Family Court of Australia

RICHARDS & DIRECTOR-GENERAL DEPARTMENT OF CHILD SAFETY	***[2007] FamCA 65***

APPEAL – CHILD ABDUCTION – Wrongful retention – Children's wishes – Mother wrongfully retained the children in Australia when they visited for holiday contact – Primary care giving mother denied permission to relocate to Australia with the children by an American court – Mother moved to Australia leaving the children in their father's care – Trial judge found an exception to mandatory return was made out, but used his discretion to order return there being no "clear and compelling" reason shown to frustrate the objects of the Convention – Error in approach in that the discretion not to order a return is at large once a defence has been made out – Upon a re-exercise of discretion the Full Court concluded that the return order should stand – Appeal dismissed.

Family Law (Child Abduction Convention) Regulations 1989

DL v Director-General NSW Department of Community Services and Anor (1996) 20 FamLR 390 at 425
Laing v The Central Authority (1999) FLC 92-849
Re HB (Abduction: Children's Objections) [1997] FLR 392
Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716

Appellant:	MS RICHARDS
Respondent:	DIRECTOR-GENERAL DEPARTMENT OF CHILD SAFETY

File Number:	BRF	2261		of	2006
Appeal Number:	NA	94		of	2006

Date Delivered:	15 FEBRUARY 2007
Place Delivered:	BRISBANE
Judgment of:	KAY, COLEMAN & BOLAND JJ
Hearing date:	31 JANUARY 2007 by video link to Melbourne Registry

Lower court jurisdiction:	Family Court of Australia
lower court judgment date:	8 DECEMBER 2006
LOWER COURT MNC:	[2006] FamCA 1383

REPRESENTATION

COUNSEL FOR THE Appellant:	MR COOPER
SOLICITORS FOR THE Appellant:	BARRY & NILSSON LAWYERS
COUNSEL FOR THE RESPONDENT:	MR WESTBROOK
SOLICITORS FOR THE RESPONDENT:	CROWN LAW

Orders

(1) That the appeal be dismissed.

IT IS NOTED IN CONNECTION WITH THESE ORDERS that the judgment of the Full Court delivered this day will for all publication and reporting purposes be referred to as *Richards v Director-General Department of Child Safety*

THE FULL COURT OF THE Family Court of Australia at BRISBANE By video link to Melbourne registry

Appeal Number: NA 94 of 2006
File Number: BRF 2261 of 2006

MS RICHARDS
Appellant

And

DIRECTOR-GENERAL DEPARTMENT OF CHILD SAFETY
Respondent

REASONS FOR JUDGMENT

1. On 31 January 2007 we dismissed an appeal against orders made by Jordan J on 8 December 2006 requiring the return of two children C born in March 1994 and S born in July 1996 to the United States of America pursuant to provisions of the Family Law (Child Abduction Convention) Regulations 1989 ("the Regulations"). We indicated that we would publish our reasons at a later date.

2. The Regulations make provisions for the performance of the obligations of Australia under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 ("the Convention").

3. Both Australia and the United States are signatories to the Convention. In broad terms the Convention and the Regulations provide that, as between countries who have ratified or acceded to the Convention, when a child is wrongfully removed from one country and taken to the other or wrongfully retained in the other country then upon a proper application being made it is incumbent upon the country to where the child has been taken or retained to return the child. The Convention and the Regulations provide for limited circumstances in which the return of the child is not mandatory but further provide that in such circumstances the Court retains a discretion as to whether or not the child should be returned.

Background

4. Mr F and Ms Richards are the parents of C and S. They married in the United States of America in 1991 and separated in June 2002. Each of the children was born in the USA. After separation the children were raised in America in the primary care of their mother and had regular contact with their father.

Orders were made by consent in the Oakland County Circuit Court in Michigan on 28 January 2004 that provided that the parties would have joint legal custody of the children and the wife would have the physical custody of each of them. The orders provided further for the father to be entitled to parenting time with the children on alternate weekends from Friday until Sunday, on every Monday and Wednesday after the mother had the children for the weekend and on every other Wednesday. There were also arrangements made for holiday visitation. At about that time the mother travelled to Australia to pursue a relationship with one Ms A who resided in Australia.

