

RELOCATION, CHILD ABDUCTION AND WHAT IS IN THE BEST INTERESTS OF THE CHILD

In a recent Family Court decision, the Family Court, looking at both Australian Family Law and the Hague Convention relating to child abduction considered that an Australian mother married to an older German father could in certain circumstances remain in Australia with the child of the marriage notwithstanding that the husband had brought applications in Germany for the return of the child.

From a parenting standpoint the case was very interesting because it was not disputed by the mother but the Court could exercise its discretion to return the child to Germany but the concern was because the mother could be psychologically harmed in Germany and that this would have an impact on the child.

The State Central Authority which is the relevant body that brings child abduction type proceedings, *“bears the burden of proving that the removal is wrongful as defined...(and) the mother concedes that the child has been wrongfully retained in Australia”*.

However what the mother had said in the proceedings gave the Court an opportunity to look at whether a return order subject to the provisions of the regulations that apply, might be used to refuse an order to return the child if the mother established that there might be a greater 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.

The child might also have an objection and show a strength of feeling beyond the mere expression of a preference or ordinary wishes. **But the return of the child would not be permitted by fundamental principles of Australia relating to protection of Human Rights and Fundamental Freedoms.**

The Court decided that it would deal with the matter in good time but not expeditiously because that might lead to an insufficient hearing of the issues and the dispute. The father of the child had also brought divorce proceedings and property proceedings including division of pension rights in Germany complicating matters (because the parties could not have proven that they are living separately for at least one year under Germany law, they could not be divorced).

Complicating the proceedings were that parents did not agree that the child would be represented by a ***guardian ad litem***.

The court appreciated having to see the mother in the witness box and it regarded her as *“a competent and thoughtful witness although somewhat overwhelmed by the whole experience. Her emotional and mental fragility was also obvious. She appeared to make an effort to answer question thoughtfully, comprehensively and most importantly honestly.*



She made concessions when it was appropriate to do so. I am satisfied she is a truthful witness.” There were doctors called but some of them were limited to assessments of the mother and one on the observations of the child and her relationship with the mother.

The mother had been the primary care giver but the mother’s mental health became an issue in the proceedings and particularly how that would impact upon the child of the marriage in the event that the mother were to accompany the child to Germany (which was a central issue in the case).

The history of the mother’s mental health issues were set out in evidence in the proceedings and wasn’t the subject of any challenge in a real sense nor was the mother’s mother or sister’s evidence challenged. It was clear that she suffered from depression and anxiety since 2007 although only formally diagnosed with depression in early 2011. As she expressed it, *“I burst into tears often, for no reason, I often felt frightened and worried about everything. I was absolutely miserable, I felt trapped, and alone, vulnerable and completely hopeless about the future.”*

The mother’s mother visited the mother in Germany in September 2012 and was shocked at her appearance underweight and mental state and it was amazing that they managed to go to Australia on holidays.

The mother in evidence stated that she was:

- (a) the victim of family violence perpetrated by the husband;
- (b) abused by the husband who often got drunk;
- (c) was emotionally and psychologically abused by the husband in front of the child including calling her name putting her down and contradicting her in front of the child;
- (d) had her money and access to money controlled by the husband;
- (e) was repeatedly told by the husband that she should be institutionalised and the child would get over the loss of the mother;
- (f) was criticised by the husband and isolated from her family, given limited access to the computer and prevented from using Skype to make contact with her family;
- and
- (h) the husband made life difficult for the wife to make friends in Germany as a result of which the mother felt socially isolated, initially speaking little German, not being permitted to work and then having regard to gaining ultimate employment, finding that her employment was not commensurate with her academic qualifications.

The State Central Authority’s case was not that the mother was not and had not been depressed but that she had not met the burden of proving that there was a great risk that the child would be exposed to psychological harm or placed in an intolerable situation



(particularly in light of safeguards could be in place if a return order was impose) but in any event having regard to the evidence of the Judge heard, the Court was satisfied that whatever factor led to the wife's depression, it was now a question of her perception of her experience in Germany and how that it was likely to impact upon her in the event that she might have to return, that was a trigger for a further major depressive episode.

