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[28/04/2000; District Court at Otahuhu (New Zealand); First Instance]
Secretary for Justice v. C., ex parte H., 28/04/2000, transcript, District Court at Otahuhu (New Zealand)

Hollins v C.

FP 58/2000

District Court Otahuhu

[2000] NZFLR 775; 2000 NZFLR LEXIS 22

28 April 2000

COUNSEL: Ms Casey for the applicant; Mr Collis for the respondent; Ms Patel for the child

JUDGE J M DOOGUE: This proceeding concerns the child J.H. who is present in New Zealand. The applicant is The Secretary for Justice, on behalf of the New Zealand Central Authority, who administers New Zealand's obligations as a contracting state to the Hague Convention on the Civil Aspects of International Child Abduction. He argues that pursuant to ss 61B, 61C, and 111B(4) (a) of the Family Law Act 1975 (Australian Legislation) both parents have parental responsibility for the child and accordingly have joint rights of custody which rights were being exercised by the father in Australia at the time of the child's retention in New Zealand. He further argues that the child has been retained in New Zealand in breach of an order of the Brisbane Family Court dated 9 December 1999. He further argued that the child was habitually resident in Australia before his retention in New Zealand.

The application is opposed by the mother who relies upon three grounds. First of all that it cannot be established that the habitual residence of the child is Australia resulting in no jurisdiction to bring these proceedings. Second that there would be grave risk of physical and psychological harm or an intolerable situation were the child to be returned to Australia (s 13 (1)(c)(i) and (ii) of the Guardianship Amendment Act 1991) and thirdly that the child objects to the return (s 13(1)(d) of the Guardianship Amendment Act 1991).

History of proceedings

The child's parents met in 1983. They commenced living together in 1984 and married on 7 March 1987. They resided in various places around Australia. J. was born in July 1988 and towards the end of February 1989 the parties left Australia and relocated to New Zealand with him. They separated shortly afterwards and the father returned to Australia. Following on from the separation the mother and child remained living in New Zealand. This was largely the state of affairs until the mother travelled to live in Australia in March 1998. Matters were quickly before the Family Court in Australia and in October 1998 an order was made granting the mother custody of the child and for the father to have certain access. The mother also applied to relocate to New Zealand in June 1999 and that application was the subject of a three day trial before Justice Buckley in the Family Court at Brisbane. In September 1999 that application was refused and the residency applications adjourned until April 2000. The Court in Brisbane was scheduled to determine the issue of residence of the child in a hearing to be held over four days commencing on 17 April 2000. Because the child is in New Zealand certain pre-hearing matters have not been able to be concluded in Brisbane and the father states in his most recent affidavit that thus the matter will in all likelihood be listed for a priority hearing in Brisbane.

An order was made that the mother be permitted to travel to New Zealand for the Christmas holiday during the year 1999/2000. The mother candidly indicates in her initial affidavit that the Court order provided that J. was to be returned to Australia on 26 January 2000. With the obvious intent of having the relocation issue relitigated and so as to subvert the application for residence order by the father, she has deliberately retained the child in New Zealand in breach of that order. On 27 January 2000 the mother's Australian solicitors sent a fax to the father advising him as follows:

An application is to be made in New Zealand to allow the child to remain in New Zealand in light of certain circumstances inclusive of:

(1) The mother's inability to maintain herself in Australia

(2) The mother's father's inability to further fund her in the short term given that his contract work has been put back to May.

(3) The child's desire not to leave New Zealand without his mother.

(4) Amongst other things.

The mother says, in her affidavit:

Immediately prior to our departure for New Zealand in December J. spent three and a half weeks in his father's care and from what I have been able to ascertain from J. it was an unsatisfactory and very unhappy time for him to the extent that J. on occasions took off from his father's home for the day and would not involve himself in his father's home environment. I have had related to me by J. that he does not want to be with his father and that he says that his father does not listen to him or give him proper consideration. J. does not like the home environment which involves the respondents step son Q. aged 11 years and the daughter of the respondent and current partner who is aged 8 years.

And:

J. is currently aged 11 he will be 12 in July 2000 he is an articulate and mature young person and I believe is well able to express his views on the matter.

Legislative framework

The Guardianship Amendment Act incorporates the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 and incorporated as a Schedule to the Act. The preamble to the Convention records that the signatory States entered into it:

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access

. . .

From those premises the objects of the Convention are stated in article one:

(a) to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

The objects are in turn attained through the detailed articles and their local statutory equivalents. For present purposes the key statutory provisions are ss 12 and 13 which materially provide:

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

(1) 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.

(2) 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.

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 Clark v Carson [1996] 1 NZLR 349, at 351, Elias J as she was known then said:

It is clear that the function of a New Zealand Court hearing an application under the 1991 Act is circumscribed. It is not its function to determine the underlying merits of whether the child is better off in one country or another. That is emphasised by s 35 which displaces the injunction contained in s 23(3) of the principal Act that in proceedings under it, the welfare of the child is the first and paramount consideration. Rather, the Act is designed to achieve international co-operation in preventing the wrongful removal of children and proceeds on the basis that, except in the special circumstances provided for by s 13, the appropriate place to determine questions of custody, access and residence is the country from which the child was wrongfully removed.

More recently the Court of Appeal said in S v S [1999] 3 NZLR 513, at 530.

[9] The provisions of the Act and Convention also make it clear that the issue before the Court is not the best interests of the child as such but rather the choice of the forum where those interests are to be determined. The general principle or presumption of the Convention and the implementing statute is that the children are to be returned to their place of habitual residence; it will be for the Courts of that place to make any determination about the best interests of the children. The legislation is to be interpreted so as not to undermine that presumption.