5. In February 2004 the husband, a medical professional, took up employment in Florida but continued to fly to Michigan twice each month to have contact with the children.

6. On 16 May 2004 the mother filed an application with the Circuit Court, County of Oakland Family Division in Michigan seeking permission to relocate the children to Australia where she proposed to reside with Ms A. That application was resisted by the father and on 16 December 2004 the mother's motion seeking permission to relocate was denied by the Honourable Martha D Anderson, Circuit Court Judge.

7. In February 2005 the mother agreed that the children should live with their father in Florida as she intended to live in Australia. There was subsequently an agreed contact visit between the mother and the children in Australia between May and July 2005. The children spent time with their mother in December 2005 and January 2006 in the United States. The mother again visited America in May 2006 and an agreement was reached that the children could visit Australia with their mother providing they were returned to the United States by 30 July 2006.

8. On 21 June 2006 the mother filed an application in the Family Court of Australia seeking orders that the children reside with her. That application was served on the father on 29 June 2006 who immediately took steps to seek the return of the children to the United States pursuant to the provisions

of the Convention. An application was filed by the Director-General of the Department of Child Safety Queensland as the State Central Authority on 8 August 2006. The mother's response to that application was to admit that the children's retention in Australia was wrongful within the meaning of sub-regulation 1A of Regulation 16 of the Regulations but to assert that if the children were returned to the United States there was a grave risk that they would be exposed to physical or psychological harm or placed in an intolerable situation. She asserted also that each of the children objected to being returned, that their objections showed a strength of feeling beyond the mere expression of a preference or of ordinary wishes and that the children had attained an age and degree of maturity which made it appropriate to take account of their views.

9. A family report was prepared by Ms B, a family consultant employed by the Family Court at Brisbane. Ms B reported that each of the children strongly indicated they were opposed to returning to live with their father in the United States. They were very unhappy living with him and perceived that he was not responsive enough to their needs. She reported that the children were very aligned with their mother and claimed that they had no time for their father at this point of time. Ms B further reported that it was appropriate that their views be taken into account. She stated that she was concerned that the level of distress that both girls reported they experienced while living with their father would impact upon their ability to settle back in the USA while the matter was resolved by the US legal system. She commented that C had experienced suicidal ideation which should not be taken lightly. She further concluded that a return to the United States would be very disruptive to the academic progress of the children. She finally concluded that the children would be at risk of emotional and psychological harm if they were returned to the USA while the appropriate US courts determined the long term welfare of the girls.

10. In his judgment his Honour stated that he was satisfied that there was evidence upon which it could be established that the wife had made out a case to bring the matter under the exceptions described in Regulation 16.

That Regulation provides as follows:

Order for return of child removed to, or retained in, Australia

16(1) If:

(a) an application is made to a court under subregulation 14 (1) for an order for the return of a child who has been removed to, or retained in, Australia; and

(b) the application is made within one year of the child's removal or retention; and

(c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);

the court must, subject to subregulation (3), make the order.

(1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:

(a) the child was under 16; and

(b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

(e) at the time of the child's removal or retention, the person, institution or other body:

(i) was actually exercising the rights of custody (either jointly or alone); or

(ii) would have exercised those rights if the child had

not been removed or retained.

…

(3) A court may refuse to make an order under subregulation (1) …if a person opposing return establishes that:

…

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views;

…

(5) The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.

11. His Honour qualified his finding by saying that the children's preference was a strong preference to reside with their mother rather than with their father but it was not an objection to being returned to the United States per se.

12. His Honour concluded that he would proceed on the basis that the objection ground had been made out sufficient to give rise to the exercise of discretion to refuse the application for a return order.

13. We observe that the mother had asserted that there were two discretionary

defences available to her, namely the grave risk exception as well as the children's wishes exception. It is not abundantly clear from his Honour's reasons for judgment whether his Honour considered it was necessary to distinguish between the two exceptions when his Honour came to consider the next part of the exercise that his Honour undertook, namely to decide whether his Honour ought refuse to make an order for the return of the children once the exception had been established. His Honour expressed no conclusions at all about the grave risk ground that was asserted in the application, but that failure was not relied upon as a ground of appeal.

