Rachel Carson, Sharnee Moore and Rae Kaspiew

Child representatives in Hague Convention matters

A recent case in the High Court of Australia and the Family Court of Australia

The High Court of Australia recently considered the issue of separate child representation in matters arising from Australia's obligations under the *Convention on the Civil Aspects of International Child Abduction* (the Child Abduction Convention), and held that the absence of a child representative did not constitute a denial of procedural fairness. In *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest, one of the judges of the Family Court of Australia & Ors* [2012] HCA 471,[1] the Court held that a child's view, and an assessment of the strength of that view and the maturity of the child, is adequately transmitted to the court via the appointment of a family consultant or other means.

The High Court proceedings arose in the context of several Family Court of Australia orders made by Forrest J (the First Defendant) concerning the return of the children to Italy, the place of their habitual residence, under the Family Law (Child Abduction Convention) Regulations 1986 (the Child Abduction Regulations). The events that surrounded the making of the (then) final return order by Forrest J were extensively publicised in the news media, and it is not the purpose of this article to add further commentary on those events. See Box 1 (on page 107) for a case chronology.

High Court decision

In *RCB*, the Plaintiff (the aunt of the children subject to the Family Court proceedings acting as litigation guardian) argued that, although s 68L(3) of the *Family Law Act 1975* provides that the court may order a child's interests be independently represented by a lawyer in Convention matters, the restriction of this mechanism only to "exceptional circumstances" compels or allows the court to function contrary to the rules of natural justice. That is, that if a child is not routinely permitted to exercise a right to participate in the proceedings—and to be heard—via direct legal representation, the court has abdicated its responsibility to afford natural justice to that child.

A further limb of the Plaintiff's argument was that the appointment of an Independent Children's Lawyer or preparation of a family report do not adequately meet the requirements of natural justice, as each of these mechanisms presents the view of the child through the filter of a third party whose role is not to advocate on behalf of the child, but to assist the court to form a view as to the child's best interests.

Conversely, the Second Defendant (Director General, Department of Communities, Child Safety and Disability Services, the body responsible in this instance for managing the Hague Convention proceedings) argued the *Family Law Act 1975* makes sufficient provision, both generally and specifically with respect to Hague Convention matters, to ensure the views of a child are put before the court where it is appropriate and warranted. That is, it would be erroneous to start with the assumption that a child should always be separately represented because there are a range of mechanisms, used at the discretion of the court, to enable the views of the child to be heard. The Second Defendant argued the absence of separate representation for the children in the matter at hand did not represent a denial of natural justice, but the appropriate operation of the rules in a case where the "exceptional circumstances" requirement was not made out.

In a unanimous decision, the High Court rejected the argument made on behalf of the children that natural justice required that they be represented by a legal practitioner bound to act on their instructions. It made the following observations:

> This contention assumes that each child can be equated with a capable adult. It assumes that each child was capable of giving instructions to the ends described in the contention. (par. 51)

> These assumptions are factually false in respect of many children. And they are legally incoherent in respect of most children. Contrary to the assumptions, unlike most capable adults, a child is almost invariably under the control of other people who owe the child legal duties. Inevitably, that child is vulnerable to their influence (par. 52).

Hague Convention proceedings in the family law courts: Key issues

Legislative framework

The question at the heart of these proceedings was whether the children should be returned to Italy. The Family Court proceedings concerned questions of jurisdiction under the Hague Convention, which is used to determine where a matter involving a dispute between parties in different signatory countries should be heard in circumstances where a child has been unlawfully removed (or retained) from their home country. They are not proceedings to determine broader questions in relation to the parenting arrangements for the child and do not involve the exercise of a best interests discretion. In distinguishing the matter from a domestic family law parenting proceedings, Forrest J noted in the decision of

3 October 2012[2] that it was not the Court's responsibility to determine the children's best interests or whether the children were better off living with one parent over another, and that to have done so would have been an error at law [4].

As a party to the Child Abduction Convention, Australia has obligations in accordance with the objects of that Convention to:

- secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Section 111B of the *Family Law Act 1975* and the Child Abduction Regulations set out the laws which give effect to Australia's Convention obligations.