Not challenged by the Court of Appeal were the comments of Fisher J. in the High Court S v S (supra). At p 519 he discussed the normative and remedial roles of the Convention:

Underlying the presumption for return is the convention premise that the interests of children are of paramount importance. In giving effect to that premise it will usually be in the interests of particular abducted children that they be returned. That is the convention acting remedially. But it would be easy to overlook its equally important normative role. There is the future of other children to consider. Their interests will be promoted by demonstrating to potential abductors that there is no future in interstate abductions. A firm attitude to the return of children, in other words, discourages those parents who might otherwise be tempted to contemplate unilateral removal. And as Judge Ryan recently added in Secretary for Justice, ex parte Speechley v Reti (District Court, Kaikohe FP 027/13/98, 12 March 1998) at p 8, such an approach also addresses the inhibitions there might otherwise be over allowing children to visit a convention country on a voluntary basis. In New Zealand's case a firm implementation of the convention is an assurance to overseas custodial parents that it is safe to allow their children to come here for access and other temporary purposes.

Section 12(1)(d) -- was the child habitually resident in Australia immediately before his removal?

Habitual residence

The term ''habitual residence'' is not defined in any statute nor in the Convention itself. The leading authority on this interpretation is In re J (a Minor) Abduction: Custody Rights [1990] 2 AC 562. Four essential factors were identified by the House of Lords.

(1) The word is to be given its ordinary natural meaning).

Is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary natural meaning of the two words which it contains. (p 578G)

(2) It is a question of fact. Habitual residence is

A question of fact to be decided upon by reference to all the circumstances of any particular case. (p 578G)

(3) An appreciable period of time and a settled intention must be established

A person may first be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. (p 57SH)

(4) Habitual residence can be the same as the custodial parent:

where a young child is in the "sole lawful custody of the mother his situation with regard to habitual residence will necessarily be the same as hers". (p 579A)

(5) Where both parents are joint guardians consent to a change in habitual residence is required;

It would not be possible for one parent unilaterally terminate the habitual residence of the child by removing a child from the jurisdiction wrongfully and in breach of the other parent's rights. (P 572 (CA)).

Another commonly cited decision is Re B (Minors abduction) No. 2 [1994] 1 SCR 394 where Waite J made some comments about the differences between domicile and habitual residence:

A far more wide ranging enquiry is needed to establish [the elements of domicile] than is appropriate or necessary when the Court is dealing with the much simpler concept of habitual residence. That is a concept which depends solely upon showing a settled purpose continued for an appreciable period of time. It follows, therefore, that the detailed type of enquiry into presumed intention which characterises domicile proceedings is inappropriate when the Court is dealing with issues of habitual residence. In the latter case it is normally sufficient for the Court to stand back and take a general view. A settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.

These authorities have been approved and followed in New Zealand in Secretary for Justice v Sigg [1993] NZFLR 340, Adams v Wigfield [1994] NZFLR 132, Marsden v Marsden [1995] NZFLR 225.

The mother argues that when she and J. moved to Australia in March 1998 their habitual residence did not change. Although they remained there for 22 months she says that was not a voluntary decision as she was prevented from leaving permanently by order of the Australian Court (that order being made within six months of her arrival in Australia). Yet she made no formal application for relocation until June 1999.

The onus is on the Central Authority to establish that the habitual residence had indeed become Australia after the move in March 1998. Standing back and taking the general view recommended by Justice Waite I am satisfied that it was the mother's settled intention when she left New Zealand to take up long-term residence in Australia.

The evidence satisfies me that in October 1997 the mother and the child visited Australia for the purposes of investigating the feasibility of a move there. The mother says she wanted to facilitate better contact between J. and the father. At that time her job prospects were better in Australia than in New Zealand, and that housing was cheaper and therefore more affordable for her to purchase.

The mother registered with Centrelink (government benefit agency) while in Australia in October 1997. There was a six months' stand down period before the benefit would commence and she and the child returned to Australia in March 1998 in time to commence receiving those government benefits.

Upon commencing residence in Australia in March of 1998, the mother applied to the jurisdiction of the Australian Court for an order to receive maintenance payments. Further applications were made over the ensuring 18 months for the Australian Courts to determine matters that arose between J.'s parents.

In December 1998 the mother swore an affidavit the tenor of which leaves the reader in no doubt that her move to Australia at that time was one which she intended would be permanent. At the same time her employer swore an affidavit in support of her application to take the child to New Zealand in which he stated:

At no stage was I given the impression that JJ. would not return to her employment. Further, I know she is in a very strong relationship with a former employee of mine . . . and that he is a resident of this area.

In an affidavit dated 19 August 1999 the maternal grandmother talks about the mother moving to Australia to make a "fresh start". There was nothing provisional, conditional or temporary imported to the move in that affidavit.

The mother has asserted that had she known she and J. would have had difficulty leaving Australia permanently she would never have gone there in the first place. However, that knowledge subsequently acquired cannot retrospectively alter the intention she must have formed over the period between October 1997 and March 1998.

The onus of proof on the Central Authority to establish habitual residence has been most amply discharged. I turn now to the defences raised by the mother wherein the onus of proof rests with her. I am bound to say that the raising of the question of habitual residence was so spurious both prima facie and on subsequent analysis that it caused me to have the same concerns about the mother's credibility as are expressed in Justice Buckley's decision. I should also say that having regard to those legal matters set out on pages 4-7 my preliminary view of this matter having read the pleadings and my

concerns about the mother's credibility led me to seriously doubt that she could establish the requisite threshold for establishing any defence and that was in fact the starting point for my deliberations in this matter.

Section 13(I)(c) -- is there a grave risk that the child's return --

(i) would expose him to physical or psychological harm?