14. Having reached the conclusion that the objection ground had been sufficiently made out to give rise to the exercise of a discretion to refuse the application for a return order, his Honour then turned to give consideration to how he should exercise that discretion. He said:

> 34. In my view, perhaps the single most important matters to be taken into account are the objectives and principles which stand behind the Regulations and Conventions. The purpose of the treaty itself is designed to secure children against abduction, wrongful removal, or wrongful retention. The treaty is intended to provide children and their families with order, predicability and legal support for their legal rights and duties. An order refusing to uphold the objectives and principles of those Regulations and Conventions, strikes at the purpose of the entire process that has been put in place.
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> 35. It is in the interests of all children throughout the world to ensure that their parents should be able to make appropriate arrangements for their children's living on a day to day basis and in relation to time spent with each parent, comfortable in the knowledge that the law will be upheld. It is expected that the Courts will adopt a robust approach when dealing with those who choose to take the law into their own hands and defy the authorities of properly constituted Courts in countries which are parties to this Convention.
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> …
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> 37. I am satisfied that I am required to uphold that Convention unless it has been established to my satisfaction that there is a clear and compelling case to sustain an objection raised. In this matter, of course, I take account of the fact that the children

were born in the United States of America, their parents married in the United States of America, the children were raised in the United Stated of America, the parties and the children remained in the United States of America after separation and the parties submitted to the jurisdiction of the Courts in the United States of America. In relation to the important final point, I take particular note of the fact that the mother, quite properly, chose to submit to the jurisdiction of the United States Court on this very issue she now wishes to effectively re-litigate in another forum.

38. Again, it would strike at our complementary systems of justice if parties submit themselves to the proper jurisdiction and the decisions of the Court, intending only to be bound by decisions that meet their favour and willing to take the law into their own hands if the decision does not suit them. In this case, I accept the thrust of the father's evidence that many of the matters the mother now asks this Court to take into account were the very same, or similar to those matters she argued before the United States Courts in 2004.

39. I also take into account that, in part, behind the difficulties now confronting these children and the basis of the objections they now raise, was the mother's own decision to leave the children and move to Australia. The children were only nine and seven years of age when the mother chose to pursue her interests in Australia. That is not to devalue the legitimacy of the mother having interest in pursuing her relationship, or perceiving that her financial circumstances and health circumstances may have been improved in Australia. However, the fact of the matter is, the mother's decision to relocate was not imposed upon her, but the consequences and hardship of it were imposed upon her children.

40. I am also left with an uncomfortable feeling about the circumstances relating to the children being in Australia in June of this year and the fact that an application was filed shortly after their arrival. It is, at least, open to infer that the mother entered into the agreement with the father in the United States in May 2006 with, if not a premeditated plan to retain the children, at least mindful of the prospect that she may file such an application shortly upon her arrival in Australia.

41. I take account of the significant body of evidence yet to be fully tested, but to the effect that the children did, in fact, appear to be doing quite well in the father's care prior to their wrongful detention in Australia. Included in that evidence is some inherently reliable objective evidence relation to their schooling

and general well-being.

42. In the exercise of my discretion, I also take into account the reasons given by the children during the course of the family consultant's evaluation. I discern from the reasons that the children were reflecting the fact that they greatly missed their mother when she chose to travel to Australia. That decision left them unhappy and living with their father who, no doubt, by comparison, was untested as a parent. He was not as available to these children as their mother had been. She had not only cared for them, but had educated them for the three years prior to her departure.

43. They describe being unhappy with their new schools and unhappy with the fact that they lived in apartments and moved around from time to time whilst the father was apparently endeavouring to put in place his life, his work and proper care arrangements after the mother's abrupt departure.

44. As to the strength of those wishes, I note that the counsellor observed that there was an alignment with the mother and that some of the children's statements appeared to be skewed by limited objectivity, limited insight and limited maturity. Ms B described it as being akin to the mother as being all good and father as being all evil. Such assertions are hardly likely to be a fair assessment of the children's experience with each of their parents throughout their lives.

