Hague Convention on Child Abduction for Return of Child to United States Denied

Family Court finds that retaining child in Australia was lawful as the parents intended to make Australia, not the US, their home

BACKGROUND

In the recent case of *Department of Communities, Child Safety and Disability Services v A* [2017] FamCA 4638 (17 August 2017) the Family Court of Australia heard the Director-General of the Queensland Department of Communities, Child Safety and Disability Services' application under The Hague Convention on the Civil Aspects of International Child Abduction for the return of the child to the United States of America ("**USA**").

The mother, aged 31 years, is a citizen of the United States of America. The father, aged 38 years, is an Australian citizen. The mother and father met in Las Vegas, Nevada, in May 2008 when the father was on a holiday there. In mid-February 2013, the mother learned that she was pregnant. In November 2012, after some years of maintaining communication, the mother flew to the United Kingdom ("**UK**"), where the father was living and working at the time, to visit him for a short period. The parties married in the UK on 25 March 2013. Shortly after they married, the mother and father relocated to the USA. Their son was born on 19 October 2013 in California, USA. The child became a citizen of the United States of America on his birth, and his citizenship of Australia by descent.

THE FATHER'S EVIDENCE

The father stated that they had many conversations from 2014 onwards about moving to Australia and that they came to an agreement that they would move to Australia as a family to live. The mother, however, denied that she ever agreed to relocate to Australia.

The father asserted that he and the mother agreed to start the process of applying to the Australian Government for a permanent residency visa for the mother in April 2016. He asserted that they both "actively participated in preparing this application". He also stated that they were told that it would be a six to eight month wait for the mother's visa to be granted. Whilst the mother agreed that she continued with the visa application after she discovered it had been made, the father told her he would not be able to get the $8,000 back that he had paid for it.

The father stated that they had sold many of their possessions, including many of the child's toys. He also resigned from his primary employment and applied to have access to his pension account. In addition, they left the mother's dog with the her sister and they discussed the possibility of brining the dog to Australia at a later date.

THE MOTHER'S RESPONSE

The mother stated they did not sell all their possessions as they intended to return to live in California. She also said that they kept the Volkswagen car when they left as they intended to use it again upon their return to California. Additionally, she stated that they left their family dog in the care of her sister to look after it for two months' whist they were away.

Further Evidence

On 6 December 2016, the family arrived in Brisbane, they flew to Mackay, located in northern Queensland, and then went to live at the father's parents' caravan park. On 16 December 2016, both the mother and the father signed a comprehensive enrolment form for the child to attend at a childcare centre/kindergarten in Sarina, close to Mackay. On 8 January 2017, the mother and the father had an argument and the mother decided to return to California. The mother changed the date of her return to the USA to 16 January 2017.

Within a few days of this argument, the father went to the mother's suitcase and removed their child's passport and locked it away in a cabinet in his parents' home. He did this so that the mother could not take the child out of the country without the father's permission.

On or around 12 January 2017, advice was received from the Australian Government that the mother's permanent residence visa had been approved, however, the mother was required to leave the country to collect her visa in another country. The mother then changed the booking for her return flight to the USA and rebooked it for 1 May 2017. She then booked return flights to Fiji for herself later in January so that she could leave Australia and return as required to secure her permanent residency visa.

On 21 January 2017, upon returning by herself to Australia from Fiji, the mother completed and signed her own incoming passenger card. She completed it claiming to be migrating permanently to Australia and saying that she intended to live in Australia for at least the next 12 months. The mother then obtained a Queensland Driver's Licence and began applying for jobs.

The mother obtained the child's passport from the father in early March by advising father that she required it for Centrelink purposes. On Friday 10 March, the mother picked the child up from day care and drove to Rockhampton airport, flew to Brisbane with the child and attempted to leave at the international airport in Brisbane on Saturday 11 March 2017.

On the evening of Friday 10 March, the father obtained ex parte orders from the Federal Circuit Court that placed the child's name on the Federal Police Airport family law watch list. When the mother attempted to leave Australia with the child on Saturday 11 March, she was stopped at the barrier and not permitted to take the child on the plane.

The child lived with the mother in Brisbane from that day until 4 June 2017 when he travelled to Mackay to spend some time with his father. On 6 June, the mother flew back to California. She returned to Australia early July and was present in Court for the hearing of his application.

RELEVANT FAMILY LAW PRINCIPLES

Where an application for an order that a child be returned to another State that is a signatory to The Hague Convention Against Abduction is made within one year of the child's removal from that country, or retention away from that country, and the State Central authority in the relevant jurisdiction satisfies the Court that the child's removal or retention was wrongful, the Court must, subject to certain exceptions, make the return order.

Was there a Removal or Retention?

The child was under the age of 16. He was brought to Australia on 6 December 2016, by both of his parents. Accordingly, this was not a case of alleged wrongful removal. The father argued that the Court could not, in any event, make a finding that the father had breached the mother's right to determine the child's place of residence as the child had ultimately been stopped at the airport barrier not by the father but rather by force of an order of the Federal Circuit Court. In the Court's view, it was the father who initiated the process that led to the prevention of the mother taking the child from the country on 10 March 2017 and at any time thereafter.

