s 12(1)(a), (b), (c), and (d) apply. It is accepted that the child is in New Zealand and that the mother has "rights of custody".

[25] Further it is submitted by the respondent that in the event that the child's habitual residence was Australia, then the mother consented to or acquiesced in the retention of the child in New Zealand.

Habitual residence

[26] The onus is on the applicant to show that a child's habitual residence persists and has not been lost in the country from which the child was removed (per Principal Family Court Judge Mahony in Fisher v Fisher (District Court, Whangarei FP 60/99, 15 February 2000) at page 12, and S v M [1999] NZFLR 337 at 343).

[27] The phrase "habitual residence" is not defined in the Act or the Convention but a number of cases are relevant in determining the meaning of the term and it is appropriate in the circumstances to paraphrase the submissions of Mr De Jong for the respondent in that regard. The following factors are relevant in determining habitual residence:

(a) Question of Fact: It is settled law that the habitual residence of a person in a specific country is a "question of fact to be decided by reference to all the circumstances of any particular case". Per Lord Brandon of Oakbrook in Re J (A Minor) (Abduction: Custody Rights) [1990] 3 WLR 492 (House of Lords) at 504 paragraph (c)-(d) and H v H [1995] 13 FRNZ 498 at 501 per Greig J.

(b) Natural and Ordinary Meaning (settled and voluntary): Greig J in H v H at page 501 stated:

. . . that the construction of the phrase "habitual residence" has no particular legal magic. It is to be construed in the ordinary meaning of the words. The essence of "habitual" is customary, constant, continual. The opposite of that is casual, temporary or transient. I think, too, it is important that it is the words that have been used in the convention rather than in the Act which are to be construed. I believe there is a clear distinction between that phrase and the phrase "ordinary residence" but more particularly from the concept of the law which is built up around the word "domicile".

(c) Continuity: There is required a degree of continuity to enable habitual residence to be described as settled. Refer Sir Stephen Brown P in V v B (a minor) (abduction) [1991] 1 FLR 266 at 271.

(d) Intention: Lord Brandon of Oakbrook in Re J above at page 504 paragraph (e) held that a person may cease to be habitually resident in one country in a single day if that person leaves it with a settled intention not to return but to take up long term residence in another country instead. Lord Brandon however continued that such a person cannot become habitually resident in the second country in a single day. He continued ". . . an appreciable period of time and a settled intention will be necessary to enable him or her to become

so" (that is habitually resident). In that case a period of two months was held to be sufficient in accepting the mother's evidence that the parties had gone to Australia to make a new life. In Re F (a minor) (child abduction) [1992] 1 FLR 548 at 555 the English Court of Appeal found that a month was an appreciable period of time.

His Honour Judge Brown in S. v O'D. [1995] NZFLR 151 discussed the position of a child in similar circumstances to the present case where the mother who was unable to cope with the child asked the child's father in Australia to care for him. Judge Brown, at page 153, stated:

It is quite clear that at the time she first requested Mr S. to have A., Ms O'D.'s life was in difficulty in various ways and I think it likely that she did initially attempt to impose some time limit or control on how long he would be with his father. I think it clear though that his father was quite resolved that he would only take A. if the boy was coming to him in the long term. He demanded and got from Ms O'D. a written acknowledgement from Ms O'D. that it was her "intention that A. should now reside with A.S. his natural father". The absence of the word "permanently" from that acknowledgement (which Mr S. ascribes to a request from Ms O'D. that the word be omitted lest the boy at any time in his life saw the document and felt he was abandoned), is not in my view definitive: residence with the father was not in any way time limited in that document or elsewhere.

Counsel for the Central Authority submits that S. v O'D. does not have the elements of the present case as the mother in the present case did not intend for the child to remain in New Zealand permanently. With respect, it is difficult to see how the arrangement was other than a permanent arrangement, and I have found on the affidavit evidence sufficient corroborative evidence to prefer that the intention of the parties was for J. to reside permanently with his father subject to his return to Australia in the event that the arrangement did not work after 6-12 months.

His Honour Judge Brown at page 154 in S. v O'D. stated that:

It is settled law that the habitual residence of a child of A.'s age will be the habitual residence of the parent who has his care.

He then found that when the three and a half year old child left New Zealand to live with his father in Australia, his habitual residence changed immediately.

(e) Termination and Change of Habitual Residence: It is well accepted as is submitted by counsel for the respondent that habitual residence can be terminated in one day. Refer Re J above.

In this case both parents are joint guardians and in terms of Australian law, both have rights of custody. Both parents agreed to J. moving to New Zealand although, as in S. v O'D. , there was disagreement as to the permanency of such an arrangement.

There can be no question that the respondent father has been habitually resident in New Zealand for some years. When J. left Australia to live with his father with his agreement, J.'s country of habitual residence changed immediately to the habitual residence of his father.

Counsel for the applicant submits on the basis of S v M [1999] NZFLR 337 at 343 per Justice Panckhurst quoting the Family Court Judge that:

Although the legal burden is on the Central Authority to establish that S was habitually resident in Australia at the relevant time or times, it is the respondent who is putting

forward the existence of the one year agreement and there is an evidential burden on her to establish that. The rule that she who asserts must prove applies.