Box 1: Background and case chronology

The children's mother is of Australian origin and the children's father is an Italian citizen. The children were born in Italy and lived there until their mother brought them to Australia in 2010. The children's parents separated, and in 2008, they made a separation agreement, in accordance with Italian law, to have joint custody of their four children (now aged between 9 and 15 years). In June 2010, the parents agreed that the mother was to bring the children to Australia for a one-month holiday. The mother and the children subsequently remained in Australia in contravention of the separation agreement.

In February 2011, at the request of the father, the Department of Communities, Child Safety and Disability Services filed an application under regulation 14 of the Regulations seeking a return of the children to Italy. The mother opposed the return and claimed, among other things, that the children objected to returning to Italy. Following the preparation of a family report and submission of other evidence as to the children's views by the mother, Forrest J ordered on 23 June 2011 that the children be returned to Italy. His Honour found that the mother had not made out any of the defences to return under the Regulations.

The mother appealed the decision of Forrest J to the Full Family Court. This appeal was dismissed on 9 March 2012. On 4 May 2012, Forrest J ordered that the children be returned to Italy on a date not before 16 May 2012. In light of evidence that the children had already been relocated in contravention of that return order, on 14 May 2012 Forrest J issued warrants for possession of the children pursuant to regulation 31 of the Regulations. These orders also stipulated that the children should be placed in foster care pending their return to Italy.

On 15 May 2012, the mother applied for a discharge of the return orders under regulation 19A of the Regulations. On 16 May 2012, the children's maternal aunt sought leave to intervene in the application to discharge the return orders as litigation guardian for the children. Forrest J dismissed each of these applications.

On 21 May 2012, Queensland Police located the children in the care of their maternal great-grandmother. The mother had maintained she was unaware of their whereabouts. On that same day, the children's maternal aunt, acting as their litigation guardian, made an application to the High Court of Australia, invoking the jurisdiction conferred by section 75(v) of the Constitution, seeking prohibition, certiorari and injunction with an intended aim of defeating the return order. On 25 May 2012, Kiefel J ordered that the matter be referred to the Full Court of the High Court.

On 26 June 2012, the mother filed a further application to discharge the return orders as well as the other orders made by Forrest J that the children live in foster care. The children's maternal aunt sought to be appointed as the children's case guardian pursuant to rule 6.10 of the *Family Law Rules 2004*. The children sought, pursuant to section 92 of the *Family Law Act 1975*, to intervene in the proceedings via their case guardian. The children wished to agitate a case precisely in the same terms as that put to the court by their mother. On 6 July 2012, Murphy J made orders that the children be returned to the care of their mother pending determination of the proceedings in the High Court, but refused the application that the aunt be appointed as a case guardian and also refused the children's application to intervene in the proceedings via their case guardian.

On 7 August 2012, the High Court dismissed the proceedings initiated by the maternal aunt, acting as the children's litigation guardian. Following the High Court decision, the mother filed a further application in the Family Court for discharge of the return orders made by Forrest J and, after seeking new reports from the family consultant, on 3 October 2012 Forrest J dismissed the application and ordered the children to return to Italy.

On 5 October 2012, the children returned to Italy. The mother remained in Australia.

In *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485, at the request of the children's father, the (now) Queensland Department of Communities, Child Safety and Disability Services initiated proceedings to have the children returned to Italy under regulation 15 of the Regulations. Pursuant to regulation 16 of the Regulations, where a child has been "wrongfully" removed, and the application is made within one year of the child being removed, a court must order the return of that child to the jurisdiction of their habitual residence. A removal is wrongful if the person seeking the child's return had custody rights in relation to that child, was exercising those rights (or would have exercised them if the child had not been removed), and the removal breaches those rights.

A court may refuse to make a return order if the person opposing the return satisfies one or more of the exceptions set out at regulation 16(3) of the Regulations. Relevantly in this matter, the exceptions include where a child (a) objects to being returned; and (b) the objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; and (c) has attained an age and degree of maturity at which it is appropriate to take account of their views.