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

As Justice Fisher said in S v S

The core principles for applying ss 12 and 13 were settled long ago overseas and more recently, to the same effect, in New Zealand. Local decisions include Damiano v Damiano [1993] NZFLR 548; Clarke v Carson [1996] 1 NZLR 349; A v Central Authority for NZ [1996] 2 NZLR 517(CA); and D v C(1998) 17 FRNZ 636, also reported as Dellabarca v Christie [1999] 2 NZLR 548; [1999] NZFLR 97 (CA). As the Convention preamble and objects suggest, primary emphasis is placed upon prompt return of children wrongfully removed or retained. The Court of the country of the child's habitual residence is presumed to be the appropriate forum for determining custody and access issues. The strength of that presumption has been emphasised on many occasions both here and overseas, most recently in the English Court of Appeal decisions in In Re C (Minors) (The Times , 23 February 1999) and Re C (a Minor) (The Times , 14 May 14 1999).

The broad objectives are relevant both to the scope of the s 13 exceptions and to the exercise of the discretion once an exception has been established. As Fisher J said:

In the case of s 13(1)(c) in particular, the presumption is strengthened by its restrictive wording. The restrictions stem from the placing of the onus upon the party opposing return ("establishes to the satisfaction of the Court"), the gravity of the required risk ("there is a grave risk"), the use of the word "intolerable" (s 13(1)(c)(ii)), and the way in which the word "intolerable" indirectly qualifies the phrase "expose the child to physical or psychological harm" in s 13 (l)(c)(i) (see retrospective significance of the word "otherwise" in s 13(1)(c)(ii)).

The presumption is also reinforced by the distinction which has to be drawn between choice of forum on the one hand and custody and access merits on the other. So long as the country of habitual residence makes the best interests of the child paramount, and provides mechanisms to achieve that end, it will normally be appropriate to leave that country to protect the interests of the abducted child (A v Central Authority , supra, at p 523). One should also be slow to criticise overseas legal systems in this respect, given New Zealand's agreement "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States" (Convention art 1(b)). So it will never be sufficient to show merely that allowing custody or access to the applicant parent would involve grave risk of exposure to physical or psychological harm or an intolerable situation. The party resisting return must go further and show why the legal system of the country of habitual residence cannot be entrusted to safeguard the interests of the child pending the outcome of custody and access issues there.

Those considerations together underpin the stringency of the "grave risk" test in s 13(1)(c). On the other hand the grave risk exception would not have been inserted in the Convention and Act in the first place unless it were intended to have a meaningful role. An overseas legal system might lack the necessary principles or resources to protect the child; military, political or social unrest might be too dangerous; the child might be subject to immediate arrest on return; the applicant parent might be so dangerous that even suitably warned State agencies would be unable to provide sufficient protection. These are simply examples of situations in which the overseas country might be incapable of protecting the interests of the child, as distinct from situations in which custody or access should be withheld from the applicant parent.

With this defence in particular one has to guard against allowing evidence that is best directed to what J.'s best interests would be in any dispute over his primary care. The following general principles appear to be relevant:

(1) The focus is on the J.'s situation not that of his mother.

(2) The return that causes the grave risk is the return to Australia not to the father. The mother must therefore satisfy the Court that it is not the return to the care of the father which will expose J. to risk, but the return to the country itself which will threaten J.'s safety or place him in an intolerable situation.

(3) The physical or psychological harm must be substantial or severe.

(4) The harm done must be more than the damage that is a natural consequence of the disruption to J.'s life of the removal and the return.

(5) The risk posed must be substantial. Damiano v Damiano [1993] NZFLR 548.

The test is not whether there appears to be unacceptable risk of physical or psychological harm. The risk is promoted to a much higher threshold. ("Grave") and ("exposed") import the most serious of situations.

(6) The mother cannot create a situation of potential psychological harm and then rely on it to prevent the return of J., (C v C (minor: abduction: rights of custody abroad) [1989] 2 All ER 465).

In S v S (supra), this defence was advanced in a situation where the Court found there had been a history of physical and psychological abuse of Mrs S; that as a consequence she suffered from battered woman's syndrome which made her

incapable of mounting an effective challenge to the husband's custody and access proposals if the children were returned to Australia. While it appears to have succeeded as a foundation for resisting return at the Family Court level in the High Court Fisher J. said at 527:

At its highest, the case could have scraped into s 13(1)(c) on only the most marginal of basis.

However, the anti-abduction objectives of the Act operated against the exercise of discretion and the children are ordered to return.

The English Court of Appeal In Re C (Abduction: Grave risk of psychological harm) [1998] 1 FLR 1145 said:

A very high threshold had been set to establish defences of grave risk of physical or psychological harm or of the placement of the child in an intolerable situation: the Court should require clear and compelling evidence of harm or other intolerability, to be measured as substantial, not trivial, and of a severity which was much more than was inherent in the inevitable disruption, uncertainty and anxiety which followed an unwelcome return to the country of habitual residence. In this case there was evidence about the worry of the possibility of a return, but that did not approach the severity of harm which would satisfy the stringent test to be applied. The potential splitting up of the family was a situation created by the mother and stepfather, as was the possible criminal prosecution of the mother, and it would be wrong to allow the mother to rely upon adverse conditions which she had created. (Headnote)

The father put his response to this defence very concisely:

The Court is being asked to conclude that J.'s return to Australia would result in psychological harm to him either because of an inevitable separation from his mother or because he would continue to be exposed to conflict in Australia. I say

(a) If J. is in my primary care I would ensure he maintained a strong and meaningful relationship with his mother and extended family in New Zealand.

(b) If the respondent chooses not to return to Australia, then J. remains in my primary care by default and the litigation is at an end.

(c) If the respondent does return to Australia, there will be a hearing in the very near future so the litigation will hopefully cease within a short period of time of their return.