On a consideration of the evidence before me and an assessment of the parties from the affidavit evidence, I am not satisfied that there was such an agreement as alleged by the respondent. It is more likely that S was to stay in Australia until the parties decided otherwise . . .

It is the applicant mother in this case who asserts that there was a time limited agreement. She is the applicant and therefore with an onus of proof to establish the four grounds in s 12 (1) of the Guardianship Amendment Act 1991. She is also alleging a time limited agreement and has not, in my determination, satisfied the Court on the balance of probability that the agreement was time limited.

Accordingly I find on the balance of probability that the applicant has not established that the habitual residence of J. at the time of his alleged unlawful retention was Australia. Indeed, in my determination, J.'s habitual residence changed immediately he left Australia to reside with his father indefinitely.

Therefore as in Fisher v Fisher above, when the facts of this case are judged against the objects of the Convention, it is clear that this is not an abduction case. As stated by Judge Mahony at page 16 of the Fisher decision:

I do not think that wrongful retention as a form of abduction can be created by the unilateral decision of one party to abandon after some months an otherwise agreed permanent arrangement to live in another country because the party becomes unhappy even though it was envisaged, at least by him, that he may become unhappy.

Consent or acquiescence to retention

[28] It is not necessary for me to consider this line of defence because of the determination I have made in relation to the habitual residence of J.

[29] However it is necessary to discuss briefly the basis for the submission.

[30] Section 13 of the Guardianship Amendment Act 1991 provides:

13. Grounds for refusal of order for return of child

(1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court –

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by or on whose behalf the application is made –

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

(ii) Consented to, or subsequently acquiesced in, the removal; or

(c) that there is a grave risk that the child's return –

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating, to the protection of human rights and fundamental freedoms.

In determining whether subsection (1)(e) of this section applies in respect of an application made under section 12(1) of this Act in respect of a child, the Court may consider, among other things, --

(a) whether or not the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum:

(b) whether or not the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On the hearing of an application made under subsection (1) of section 12 of this Act in respect of a child, a Court shall not refuse to make an order under subsection (2) of that section in respect of the child by reason only that there is in force or enforceable in New Zealand a custody order relating to that child, but may have regard to the reasons for the making of that order.

[31] The defence relied upon by the respondent is in terms of s 13(1)(b)(ii) visually that the applicant consented to or subsequently acquiesced in [the retention] of J. The remedy is discretionary in that the Court may refuse to make an order if there is proved such consent or acquiescence.

[32] The respondent submits that the applicant consented to J. living in New Zealand and points to the factors already referred to when considering the issue of habitual residence including the agreement reached between the parties and the mother's written note to the respondent. Counsel for the respondent makes three submissions in respect of consent:

(a) Consent must be valid and not obtained fraudulently or by deception;

(b) Consent must be real, positive and unequivocal -- Re K (abduction: consent) [1997] 2 FLR 212 where Hale J found at 218 that consent does not need to be in writing but once given, consent is not taken away by the father subsequently thinking better of it;

(c) Whether there has been consent (or acquiescence) is a question of fact taking all circumstances into account. Refer Re Woolfe v Woolfe [1993] 10 FRNZ 174.

[33] It is clear that consent in this case was given by the applicant mother for J. to be taken out of Australia to live with his father in New Zealand. The extent of that residence is in dispute as the mother has stated that she believed it was for a time limited period. I have already made a finding in that regard preferring the evidence of the respondent.

[34] If it is argued by the applicant that her consent was conditional upon the child's wishes at some future date seeking to return to Australia, then in any event it is not established on the facts that the child has and continues to express a desire to return to Australia. Indeed the evidence from the neuro-psychiatrist is to the contrary with J. allegedly expressing a desire to remain in New Zealand.

[35] In the circumstances, I am of the determination that there is "clear and compelling evidence" of such consent. Refer Justice Elias in Clarke v Carson [1995] 13 FRNZ 662 at 667.

[36] In the circumstances of this case, I would therefore determine that the mother had consented to the removal of J. from Australia with the intention of establishing permanent residence in New Zealand with his father unless J. consistently expressed a wish to return to Australia.

[37] In the event I would determine, if it were necessary for me to do so, that the Court should exercise its discretion not to return J. to Australia as J. has been in New Zealand for over 12 months; he has successfully settled with his father; the psychiatric report indicates there is no appearance of any instability in his current environment and that he is settled with no concerns either in relation to the family situation or the school situation (as distinct from his position in Australia) leading to a possible outcome of any family proceedings in this forum maintaining the status quo.

[38] An issue of concern is the separation from his siblings but that was and must have been a consideration of the parties when the original arrangement was entered into.

[39] Accordingly I would find this case one of those unusual circumstances and comparatively rare cases where I would exercise the discretion in favour of refusing to return J. to Australia.

[40] Accordingly the application for return is dismissed on the grounds that the applicant has not established that Australia was the habitual residence of J. prior to his alleged wrongful retention. The question of costs is reserved and counsel are requested to provide the Court the memorandum as to costs within three weeks from the date of release of this judgment.

Ms Walker for the applicant

Mr De Jong and Ms Whyte for the respondent

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