By initiation of the process of placing the child on the Airport Watch List, it was the father who prevented the mother from taking the child back to the USA. If there was a wrongful retention, it happened, at the very latest, when the mother was stopped from taking the child out of the country at the Brisbane Airport on 10 March.

Both parents and the child all had tickets with pre-booked flights returning to the USA on 8 February. There was dispute about whether they were always going to go back to the USA on that date, and, relevantly, as to whether any such return was going to be only temporary or permanent. That factual dispute was not, determined, it was not in dispute that the mother informed the father on 8 January that she was intending to return to the USA earlier than previously planned. She also asserted that when she told him that she also told him that she acquiesced to the child remaining in Australia with the father until the date of the pre-booked return flights to the USA on 8 February 2017. It was also not in dispute that the father told the mother, either on that same day, or within days thereof, that he had no intention of returning to the USA on 8 February 2017, or of allowing the child to return on that day.

The Court was of the view that in the absence of a finding of fact that the parties agreed before 8 February 2017 that the child was not to return to the USA on 8 February 2017. The mother argued that the child was retained in Australia by the father in breach of the mother's rights of custody in relation to the child on 8 February and at that time he habitually resided in California. The mother submitted the child's habitual place of residence was California at the time the father did not permit or cause his return there.

Was the Retention Wrongful?

The Court was satisfied that the child's retention in Australia on the relevant day would be "wrongful", within the meaning of that term as used in the Family Law Regulations, if immediately prior to the retention, the child habitually resided in the USA.

The applicant's case, relying on the evidence of the mother, was that the child was retained in Australia by the father in breach of the mother's rights of custody in relation to the child on 8 February and at that time he habitually resided in California. Reliance was placed on the mother's evidence that she, the father and the child only came to Australia in early December 2016 for a temporary visit, that they had not determined to permanently relocate to Australia and intended returning to the USA after two months to continue living in California.

The Applicant submitted that the child's habitual place of residence was California at the time the father did not permit or cause his return there. The father's case in response was that the child no longer habitually resided in the USA as at the relevant retention date, whichever that was. The father's evidence was that he, the mother and the child had relocated to live in Australia when they arrived in Australia in or around early December 2016. Therefore, the child ceased to habitually reside in the USA upon leaving California. The Court was satisfied that if the child had ceased to habitually reside in the USA upon leaving California in early December 2016, then the application must fail.

The Law on Habitual Residence of a Child

In *Lk v Director-General, Department of Community Services* ("LK"), the Court accepted that the enquiry into "habitual residence" is a broad one and to approach the term "habitual residence" only from a standpoint which describes it as presenting a question of fact has evident limitations. The identification of what is or may be relevant to the enquiry is not to be masked by stopping at the point of describing the enquiry as one of fact. If the term "habitual residence" is to be given meaning, some criteria must be engaged at some point in the enquiry and they are to be found in the ordinary meaning of the composite expression. The search must be for where a person resides and whether residence at that place can be described.

In their decision their Honours approved the following passage from the decision of the New Zealand Court of Appeal in *Punter v Secretary for Justice* [2007] 1 NZLR 40: Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and current), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration.

In *SK v KP* [2005] 3 NZLR 590 held that settled purpose is important but not necessarily decisive. It should not in itself override the underlying (this sentence is unfinished)

WHERE WAS THE CHILD'S HABITUAL PLACE OF RESIDENCE?

The Court had no difficulty deciding that the child, along with his mother and his father, habitually resided in California up until they left California on 4 December 2016. If the parents had a settled intention, as the mother asserted they did, then they left California to visit Australia and then return to their place of habitual residence in California at the end of their stay. It would be difficult, in the Court's judgement, absent a finding of clear parental agreement, to subsequently change plans and to remain permanently in Australia. There was a finding that the child did not remain a habitual resident in California on 8 February 2017 or 10 March 2017.

It was found that both parents had an intention to settle in Australia, as the father asserted this upon leaving California. As there was only a short visit back to California, in the Court's view, it was difficult to conclude that the child was not already habitually residing in Australia by January 2017. Considering the evidence of the parents and making findings about the factual matters in dispute was crucial to the determination of this application.

CONCLUSION

The Court was satisfied that when the parents left California to travel to Australia with the child on 4 December 2016, it was with the intention that they would regard Australia as their home, despite the mother's residency visa not yet being secured. The Court was satisfied that the parties were leaving California with no intention of returning to live there in the foreseeable future. This was the finding, despite the Court's understanding that there was a possibility they would return to California, possibly as early as 8 February 2017, for a short while, if circumstances required that.

The Court was satisfied that they went about taking steps to assimilate into life in Australia, including enrolling the child in a child care centre with the intention of having the child attend at the commencement of a new school year. Further, registering the child on the father's Medicare Card and applying for any Centrelink benefits they may be entitled to as parents and as a family, were sufficient evidence that as of 8 February 2017, the child was no longer habitually resident in the USA. Given this finding, the Court, therefore, was not satisfied that retention of the child in Australia by his father at that date was wrongful within the relevant provisions of The Hague Convention Regulations in Australia.

ORDERS

1. That the Application field in this Court on 11 May 2017 by the Director-General of the Queensland Department of Communities, Child Safety and Disability Services initiating proceedings under the Family Law (Child Abduction Convention) Regulations 1986 was dismissed.

2. All Previous Orders made in these proceeds were discharged.