(d) Leaving J. in New Zealand also exposes him to risk of psychological harm. I see the problems of the last 18 months as a refusal by Ms C. to allow me to participate in J.'s life. Nothing I have experienced in the last 18 months gives me any confidence that J.'s relationship with me will be encouraged in the future. I think it is psychological harmful for him to be deprived of that relationship.

The Court has the benefit of a psychological report from April Trenberth Registered Clinical Psychologist whose brief was to address the defences contained in s 13(1)(c) and (1)(d) of the Guardianship Amendment Act 1991.

Ms Trenberth's evidence was that J. demonstrated a secure attachment with his mother. Thus a return to Australia without his mother could run the grave risk of seriously disrupting J.'s primary attachment relationship and consequently of compromising his sense of psychological security. J. has developed a loss of trust in the legal system and, more importantly, in his father. She said J. is fearful of a change of custody and he is experiencing high levels of confusion, fear and anger in these regards.

The mother says she is no longer financially able to accommodate herself in Australia so that a return for J. may mean in actual terms a change to his father's primary care at least in the interim.

The mother says her emotional and physical wellbeing was compromised in Australia. Some months prior to the return to New Zealand she had reportedly experienced serious anxiety and depressive symptoms. She also says her wish to return to New Zealand had been motivated by a wish to find a solution to this predicament because she recognised the inherent implications to her ability to parent effectively. Ms Trenberth expressed the view that if the mother was required to return to Australia she would return to the same financial and emotional circumstances thus seriously compromising her ability to provide healthy care for J.

Although I have not seen the mother I have some concerns about the mother's credibility as to her motivation. It seems her primary motivation has been to knowingly second-guess Justice Buckley's decision and to undermine the Australian Court's decision on relocation and pre-empt the decision on what is known in that country as residency and in this custody. I say that in the context of the weight to be placed on her alleged psychological distress and thereby J.'s.

The mother's allegation of risk is also based on an assumption of what order a trial Judge in Australia might make in the proceedings there. It is not for the mother nor is it for this Court in these proceedings to speculate what the outcome might be. That would be presumptuous in the extreme. Australia recognises the principle that the best interests of children are of paramount importance and applies the principle in its proceedings. Were that Court not to give paramountcy to J.'s interests then the risk would be established but the respondent cannot speculate on an outcome and rely on her speculation as a defence to J.'s return.

There was not sufficient evidence to maintain an argument that the mother would fail to return to Australia and that this failure would result in psychological harm to J.

In cross-examination when Ms Trenberth was asked the following question:

"Despite the difficulties, she wouldn't let J. return alone would she?"

Ms Trenberth agreed and said that was her impression.

Likewise while it was advanced that the financial support the mother had received from her family would no longer be made available to her if she returned to Australia, I suspect that in fact the converse could well be the case.

Having the concerns I harbour about the bona fides of the mother and having reached the conclusion she overstated her case on "habitual residence" I am left with the distinct impression that the Court should view with considerable caution her statements as to the distress she was labouring under in Australia. Also I am not convinced she could not return and function adequately for the limited period associated with the hearing of a priority case in Brisbane. She does have accommodation she can use even if it is not ideal. I expect her family would support her in fact and the evidence is simply not substantial enough to persuade me she would not adequately care for J. at that time notwithstanding the evidence of the Court appointed expert to the contrary.

The evidence also fails to meet the threshold because there is no certainty that custody will in fact change. The mother and the New Zealand psychologist are critical of the Australian psychologist and the Australian child representative because they are said to have proposed a change of residence between the end of the relocation hearing and December 1999. However, there is no evidence to suggest that a Judge would not accord the appropriate priority to J.'s welfare and best interests in any proceedings. That Judge could also now have the advantage of the additional expert evidence available to this Court if the mother chose to present it.

Counsel for the Central Authority submitted that once again the evidence fails to attain the requisite threshold and that there is good reason for keeping the level as high as it is. I agree. I will not "drive a coach and four" through the Convention by a liberal interpretation of what would constitute a successful defence on this ground. If allowed it would be open to every parent not wanting to return to rely on the undoubted stress and anxiety experienced on an enforced return to argue the quality of parenting would be adversely effected. This must be so particularly where the parent has been the architect of many of the difficulties as the mother appears to have been in this case.

If the mother had proved on the balance of probabilities that she would not under any circumstances return then the evidence satisfies me overwhelmingly that for J. a return to Australia would entail a return into the primary care of his father and that could in fact be psychologically abusive to him and thus 13(1)(c)(i) would be made out. But as I am satisfied she would return with him I need not traverse that evidence under this ground.

Section13(1)(d) -- does the child object to being returned and has he attained an age and degree of maturity at which it is appropriate to take account of his views?

Fisher J said in S v S (supra at 521):

. . . the framers of the Hague Convention assumed that a mature child's wishes would be taken into account without distinction between a wish to remain and a wish to return. The background to the Convention is outlined in the explanatory report on the Convention published by the Permanent Bureau of the Conference in 1982. The report was prepared by Professor Elisa Perez-Vera. She had been the reporter of the Hague Conference on Private International Law where the Convention was prepared. In Dellabarca v Christie, supra, at 554 555 the Court of Appeal relied upon it as a guide to the ideas and principles underlying the Convention. As to the wishes of the child, the report said this at para 30:

In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests.

The report went on to refer to the dangers of direct questioning of young people in a way which might force them to choose between two parents and the difficulty of defining a minimum age for taking into account the views of the child. . .

Finally, art 12 of the United Nations Convention of the Rights of the Child requires member States to respect the wishes of mature children in matters of this kind. In particular, art 12(1) provides:

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.