45. Again, paragraph 24 of the report refers to the unhappiness that these children experienced whilst they were apart from their mother. As Ms B said in paragraph 25, given this, it was quite likely that no matter what the father did, it was never going to be enough to meet the void the children felt when their mother left them and moved to Australia.

46. It seems to me that, in terms of the exercise of my discretion and taking into account the children's expressions in this context, I should take into account that such statements are borne, in part, as a consequence of these children being very distressed by their mother's abrupt decision to leave them. They had dealt with that, at least in part, by choosing to blame their father for the mother's decision and their inability to be with her. As a bystander and applying some objectivity to the exercise, that would indeed appear to be a very harsh view of the reality of the situation. In evaluating the weight to be given to the children's expressions, I must apply more rational thinking to the history of the matter than is available to these children, having

regard to their age, their maturity, and the fact that they are operating in a circumstance where they are emotionally fragile as a result of the disruption to their lives in recent years.

47. Further, in the exercise of my discretion, I do take into account the content of the father's affidavit material. He swears on oath that, having regard to the contents of the report of Ms B, he acknowledges the possible difficulties for the children, particularly if they had become aligned with their mother upon some proper basis, or been induced to do so. He proposes to this Court that the first and preferred course should be to enable the children to return to the United States in the company of their mother, and thereafter to remain in the mother's primary care in accommodation provided by him, with the mother to receive financial support by way of spousal maintenance and further financial support by way of child support.

48. He also proposes that, in order to meet the children's difficulties, they should be assisted by having available to them professional counselling, and he has indicated, not only does he support that notion, but that he would be prepared to meet the costs of that counselling. He also indicates to this Court that he would support the appointment of a guardian ad litem to represent the children's interests. That is one of the matters I have taken into account in the exercise of my discretion. It is, at the end of the day, not an insignificant aspect of the reasons I have come to my conclusions, but I do not want it to be seen as being the decisive factor.

49. The other matters I have earlier referred to, in my view, serve to indicate that this is not one of the exceptional cases where there is a clear and compelling argument to uphold the objection and to frustrate the purpose of the Convention.

50. However, I am satisfied that it is in these children's best interests to have the opportunity to be accompanied by their mother and to remain in her primary care, pending determination of any applications in the United States. I propose to include a notation which incorporates the matters referred to by the father in paragraph 70 of his affidavit.

51. I reiterate that I do not intend that the children's return to the United States be conditional upon such matters, but I have been informally advised, as I would have hoped and expected, that it is the mother's intention to return with the children to the United States. Like her, I am satisfied that that is the proposal which least exposes the children to emotional harm of the two options

> that I am considering. The other option is an order that they return forthwith without the mother.

15. The ex tempore judgment requiring the return of the children was delivered on 8 December 2006. It envisaged that the children would leave Australia on or before 10 January 2007. That order was subsequently stayed pending the outcome of the appeal. We heard the appeal on 31 January 2007 and announced that we would dismiss the appeal and publish our reasons for judgment later. We extended the time for the removal of the children from Australia to 5 February 2007.

16. It should be noted that we were told by Mr Cooper on behalf of the mother that his client would accompany the children back to the United States although how long she stayed with them in the United States was a matter about which she appeared to have not yet made any decision.

The appeal

17. Mr Cooper, who appeared on behalf of the mother, submitted that Jordan J's exercise of the discretion had miscarried for several reasons which included that:

> Jordan J held that the principles of the Convention act like a "trump" consideration in the exercise of the discretion, unless there is a "clear and compelling case" to the contrary.

He further submitted that such an approach flew in the face of the unfettered nature of the discretion asserting that the principles of the Convention were important but were only one factor to consider and should not act as establishing an onus.

18. In his dissenting judgment in *DL v Director-General, NSW Department of Community Services and Anor* (1996) 187 CLR 640 at 688-689 when discussing the manner in which a trial judge should evaluate evidence concerning the strength of a child's wishes to determine what weight should be given to them, Kirby J said:

> So long as the judge clearly keeps in mind the limited purpose of the jurisdiction conferred, the ordinary way in which the regulations and the

> Convention are expressed to operate and the need for a clear and compelling case to sustain an objection which permits an exception to the ordinary duty to order the return of the child, it can be left to judges to deal with individual cases as the evidence requires.