Additionally, once a return order is made, an application can be brought under Regulation 19A for the order to be discharged. The scope for discharging an order is limited to circumstances where (a) the parties consent to the order being discharged; or (b) there are new circumstances that make carrying out the order impracticable; or (c) there are exceptional circumstances; or (d) the day on which the application for discharge is made is more than one year after the return order was made or related appeal determined.

Where proceedings arise under section 111B of the *Family Law Act*, section 68L(3) of the *Family Law Act* provides that a court may order that the child's interests be independently represented by a lawyer if there are exceptional circumstances. For the purposes of both regulation 19A of the Regulations and section 68L(3), what constitutes exceptional circumstances is at the discretion of the court, but is often treated as something more than "unusual".[3]

Key issues

In the earlier Family Court proceedings (reported as *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485), the mother put forward several arguments opposing the application for return orders, including that the children objected to returning to Italy. Forrest J ordered reports from a Family Consultant, and the mother adduced evidence from a psychologist who interviewed the children in order to ascertain their views. No order for an Independent Children's Lawyer was made as, pursuant to section 68L(3), Forrest J found there were no exceptional circumstances. Forrest J notes in the decision ordering the children's return that, although the children had expressed a preference to remain in Australia with their mother, "I do not find that the children's objections show a strength of feeling beyond the mere expression of a preference or of ordinary wishes" [118].

Protracted original and appellate proceedings followed the making of this return order by Forrest J. The central, but not necessarily sole, issue in each of these proceedings was the children's objection to being returned. Interestingly, the issue of procedural fairness that formed the basis of the High Court appeal was not raised in earlier proceedings. In the ultimate decision on 3 October 2012 *Garning & Department of Communities, Child Safety and Disability Services and anor* [2012] FamCA 839, Forrest J observed that the strength of the children's objections had increased in the twelve months or so between the original return order and the time the final appeals were heard. This was noted as being unsurprising, given the circumstances of the matter [43]. Forrest J was critical of the conduct of the mother and maternal relatives (particularly the maternal great-grandmother) and was cognisant of the influence of their conduct on the children's views [e.g., 49–50]. Forrest J also noted that a significant reason for the children's objection to returning was a belief that the mother could not return with them, but found this to be an insufficient reason to avoid their return [53].

Apart from the appellate proceedings, the mother also made several applications, pursuant to regulation 19A of the Regulations, that the return order be discharged. These applications principally relied on two of the available exceptions: that carrying out the order is impracticable and/or there are exceptional circumstances that warrant discharging the order. Ultimately, there were two elements to the mother's arguments on these issues. The first was that the strength of the children's objection manifested in "escalating psychological distress", which constitutes an exceptional circumstance that justifies discharge of the order [44]. The second was that the mother was unable to return to Italy for both economic reasons and a fear of being arrested, criminally prosecuted and imprisoned for having retained the children in Australia. Forrest J dismissed each of these grounds as unfounded, unexceptional or not genuine impediments to return. Forrest J noted the decision of Butler-Sloss LJ in *Re C (A Minor) (Abduction)*[4] in which her Ladyship stated that, in a situation where a risk of harm to a child is created by a parent who is refusing to

accompany that child back to their country of habitual residence, the parent could not then rely on that risk to defeat an order of return. In relation to the mother's economic circumstances, Forrest J had made the original return order conditional upon a cash payment by the father to the mother to assist with her immediate financial support upon arrival, should she opt to also return with the children [51, 58–59].

The original order thus stood and the children were returned to Italy on 5 October 2012.

How can social science research be used in judicial determinations?

The Family Violence Best Practice Principles acknowledge that courts may be assisted by evidence about current social science and medical research when determining the effects of family violence on "child development, child health and parental capacity" (Section F). The question arises as to how this evidence may be used by judicial officers in family law disputes.