The Court felt that if the mother could be assisted to return by practical arrangements such as securing independent accommodation in Germany, ensuring that she had access to necessary finances for herself and the child and being provided with significant support if she is living independently from the father, then there would be no reason why she could not have access to support regularly via telephone or video phone such as she has in Australia. Evidence was put before the Court but although a return to Germany might be expected to be less stressful for the mother in circumstances where she no longer in relationship with the husband and if arrangements were put in place about financial support and accommodation, the remaining issue would be what the mother's emotional reaction to a return in Germany would be like and whether she *"would ...(be)...likely ...(to)...suffer ongoing anxiety and depression whether she is with ...(the husband) or not"*. Evidence was given that they would be a negative experience. Accordingly the Court considered that it was not possible to fashion safeguards which would adequately protect the mother from a major depressive episode and ultimately the child from the effects of the deterioration in the mother's mental health. This was clearly significant.

The risk was entire 50 to 60% in relation to the mother and that was sufficiently high for the court to avoid ordering her to return to Germany with the daughter.

The Court relied upon a recent 2001 High Court decision that exposing the child to a grave of physical or psychological harm or an intolerable situation enable the Court in its discretion to refuse to make an order for the return of the child to another jurisdiction.

The Court then looked at the risk to the child and considered that this was the determining factor rather than the risk for the mother. All expert evidence support the proposition that the mother's depression and anxiety would be likely to impact upon the mother's parenting capacity and lead to the mother being *"withdrawn, irritable, emotional, teary and fragile and potentially disconnected from the child, and if not disconnected, then the mother might possibly find herself becoming more dependent upon ...(the child)...and potentially the child takes on a carer of a role in that situation...which would be inappropriate in a child of (...the child's) age. Accordingly the Court concluded that the risk to the child was a psychological risk of experiencing the deterioration of her mother's mental health and the Court was satisfied that even if the mother was well intentioned, the impact of her increasing anxiety and depression was likely to overwhelm the best of intention. ..."*

Notwithstanding that the mother was a responsible and well intentioned parent, she was not able, without the assistance of her mother and her sister and upon her return to Australia, to return to psychiatric or psychological assistance she required. The fact that

the husband might be able to assume primary care of the child in the event that the mother did seek his assistance would not (...in the view of the Court)... lessen that psychological risk. According to the Court considering the deterioration to the mother's mental health if she were to return to Germany would expose the child to a grave risk of psychological harm and otherwise placed the child in an intolerable situation.

Interestingly the wife had given evidence as to what she would require in the event that the Court in exercising its discretion, ordered that the child return to Germany. The Court said the situation awaiting the child upon return to Germany was relevant and she sought that the father arranged a two (2) bedroom fully furnished apartment for the wife and child within 50 kilometres of where the husband lived in Germany and the husband was to pay €15,200.00 to be held in trust and paid out for air fares for the mother and daughter but also sought further orders to restrict him from coming near her or her place of work or residence at not to pursue any criminal proceedings against her and pay child maintenance of €360.00 pending a decision of the German Courts and also to deposit a lump sum of €8,400.00 to cover the monthly rental of the accommodation. The husband opposed some of these orders so there would have been significant uncertainty and although it was submitted on behalf of the State Central Authority that the child should be returned to Germany subject to the husband satisfying the conditions to which the Court referred, the

Medical Experts suggested that the mother would recover in about 6 to 9 months provided that she remained in Australia and the suggestion was made in expert evidence that a return to Germany would be a trigger deterioration of the mother's mental health with consequential harm to the child.

The court concluded that the child was wrongfully retained in Australia however it was satisfied that to order the child's return to Germany in a likelihood of deterioration in the mother's mental health would expose the child to a graver risk of psychological harm or otherwise place her in an intolerable situation and as a result the Court's discretion was exercised in favour of the wife and child remaining in Australia.

As will be seen, this sort of decision highlights the issues where an Australian parent lives overseas and comes back to Australia with the child and problems ensue in the marriage.

The issues under the Hague Convention about child abduction have to also be balanced against the welfare of the best interest of the child and sometimes it appears in so doing, one has to take into account the welfare of the mother.

Goodwill Relations can help chart a course through this minefield to enable parties to come to a mediated solution for the benefit of the child of the marriage.