19. However, in their majority judgment Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said at 661:

> However, it is to be noted that, if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [regulations]" enable it to be said that a particular consideration is extraneous. That subject matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.

20. We accept the submission that his Honour was in error in determining that there needed to be "clear and compelling" reasons to frustrate the objectives of the Convention. The Convention and the Regulations mandate the return of children in certain circumstances. There are permitted exceptions to such mandatory return. Once an exception has been established there remains a discretion to refuse to order a return. The discretion is at large and requires the competing considerations to be carefully weighed before determining an outcome. The factors to be considered will vary according to each case but may certainly include giving significant weight in an appropriate case to the underlying objectives of the Convention as stated in the preamble to the Convention, namely a desire 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.

21. As we were persuaded that his Honour's exercise of discretion was vitiated by the error so identified, it became appropriate that we independently re-exercise the discretion. There was no submission made that the matter ought

be remitted for retrial. Hague Convention cases are normally decided on the written material.

22. An application was made that in addition to the material available at trial we admit into evidence several further documents, being paragraphs 85-96 of an affidavit sworn by the mother on 12 January 2007 and exhibits “B”, “H” and “I” to that affidavit. We did not perceive that there was stringent opposition to the admission of such further evidence although its effect on the outcome remained a matter of controversy.

23. The gravamen of the mother’s further evidence is that the father told her after the return order was made that he would not honour his expressed commitment to make financial provision for her should she return to the United States with the children. She further asserted that she was at risk of prosecution in the United States for child abduction and trafficking minors across state lines.

24. Exhibit “B” was a letter from a Queensland solicitor to the mother dated 22 March 2006 advising her (inter alia) that any application to an Australian court for a residency order needed to be made “as soon as the children arrive in Australia”. It appears to clearly support the suspicions of Jordan J expressed in paragraph 40 of his reasons where his Honour said he was left with an uncomfortable feeling that the mother entered into the agreement with the father in the United States in May 2006 with, if not a premeditated plan to retain the children, at least mindful of the prospect that she may file such an application shortly upon her arrival in Australia.

25. Exhibit “H” was a letter from Dr T, a Queensland doctor who says that she has been the children’s general practitioner since August 2005. She reports that the children are “quite distressed about having to return to America and about leaving their mother”. Dr T expressed the opinion that a forced return to America would be very detrimental to the children’s mental health. She has referred the children to counselling.

26. Exhibit “I” was a report from Ms O, psychologist to whom the children were so referred. Ms O reported that the children “enjoy every aspect of living with

their mother and partner in Australia" and are extremely unhappy living with their father. She concluded that C was exhibiting symptoms of Major Depression. Her condition needed to be monitored closely and it would not be in either child's best interests to be separated from their mother and returned to their father at the present time.

27. Ms O's concerning observations need to be read in terms of the effect of the proposed return order. The father has made it clear to the Court that if the mother returns with the children he will surrender their care to her pending further proceedings in the United States. He has formally offered to provide financial support for her although she challenged the bona fides of that offer. Her counsel did not argue that without such support she could not stay in America pending the outcome of any further litigation.

28. Any decision to once again separate these children from their mother pending a further hearing would be the mother's decision, rather than a necessary effect of the return order. The order does not mandate the return of the children to their father, nor does it mandate the separation of the children from their mother. Accordingly the concerns expressed by Ms O and Dr T, especially about C's health, can be largely met by the mother ensuring she stays with the children whilst awaiting further proceedings in the United States.

29. As can be seen from the resolutions of the 5th Meeting of the Special Commission to review the operation of the Hague Convention held in late 2006, the prosecution of criminal charges against an abducting parent can act as a hinder to the prompt return of children. The Commission said:

> Criminal proceedings
>
> 1.8.4 The Special Commission reaffirms Recommendation 5.2 of the 2001 meeting of the Special Commission:
>
> *"The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw*

charges."

The Special Commission underlines that Central Authorities should inform left- behind parents of the implications of instituting criminal proceedings including their possible adverse effects on achieving the return of the child.