New Zealand ratified that Convention in March 1993. On an application under the Hague Convention resort may be made to the United Nations Convention on the Rights of the Child where not inconsistent with the former: see Murray v Director of Family Services, ACT (1993) SLC 80,243 80,257-80,259 (FCt); Secretary of Justice v Penney (1995) 13 FRNZ 264, 272; [1995] NZFLR 827, 835; andSigg v Bowden (District Court Auckland FP 004/1580/92, 8 April 1988, Judge Green) at p 15. There is in fact a tension between the principal anti-abduction thrust of the Hague Convention and the respect for a mature child's wish to remain as a subsidiary consideration under the same Convention.

Of course as a matter of degree the weight to be attached to the wish will turn upon all the surrounding circumstances. "Age and degree of maturity" are expressly referred to in s 13(1)(d) and para 30 of the report on the Convention quoted

earlier. Other considerations will include the cogency of any reasons given by the child and the possible role of external influences. As Elias J said in Clarke v Carson , supra, at p 354:

The position at which it is right to take into account the views of children seems to me in the normal course to be the time when they are able to reason. That is a position supported by the convention on the rights of the child. Here, on the whole, the reasons put forward by the children for their objections are reasonably held. Even though there are indications that some reasons are affected by their lack of maturity and even though I have doubts as to their capacity to see the whole picture (so that I should not accept that their views should be determinative), I accept that both children are of an age and degree of maturity which makes it appropriate to take their views into account.

The weight to be attached to such wishes will turn upon age and maturity, the reasons given by the child, possible influences upon the child, competing considerations and all the surrounding circumstances.

In Ryding v Turvey [1998] NZFLR 313, 316 His Honour Judge Inglis QC referred to the differences of judicial opinion regarding the interpretation of the words "objects to being returned". He preferred and followed the decisions of the English Court of Appeal in In re S (A Minor)(Abduction: Custody rights) [1993] 2 WLR 775 as well as the majority view in the full Court of the Family Court of Australia in De Lewinski v DG Dept Community Services (1997) 1337 FLR 391, 402. The Court held as follows:

Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what children have to say and by taking, a literal view of the term "objection". That is because it remains for the Court to make the critical further assessment as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised.

Judge Inglis QC said:

I would therefore rule that the word "objects" means no more than that the child has expressed a wish not to return. But, (and relying on the Nicholson CJ view) once that threshold has been crossed there remains the further critical assessments relating to the weight to be given the child's objection.

Some other cases where children's objections have been considered in New Zealand are B v B [1994] NZFLR 497, Clarke v Carson (supra), Speechley v Reti (supra). Both Trapski's Family Law and Butterworths Family Law Service contain a number of references to cases where the Courts have considered this objection. Because the facts are all different so too are the conclusions. However, they do establish that;

*** At the age of 11[frac12] J. is within the range of ages where a child's objections have been considered.**

*** There should be some articulation of the reasons for the child's objection.**

*** There must be some assessment of this ability to reason and of the level of maturity of the child and of his or her ability to have formed his or her own ideas and opinions independent of the adults around them.**

I refer to page 28 of Justice Buckley's decision of 27 October 1999:

Mr Trudinger said in his evidence --

And I think when Josh thinks about this -- and it's very hard for him not to -- it's uppermost in his mind, and he feels antagonistic, annoyed, irritated, frustrated; all those words -- towards his father and about the process. But when he's not thinking about it, there is no reflection of that.

So far as J.'s wishes are concerned, I set out the following passage during the course of the cross-examination of Mr Trudinger by Ms Carew --

J. has made it clear to you verbally that he wants to go back to New Zealand? -- Yes.

And do you accept that that is what J. wants? -- No.

I don't know what he wants. I don't think he knows. I don't think he had the chance to form an independent view. -- But I don't know that he has had enough chance to really form a truly independent view and I'm not sure if he is really old enough or even in a position enough to really make up his mind about it.

. . .

His disenchantment with his father on occasions is understandable for not supporting his want to go back home as he sees it? -- I don't accept that.

And further --

. . . if it is his firmly held wish and he isn't able to go, then there is a high probability that that will damage his relationship with his father. I think there will be a disruption. There will be difficulties with it in the short term.

. . .

I adopt his conclusion --

J. does appear to make comments that reflect his mother's stated wishes and beliefs. There are several indication (sic) of a dependent and overly involved relationship – J. does not appear to have or to have been able to have his own particular thoughts or independence, both in terms of the current issues and more significantly in terms of the contact and relationship with his father.

I gained substantial assistance from Ms Trenberth the Court appointed psychologist with the most recent information as to J.'s views, his level of maturity and comprehension of these proceedings and the implications for him.

Ms Trenberth reported to the Court:

He was able to engage in a thoughtful discussion about his family situation. J.'s expressive language and comprehension were consistently mature. His characteristic speech patterns were at an adult level. He was readily able to identify and articulate his own emotional responses to a range of events. . . When questioned more comprehensively it was apparent that he was experiencing a great deal of sadness and fear about the situation. There were no indicators of "parentified" behaviours or excessive expectations to protect his mother. . .

The extent of J.'s feelings was indicated by his assertion that he would run away if placed in his father's care. This potentially represented an additional risk to his wellbeing, both physically and psychologically. The mother said he would "stay away just long enough to worry everybody". This impression was consistent with those of the writer. However caution should be exercised in minimising J.'s intentions in this regard.

In this context J.'s wish to remain in New Zealand were [sic] an appropriately self protective response. A wish to maintain continuity with his secure primary attachment figure is appropriate and child focused. Although J. had internalised the sum of his mothers sentiments he was also able to identify and articulate his own self-focussed distress separate from the predicament of his mother.

Both psychologists agree J. wants to live in New Zealand. One says this is a thought through considered view where the child is able to separate his mother's needs to a certain extent from his own child focused needs and the other says J. is unable to say what he truly wants, that he reflects his mother's stated wishes and has not had a chance to form a truly independent view. I must allow for the fact that on greater examination of the respective expert opinions and the merits of custody dispute his views maybe overridden in his best interests.