The Full Court of the Family Court of Australia has recently considered the question of the admissibility of academic opinion in *McGregor and McGregor* [2012] FamCAFC 69. In this case, Bryant CJ, Faulks DCJ and Ainslie-Wallace J upheld an appeal by a father against a decision of the Federal Magistrates Court, in circumstances where the parenting orders were made with reliance on academic literature about "parental alienation". Federal Magistrate O'Dwyer referred to the academic literature summarised in Fidler and Bala (2010) when concluding that the case before him was a "classic case of parental alienation perpetuated by the husband against the wife" [15] (citing [41] of the Federal Magistrates reasons). Federal Magistrate O'Dwyer accepted the mother's claims that "the father had been aggressively violent, both physically and verbally to her and that he had caused the children to behave in a similar way" [9].

The Full Court held that Federal Magistrate O'Dwyer's findings of fact that the father's behaviour had encouraged the children were not impugned. Rather, the finding based on these facts was challenged. The Full Court held that academic literature that underpinned Federal Magistrate O'Dwyer's finding that the father had alienated the children from their mother had not been properly admitted into evidence, therefore depriving the father of an opportunity to make submissions about this evidence.

The Full Court provided guidance for the proper approach to admitting material such as academic literature as evidence in proceedings for parenting orders. The Full Court stated that where "evidence of an opinion is to sought to be tendered, a judge must carefully address the admission of such opinion evidence and the weight to be afforded it" [88]. Accordingly, a judicial officer must first be satisfied that the opinion evidence is both relevant and not unfairly prejudicial (pursuant to s 55 and s 135 of the *Evidence Act*), and then must evaluate the appropriate weight to accord to the evidence.

The Full Court allowed the appeal and remitted the matter to be reheard by another Federal Magistrate on the basis that:

- the academic literature had not been properly tendered;
- no consideration had been given to whether it should be excluded and, if not, what weight should be accorded to it; and
- the father had not been provided with an opportunity to make submissions about the academic literature.

Interpretation of the new family violence provisions

The new family violence provisions introduced by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), discussed in the previous issue of *Family Matters* (Issue 90, p 106) have been interpreted in *Carra and Schultz* [2012] FMCAfam 930, a recent decision of the Federal Magistrates Court.

The father in this case filed an application seeking orders to spend time with his daughter (six years of age), together with a Notice of Child Abuse, Family Violence or Risk of Family Violence. The father alleged that the mother had engaged in family violence (according to the revised definition) by failing or refusing to allow him to spend time and communicate with his daughter, save for the occasional telephone call.

The revised definition of family violence introduced into the *Family Law Act 1975* (Cth) by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) provides that family violence "means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful" (s 4AB(1)). A selection of non-exhaustive examples are provided in s 4AB(2) and are as follows:

- assault;
- sexual abuse;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;

- unreasonably denying the family member the financial autonomy that he or she would otherwise have had;
- unreasonably withholding financial support to meet reasonable living expenses;
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Federal Magistrate Hughes stated that the examples do not form part of the definition and that presumably their inclusion "was designed to have an educative effect by illustrating the types of behaviour which might constitute family violence or exposure to it" [6]. Federal Magistrate Hughes held that the father's reliance on s 4AB(2)(i):—"preventing the family member from making or keeping connections with his or her family, friends or culture"—was misconceived. It was further held that the "withholding of time or communication with a child, *without more*, does not constitute family violence" (emphasis added) as the "essence of the definition of family violence is behaviour which '*coerces or controls*' a family member '*or causes [them] to be fearful*'" [7]. The critical element identified by the Federal Magistrate in this case, was that there was no evidence that the mother was trying to coerce or control and there was no evidence that the father felt fearful. Indeed, it was held that on the father's own material there "may be good reason" for the mother preventing contact.

Federal Magistrate Hughes contrasted the case before her with a hypothetical scenario involving a parent fleeing from family violence who is prevented by the other parent from communicating with their child, identifying that this could amount to family violence if it was a measure used to coerce or control the fleeing parent or to cause them to be fearful for their safety or that of their child.

The father in the present case was ordered to withdraw his Notice of Child Abuse, Family Violence or Risk of Family Violence because if "every parent who alleges the other is withholding a child files such a Notice, regardless of whether or not there is associated coercive or controlling behaviour, the child protection authorities will be swamped with Notices and have their genuine child protection work hampered" [10].

