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Case Study: Breach of Model Litigant Obligations

Walpole & Secretary, Department of Communities and Justice [2020] FamCAFC 65 (25 March 2020)

This decision by the Full Court of the Family Court of Australia (Watts, Ryan and Aldridge JJ) allowed an appeal against orders made on 29 November 2019, requiring two children, aged three and two years respectively, to return to New Zealand.

The proceedings involved interpretation of the Family Law (Child Abduction) Regulations 1986 ("the Regulations"), which give effect to the *Hague Convention on the Civil Aspects of International Child Abduction* in Australia.

The case is interesting because apart from examining Australia's obligations under the Abduction Convention, it is also one of the first cases to provide guidance as to how the Family Court might handle cases during the time of COVID-19.

The Abduction Convention provides a mechanism for the prompt return of wrongfully removed or retained children, the aim being to deter the wrongful abduction or retention of children and restore them to their usual place of residence, as well as to ensure the children's' best interests.

The Hon Justice Ainslie-Wallace, who heard the matter at first instance, found the conditions for return of the children as prescribed in the Regulations were satisfied, notwithstanding the fact that the father had a known and lengthy criminal history, the mother had repeatedly returned to the father in a complex relationship dynamic and the children had lived with and been exposed to family violence.

On appeal, the mother opposed the children's return to their father on the basis amongst other things that the totality of the circumstances in which the children would find themselves if they returned to New Zealand was unsafe and intolerable.

The decision to return the children to New Zealand in circumstances where there were strict international travel restrictions in place and Australians were prohibited from leaving the country due to the Australian Government issuing a "do not travel" ban is significant.

Moreover, the plurality (Ryan and Aldridge JJ) made a number of interesting (obiter) observations, including being critical of the role of the Secretary of the Department of Communities and Justice and its obligations as a model litigant. They said three things:

1. [At 78]: "We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The NSW Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance

with the highest professional standards. Relevantly, this includes not requiring the other party to prove a matter which the state or an agency knows to be true."

The Central Authority should have enquired into and divulged the father's criminal record in Australia and New Zealand, rather than requiring the mother and the Independent Children's Lawyer to present that information and essentially 'requir[e] the other party to prove a matter which the state or an agency knows to be true".

Further [At 80]: "Instead, it was left to the mother and the ICL to gather records from New Zealand and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious."

2. [At 81]: Consideration should be given to the powers of the Central Authority to refuse to present an application. "Regulation 14 states that a Central Authority "may" apply to the court. This is the language of discretion and carries with it the implication that a Central Authority may decide against presenting an application for a return order. We did not hear argument on the point, but we encourage the Commonwealth and Special Commissions who oversee the Abduction Convention to give this matter further consideration".

3. Reform of the Regulations should be considered in view of the *Equality Before the Law: Justice for Women* (ALRC Report No. 69, Part IV – Violence Against Women, Violence and Family Law (1994)). This Report recommended that the Regulations be amended to "…provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child". (Recommendation 9.5). [At 82]: "It seems to us, that an amendment to the Regulations along those lines coupled with an effective discretion reposed in the Requesting and Central Authorities, could only enhance the operation of the Abduction Convention and ensure that it operates as initially intended."

Justice Watts disagreed with the comments relating to the Central Authority in relation to the issue of the father's extensive criminal record. His Honour said [at 84]: "I do not join any criticism as to any lack of complete propriety and professionalism of the Central Authority. Having said that, it is regrettable in this case that neither the primary judge nor this court was provided with an entire set of NSW COPS records. Both the parties were legally represented and the ICL represented the children [i]t would be speculative to comment on who, if anybody, is to blame for that lacuna in the evidence".

https://lsj.com.au/articles/the-limits-of-the-hague-convention-in-child-abduction-cases/

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCAFC/2020/65.html?context=1;query=walpole%20[2020]%20FamCAFC%2065;mask_path=

OUR ANALYSIS

1. Procedural aspects

The decision of the primary judge of the Family Court was handed down after hearing the evidence on both sides – viz., on behalf of the Applicant and the Respondent. Evidence was also given by an Independent Children's Lawyer. http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2019/904.html?context=1;query=[2019]%20FamCA%20904%20-%20;mask_path=

In the decision at first instance, the Applicant had the onus of convincing the Family Court that the children's removal from New Zealand was wrongful. Her Honour Ainslie-Wallace opined there was no immediate prospect that a risk to the children would eventuate because the parents were unlikely to resume their relationship.

On appeal, Ryan and Aldridge JJ commented that the *"complexion of the mother's case at trial and on appeal is quite different"* [at 56]. Additionally, the evidence adduced at trial in relation to the very serious issues of risk was much better presented on appeal. Notwithstanding these differences between the decision on appeal versus the one at first instance, there were sufficient protections in place which would enable the New Zealand courts to determine the children's future living arrangements without the children being exposed to a grave risk of physical or psychological harm. Central to this was the acceptance of the mother's evidence that she had permanently separated from the father and taken necessary steps to keep him away from her and the children.

2. Model litigant obligation aspects.

His Honours Ryan and Aldridge commented that they were "troubled" by what occurred in this case. Specifically, they highlighted the need for government agencies to act with complete propriety and in accordance with the highest professional standards and this obligation extends to not putting opposing parties to the trouble of having to prove matters in situations where government agencies know those matters to be true.

The judges were critical of the Respondent agency for failing to disclose certain information about the father's criminal history that it was aware of, thus effectively forcing the Appellant mother to have to go to the trouble and expense of obtaining the father's records from overseas in circumstances where time constraints were tight and the Appellant was on a limited income.

What happened in this case is exactly the sort of scenario that Appendix B of the Legal Services Directions 2017 (Cth) ("the Directions") seeks to avoid. Government agencies have an obligation to act as model litigants and this obligation extends to keeping the

costs of litigation to a minimum by not requiring opponents to prove matters which the agencies know to be true and/or not taking advantage of opponents who lack the resources to litigate a legitimate claim. (Refer to Paragraphs 2(e) and 2(f)) of the Directions).

The Directions and OLSC Guidance Notes 7 and 11 provide a standard of behaviour that Commonwealth government agencies should adhere to. Government agencies are required to report to the Office of Legal Services Coordination on *significant issues* that arise in the conduct of litigation and failure to report on those issues can result in the Attorney-General imposing sanctions for non-compliance with the Directions.

Commonwealth government agencies are required to report significant issues to the Commonwealth Attorney General's Department as soon as they emerge, and judicial criticism no doubt falls within that purview.

One only has to look at the Commonwealth Attorney-General's website and peruse its annual reports to see that this level of reporting is not currently happening in the public arena.

POINTS FOR DISCUSSION:

i. What ***should*** happen in situations when the judiciary makes a negative comment about the conduct of a particular Commonwealth government agency in court proceedings?

ii. If particular Commonwealth government agencies are found to be in breach of their obligations as model litigants, are there any circumstances in which those breaches and the details of those breaches should be ***protected*** from public scrutiny?

iii. Given that all Commonwealth government agencies have an obligation to report to the Attorney General's Department on significant issues that may arise during the conduct of litigation, ***what degree of transparency in reporting*** should there be as far as reporting to the general public is concerned?