Once again the onus is on the mother to establish the requisite evidential threshold. There are difficulties for her in reaching the necessary level because Ms Trenberth's conclusions are contradicted by Mr Trudinger the Australian Court appointed psychologist. Ms Trenberth's inquiries did not because of geographical distance afford her the opportunity to meet the father in person although she did conduct telephone interviews with him. The Brisbane psychologist had the advantage of spending a significant amount of time with the parties and seeing both parties and J. The conclusions drawn by the Australian psychologist were accepted by a Family Court Judge at the end of a three day hearing.

Counsel for the Central Authority referred Ms Trenberth to a book entitled Children's Rights and the Developing Law written by Jan Fortin 1998 Edition by Ms Casey for the Central Authority and in particular to two passages. They were:

Research on developmental psychology can take matters further than merely distinguishing between the thought processes of children and adults. It also indicates that although young children certainly make considerable advances during the years between infancy and early adolescence, there appear to be fundamental psychological differences between the competence of young children aged up to about eleven to twelve and that of adolescents, between that age and the age of eighteen. There is general agreement amongst researchers that despite developmental changes being gradual, it is during early adolescence that young people's thinking, becomes more abstract, multi-dimensional, self reflective and self-aware, with a greater use of relative, rather than absolute concepts. It is the ability to conceptualise, to think about the meaning of their experiences and to establish concepts about themselves as distinctive persons that marks out adolescence from the earlier years of life.

And

Clearly the research evidence cannot provide generalisations or "rule of thumb" guidelines to assist with assessing an individual adolescent's competence to reach decisions. Indeed researchers warn that competence for decision-making will vary enormously depending on a variety of factors, such as peer pressure and family environment.

Ms Trenberth confirmed that in her view J. fitted into the early adolescence stage of development as defined in these passages in that he is able to conceptualise about himself as distinct from other persons most importantly in this case -- his mother. And that allowing for the variables cited in the second passage that J. is competent to make independent decisions notwithstanding the overt and covert pressure applied at times over time by his mother.

I was very reluctant to accept the evidence of Ms Trenberth against the background to this matter. Because on a full reading of the voluminous material in this case I had formed a preliminary view that J.'s independent views could not be established because they were framed in large measure by the actions of the mother.

I have been persuaded on the strength of Ms Trenberth's viva voce evidence (particularly that when under cross-examination) and senior counsel for the child's memorandum dated 29 March 2000 and counsel for the child's submissions and my own interview with J. on 27 April 2000 that J. does have his own independent, soundly-based views.

I formed the view at the conclusion of the submissions that I needed to speak with J. myself. I did so in the presence of his counsel. I had indicated that I would not do so unless the session could be taped and a record made available to all counsel. At the outset of the interview I obtained J.'s consent to tape the session. The session terminated when J. became unwell and vomited. I learnt later that the session had not in fact been captured successfully on tape. The interview assisted me greatly in reaching the conclusion that what J. said was congruent with what he had told Ms Trenberth and counsel for the child and I formed my own conclusions as to his capacity and independence.

Counsel for the child reported:

J.

(11) J. presented as an intelligent, and mature boy . . .

(12) . . .

(13) Ms C. advised that he suffers from nose bleeds, diarrhoea and stomach pains when custody/access issues rise. She advised that these had recommenced about 2 weeks ago.

(14) J.'s view is that he wishes to remain in New Zealand. This view has been consistent throughout the proceedings in Australia. Both reports prepared in Australia state this. The Child Representative in Australia did not seek his views.

(15) J. is very close to his maternal family in New Zealand and stated that he missed them whilst he was in Australia. He is very happy to back.

(16) He views New Zealand as "his home".

(17) J. stated that he did not know his father that well and this follows from the limited contact he has had with him during most of his life.

(18) He clearly perceives his father as forcing him to return to Australia. He does not believe that his father is thinking of him as he has told him that he does not want to live with him. He does not want to return.

(19) He cannot perceive living with his father. He states that if he goes to live with him he will run away.

(20) J. is aware that if he returns to Australia the conflict between his parents will continue.

(21) He is tired of the legal process; he is tired of being interviewed by professionals and wants to stay in New Zealand. The conflict, of which he has been the centre, has been occurring for nearly 2 years. He perceives this as a very long time.

(22) J. is very clear in his view that he wishes to remain in New Zealand and that he does not wish to return to Australia.

(23) He states that he did not like Australia. He associates Australia with conflict.

(24) He states "If I had one wish for the rest of my life then that would be to live in New Zealand".

And I now set out the reasons why I am satisfied that J. does object to a return to Australia and that his objection is a reasonable one based on his experiences and needs as opposed to his mother's experiences and needs.

J. was able according to Ms Trenberth to speak with her about all matters from a child focused perspective. In discussion with her he did not give any indication of having been coached to make statements to advance his mother's cause. In fact he was able to speak to Ms Trenberth about matters which his mother had not mentioned at all. Ms Trenberth described him as being mature for his chronological age and that he could speak about this own emotions very well and very accurately. She was supported in this view by counsel for the child in her own interactions with J. There is also evidence that a Dr Lloyd considered J. capable of expressing independent mature views at an appropriate chronological age and that he had not been coached to his views. I have seriously considered what weight to attach to Dr Lloyd's stated opinion because he is not a clinical psychologist nor was he truly independent in that he is not Court appointed. He was consulted by the mother. However with the benefit of all the evidence available to me his opinions can be relied on to the extent that they are consistent with those of Ms Trenberth, Ms Patel and myself having interviewed J.