Changes to the Federal Magistrates Court

The Federal Magistrates Court will be known as the Federal Circuit Court of Australia and the title of Federal Magistrates will be replaced with Judge, following the passing of the Federal Circuit Court of Australia Legislation Amendment Bill 2012 in the Senate on 19 November. The changes are expected to commence in the first half of 2013.

The changes were made following a consultation process with the Federal Magistrates Court announced by the Attorney-General on 8 June, following the release of the *Strategic Review of Small and Medium Agencies in the Attorney-Generals Portfolio: Report to the Australian Government* (Skehill Review) discussed in *Family Matters* 90 (p. 108).

Federal Attorney-General Nicola Roxon announced the proposed changes on 13 September 2012. Ms Roxon explained that changes would better reflect the Court's role in the federal judicial system, highlighting its program of regular court circuits in regional and rural Australia, with the title of Judge "better reflect(ing) the role and responsibilities of a federal judicial officer which is significantly different from that of a state or territory Magistrate" (Roxon, 2012a).

When introducing the Bill for a second time, Ms Roxon explained that from the outset, the court has "actively pursued ways to provide court services to communities that experienced difficulties in accessing justice—whether that be due to low socio-economic conditions, remoteness or lack of services and facilities" (Roxon, 2012b). This amendment and other measures (including an injection of $38 million over four years to the Federal and Family Law Courts via a change in fee structures) are part of a wider federal courts reform package being undertaken by the Gillard Government.

Announcement of additional funding for children's contact services nationwide

Sixty-three contact services across the country will receive a "one-off" funding boost of over $1 million dollars ($1,065,359), announced Federal Attorney-General Nicola Roxon on 6 September. This provision of additional funding was identified as enabling an increase in services providing a "safe and child-focused venue for supervised visits and changeovers" for families going through separation and divorce (Roxon, 2012c). Of the 63 services receiving this additional funding, seven are

in New South Wales, nine in Victoria, six in Queensland, four in Western Australia, four in South Australia and one each in Tasmania, the Australian Capital Territory and Northern Territory.

Release of the third edition of the Family Violence Best Practice Principles

The Family Court of Australia and the Federal Magistrates Court of Australia have released a revised edition of the Family Violence Best Practice Principles, taking into account the recent legislative amendments introduced by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) that place greater emphasis on recognising and responding to family violence.

The Best Practice Principles provide practical guidance to courts, legal practitioners, litigants and others involved in family law matters involving issues of family violence and/or child abuse. The principles were first introduced after the major 2006 amendments to the *Family Law Act*, and while they are voluntary and do not operate as a fetter to judicial discretion, they provide a detailed (although not exhaustive) checklist of considerations in cases involving family violence or child abuse or the risk of family violence or child abuse in family law cases.

This revised edition of the principles reflects the legislative changes to the definitions of "family violence" and "abuse", as well as the changes to the statutory framework within which the principles operate. (See *Family Matters* 90, p. 106, for summary of the key measures introduced by they *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).) In addition to accommodating the revised s 60CC considerations, the changes to the principles incorporate, for example, the obligations arising from s 67ZBA and s 67ZBB. Together, these provisions require the filing of a Notice of Child Abuse, Family Violence or Risk of Family Violence where family violence or risk of family violence is alleged, and the courts to take prompt action to protect the child and to facilitate the timely gathering of evidence.

This latest edition of the Family Violence Best Practice Principles is available at: <www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc>.

Endnotes

1 In Family Court decisions, the matter is reported as *Garning & Department of Communities, Child Safety and Disability Services*. See, for example, n ii.

2 *Garning & Department of Communities, Child Safety and Disability Services and anor* [2012] FamCA 839.

3 Refer to the discussion in *Garning & Department of Communities, Child Safety and Disability Services and anor* [2012] FamCA 839 [19-22].

4 [1989] 1 FLR 403.

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Family Law Act 1975 (Cth)

Family Law (Child Abduction Convention) Regulations 1986

Garning & Department of Communities, Child Safety and Disability Services and anor [2012] FamCA 839

Federal Circuit Court of Australia Legislation Amendment Bill 2012 (Cth)

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RCB as litigation guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest, one of the judges of the Family Court of Australia & Ors [2012] HCA 471