30. Whilst there may be cases where the impact of criminal charges arising from an abduction may cause severe detriment to the welfare of a child because the child will be likely to be separated from an appropriate caregiver, the evidence of that occurring in this case is very tenuous indeed. There is no evidence of any charges pending. The children were lawfully removed from the United States with the consent of both parents. The mother's failure to return them might amount to contempt of the 2004 judgment denying her the right to relocate the children to Australia, but the prospect of any such charge being laid and the certainty of incarceration following a successful prosecution seems entirely speculative.

31. We are of the view that the appropriate outcome in this case is that the children be returned to the United States. In reaching that view, we balance the considerations discussed below, all of which were clearly identified by the trial judge:

- The objectives and principles which stand behind the Regulations and Conventions ought be taken into account. The purpose of the treaty itself is designed to secure children against wrongful removal, or wrongful retention.
- These are American children born in the USA of American parents. The parties and the children remained in the United States of America after separation and the parties submitted to the jurisdiction of the courts in the United States of America.
- The issue of the children residing with their mother in Australia has already been determined by an American court of competent jurisdiction. As Kay J said in *Laing v The Central Authority* (1999) FLC 92-849, at paragraph 60 "it is important to ensure the integrity of the judicial process and not be

seen to reward those who seek to evade the rule of law unless the dictates of justice clearly demand otherwise."

- The difficulties now confronting these children arise essentially from the mother's decision to leave the children and move to Australia. The mother's decision to relocate was not imposed upon her, but the consequences and hardship of it were imposed upon the children.
- The father openly offered to allow the children to remain in the mother's primary care in accommodation provided by him, with the mother to receive financial support by way of spousal maintenance and further financial support by way of child support. He also proposed to meet the costs of professional counselling for the children and supported the appointment of a guardian ad litem to represent the children's interests. Although the mother raises doubts about his bona fides, we are unable to resolve those doubts in these proceedings and have not been asked to ensure the provision of funds as a necessary precondition to the children's return.
- The mother proposes to accompany the children to the United States.
- The children have strong wishes to remain in the mother's care, and any separation of the children from their mother may prove to be extremely detrimental to their welfare.
- It would seem that there is no realistic impediment to the mother remaining with the children in the United States pending the outcome of further proceedings in that jurisdiction.
- There is no reason to believe that the issues concerning the future residence of the children will not receive an appropriately speedy hearing in a court of competent jurisdiction in the United States, be that in Michigan or Florida.

32. The principle of return is especially significant when children have been retained by a parent with whom they were visiting overseas. In *Re HB (Abduction: Children's Objections)* [1997] FLR 392, Hale J said at 399-400:

> The policy of the Convention is, in my view, particularly important in cases where children come to another country for visits. It is obviously in the best interests of children whose parents live in separate countries that the parent with whom they live should feel able to send them on visits secure in the knowledge that the children will be returned at the end without difficulty. Otherwise parents may be tempted not to allow the children to come, and that would be detrimental to the children.

Similarly, in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716,

Balcombe LJ said at 731

> …It is sometimes said that the Convention was to prevent the wrongful abduction of children. It also applies expressly to the wrongful retention of children after an authorised visit. The purposes of that are fairly clear. When parents separate and they are living in different countries, it is in the highest degree important for the welfare of the children generally that the custodial parent in one country, whether the father or the mother, can send the children for visitation, access or contact (whatever it be called it embodies the same concept) to the non-custodial parent in the confident belief that at the end of that period the children will return pursuant to any agreement or order of the court which already exists.

33. Balancing all of these considerations it appeared clear to us that this was not a case in which it would have been appropriate to exercise our discretion in favour of an order dismissing the application for return of the children. These are American children whose American parents have already had extensive involvement in the American legal system. That is the appropriate jurisdiction to resolve ongoing issues as to where and with whom the children should live. The evidence concerning their capacity to progress satisfactorily or otherwise in the care of their father is predominantly available in Florida. The reasons why they have remained in America apart from their mother all appear to relate to her decision to leave that country without them when faced with a court order prohibiting their relocation. If the time has now arisen for that decision to be reviewed, the American courts are the appropriate venue.

I certify that the preceding thirty three (33) paragraphs are a true copy of the reasons for judgment of this Honourable Full Court

Associate:

Date: 15 February 2007