J. has a perception based on his own experience of being in the care of his father that the father is stressed and as a result quick to anger. This is not an implication of physical risk because J. is clear there is none in the sense of his father being violent towards him. But rather that there is a tension in the household that he resolves by leaving his father's home for lengthy periods of time. J. told me he has done this on a number of occasions. He has told me he would try to run away again and make every effort to return to New Zealand in doing so.

J. is distressed at the notion of having to live with his father when his primary caregiver for his entire life has been his mother. This is reasonable in the circumstances. She is his primary attachment figure. This does not mean that he does not love his father nor that he could not spend time with his father. It precludes him from wanting to live with his father

because to do so would to be to leave J. with a profound sense of loss of his primary attachment figure when she is available and willing to parent and there are no explicable reasons to J. as to why that state of affairs ought not to continue. In his words "I would miss her too much".

J. has also experienced some frightening and distressing events in his life in Australia which cause him to be fearful of a return.

On 3 December 1998 his mother attempted to bring him to New Zealand for a holiday. They were refused entry to the flight because there was an order barring J.'s departure. Not surprisingly J. viewed that as his father denying him the chance of a holiday in New Zealand.

J. also described to Ms Trenberth seeing his father's partner in an altercation with his mother:- "with her hands on his mother's shoulders and pushing her down at which point he describes as feeling distressed and beginning to cry and ran to the car and waited for his mother there". I refer to a letter written by Dr Lloyd at this time:

26/03/1999

To whom it may concern.

J. C.

[. . .]

I understand that there has been a further incident recently which has caused distress to J. He is exhibiting typical physical symptoms which I believe are a result of unresolved psychological conflict. J. feels he has been getting a better relationship with his father since Christmas but this has been setback by this recent physical altercation between his mother and his father's de-facto.

J. is apprehensive about going to see his father this weekend because he feels his mother will be blamed for what happened. He feels that what is likely to happen is that he will have to sit with his father and de-facto and talk about it. He has expressed to me quite clearly that he does not wish to do so.

I believe that J. is old enough to be able to vocalise his own ideas to me and I believe he should be listened to.

For J. Australia is associated with on-going litigation and conflict, something that was not apparent for the first eight years of his life in New Zealand.

J. is angry towards his father for the damage the litigation has caused and for the limitations that it has placed on things J. wants to do. All of this according to Ms Trenberth was presented to her in a very child-focused way -- which is not consistent with a child who has been coached or alienated.

J.'s major fear is that if he is returned to Australia he will be placed in the care of his father. This is reasonable given the views expressed by his lawyer and the Australian Court appointed psychologist at this stage. His fear is therefore reasonably based as there is a high probability this would be so. As I have said earlier in another context -- it cannot be said it is a certainty but it is certainly legitimate for J. to see it as highly probable. I only enter these realms in terms of his "objection" and not in any sense to determine the merits of the placement with his father.

J. has also experienced loss of trust in the judicial system. Again -- let me be clear I am not attempting to determine whether he has been failed by those persons entrusted with representing to the Court where his best interests lie but rather focusing on his experience as it has led to his objection to return. J. described to Ms Trenberth that his experience of his interviews with Mr Trudinger consisted of his being required to play a card game. His distress was that he felt he had to maintain a focus on playing the game according to its rules and that this left him with a sense that he had not had sufficient opportunity to be heard and heard in a way that maximised his ability to talk about his feelings. He told me that he found Ms Trenberth by comparison to be very empathetic and easy to talk to.

J.'s fears around a return to Australia were based on all of these factors. His fears were well grounded given that a change of custody had in fact been recommended by the children's representative and supported by the Court appointed psychologist.

The evidence suggests that although his mother to a certain extent influences J., he does have a clear capability and capacity of reasoning for himself. There is good reason for him to hold the views he has. He is trying to avoid going into a situation that he does not like, whether his mother comes with him or not. There is logic to his opinion when looked at from his point of view.

I am not revisiting the decision made by Justice Buckley. Nor am I critiquing that Court's processes. On the narrow but critical point of J.'s objection I am satisfied that this Court has the better evidence. First it has a second opinion on J.'s wishes from an appropriately qualified psychologist. Secondly J. was able to give clear instructions to his Court appointed representative who sought his views directly in a comprehensive fashion unlike her counterpart in Australia and I have met with J. myself. I am satisfied J.'s objection is soundly based and is not the result of coaching by the mother nor solely the product of her coercion overt or covert. It must be remembered that children like adults are in an interdependent relationship with others and will in some measure be shaped by those interactions. It must also be remembered that the mother is J.'s primary attachment figure -- it would be strange indeed if he did not reflect her opinions on important

matters. But I am satisfied he has his own experiences on which he bases his objection. Experiences separate from those of his mother. I find the child does object and his objection is soundly and independently based.

Exercise of discretion

Now that a s 13 defence is established the Court must exercise its discretion as to whether or not to refuse the application for return. It is clear from all the authorities that this discretion is to be exercised bearing in mind the overall approach of the Convention. So the discretion to make or refuse an order is not unfettered. It must be exercised in the context of the Guardianship Amendment Act and the Hague Convention.

Elias J in Clarke v Carson (supra) comments on the exercise of that discretion in a passage which has been relied upon both in this jurisdiction and overseas. At 351 she said this:

Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the Court by the person resisting the order for return (here, the mother) the consequence is not that the order will be refused but that the Court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the Convention which it implements in schedules. (See Re A (Minors) (Abduction: Custody rights) [1992] 2 WLR 536, 550 per Lord Donaldson of Lymington MR.) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrongfully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other.

I remind myself of the objectives that are relevant to the exercise of the discretion; the remedial objectives; a strong presumption that children will be promptly returned so that the Courts of the country of habitual residence are able to deal with the dispute over custody and access. The normative objective; parents and Courts should feel confident that children can come to New Zealand for visits without fear that the Convention principles will be diluted or reinterpreted.

The importance of preserving these objectives is heightened in this case. This case involves Australia, travel back and forth between Australia and New Zealand is extremely common. The Court should guard against setting a precedent that might discourage this. The country of habitual residence was already seized of this custody and access dispute. If the Court makes an order returning J. to that forum it will be returning him to a forum which has already begun the process of deciding the future care arrangements for J. When the mother decided to stay in New Zealand, the Court was three months away from a final decision about residence which had first become an issue 15 months before. It is not the purpose of Hague Convention proceedings to redress perceived wrongs or injustices experienced by a parent in another jurisdiction.

I have already referred to Fisher J's comment on the tension between the principle anti-abduction thrust of the Convention and the respect for a mature child's wish to remain. In balancing the two competing factors one must consider what weight to attach to the expressed wish. The matters to consider in relation to weight are:

*** age and degree of maturity**

*** cogency of reasons**

*** possible role of external influences**

In this case where there is dispute on the evidence as to the role of external influences in particular, influences which have already been the subject of strong criticism by an Australian Family Court, it is forcefully argued that the Court cannot and should not give priority to this child's views over the principles of the Convention.

J. is of an age and maturity where it is appropriate that his views are taken into account. Having regard to s 13(1)(d) and art 12 of the United Nations Convention on the Rights of the Child it is critical that the Court takes account of the child's viewpoint and that the child, where it is possible, feels that viewpoint has been taken account of by the tribunal vested with the authority to make the decision.

Both Australia and New Zealand have represented to the Committee on the Rights of the Child that their legislative policies and practices comply with the United Nations Convention on the Rights of the Child.

Tapp has written:

Where a convention has not specifically been incorporated by legislation, a strong case for incorporation of the principles of the convention into domestic law, going beyond the interpretation presumption, can be made where the state has taken steps beyond mere ratification to give effect to its international obligations. Such steps include the listing of international human rights conventions and declarations in a schedule to a statute as occurred in Australia with the Human Rights and Equal Opportunities Commission Act 1986. (Page 238 of her paper for the Family Law Conference 31 August to 2 September 1998 in Christchurch New Zealand.)

Further Tapp argues that this convention has "special significance" because it is "an almost universally accepted human rights instrument". I consider in the exercise of this discretion a s 13(1)(d) defence having been made out that I should have regard to the United Nations Convention on the Rights of the Child.

Research into child development has established that being and feeling heard and having one's views respected by others is critical in the development of self- esteem, competence and healthy psychological functioning.

Wallerstein and Kelly state:

There appears to be an important link between the child's success in coping and his or her capacity to understand and make good sense of the sequence of the disruptive events within the family.

It has also been established that procedural fairness and justice are important to children and that they are more likely to accept findings and decisions if they feel that the process has been fair and that they have actively been involved in that process.

The second right in art 12 makes it clear that while the voice of the child must be ascertained, heard and respected, the child's other convention rights must be considered in determining the best interests of the particular child in these specific situations. The best interests consideration is enshrined in art 3.

Article 12 is very much the linchpin of the United Nations Convention on the Rights of the Child. It is a recognition of the child's personality and autonomy and that to quote Lord Justice Butler-Sloss (in the Cleveland Report) "the child is a person and not merely an object of concern".

According to Pauline Tapp:

The Convention on the Rights of the Child recognises that children, like adults, are in an interdependent relationship with others, that a child's interpretation of their experiences, while actively invented and constructed by the child, is developed in partnership with others and that giving a child the opportunity to participate in society both assists the child to develop the skills, abilities and values of a responsible citizen and ensures that decisions made in matters affecting the child have some chance of being understood, accepted and implemented by the child because the child's reality has been considered.

(Challenging Patterns of Practice, Pauline Tapp).

The Court has a duty not to pay just lip service to this requirement. The Court has a duty to listen to J., to take into account his emphatic objection to being returned. The Court has a duty to see him as a person in his own right.

To do other than respect his ardently expressed views at this time would be Draconian in the extreme. To do so would be to elevate the remedial and normative objectives of the Hague Convention unduly ahead of the defence contained in s 13(1) (d) and the obligations this Court has in administering the principles and articles of the United Nations Convention on the Rights of the Child. It would result in treating J. as an "object of concern" and not the person he is in his own right. The Court should guard against an outcome that punishes the child unduly because of the actions of a parent. This is not the intention of the legislation.

If he remains in New Zealand and in his mother's care while the custody applications are decided his immediate fears would be alleviated. The additional important advantage of remaining in New Zealand would be the opportunity for the child to present at his highest level of functioning in his interactions with experts and his legal representative with whom he has an exceptional rapport and in whom he reposes considerable trust in contrast with the anxiety laden atmosphere associated with a return to Australia and to interactions with professionals whom he mistrusts.

In reaching the conclusion that New Zealand is the forum where the custody dispute should be heard because that is J.'s independent and strongly held view I have weighed up the many factors referred to in this decision and including how the effect of his mother's actions might have role modelled for him that you can ignore Court orders at will. In conclusion I find that to ignore his expressed wish and to force him to return to Australia is what weighs most heavily with me. I have formed that view because of his palpable fear of a return to Australia as he has expressed it to others and to me and the physical manifestation of that fear in my Chambers when he vomited having been told how difficult it would be to accede to his request. That presentation was consistent with that referred to in counsel for the child's report. I find myself unable to cause him to experience what would be psychologically abusive to him given his views.

In not ordering his return I remind any person who may read this decision and conclude that it opens the flood gates of a "best interests" approach to these matters that the facts of this case and the child's ability to communicate what he wants in a genuine and articulate fashion coupled with the physical symptoms he has manifested puts this case in a truly exceptional category. In the interests of this one child it would be punitive to him in the extreme to overlook his express wishes and his fears and force him to return.

I decline the application for J.'s return to Australia.

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