Robert Glade-Wright's family law case notes

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DECEMBER

HAGUE CHILD ABDUCTION CONVENTION – Mother ordered to return child to NZ – Conditions imposed on father set aside

In *Arthur & Secretary, Department of Family & Community Services and Anor* [2017] FamCAFC 111 (29 June 2017) the mother, who retained the parties' child in Australia after a visit, was ordered by the Family Court of Australia to return the child to New Zealand under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth). The Full Court (Bryant CJ, Thackray & Austin JJ) dismissed the mother's appeal against that order but allowed the father's cross-appeal against conditions imposed in a subsequent order.

The conditions were ([60]) that the father (who in 2013 was granted supervised contact in NZ) pay for the mother's rental accommodation in NZ for two months (and bond); undertake to pay her NZ$535 per week until she began receiving welfare payments; pay all child support obligations in Australia and NZ; and undertake to provide his employer with a copy of an existing protection order and not use any firearm until further order of the NZ Family Court.

The husband argued that the conditions were ultra vires or made without considering his meagre financial position, frustrating the return order.

The Full Court said ([69]) that reg 15(1) confers the power to impose a condition the court considers 'appropriate to give effect to the Convention', citing ([76]) an English case *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 at 1025 in which Butler-Sloss LJ said that "conditions or undertakings should operate only until the courts of the country of habitual residence can become seized of the proceedings brought in that jurisdiction"; "must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations"; and "courts must be careful not … to usurp … the functions of the court of habitual residence."

The Full Court concluded ([94]):

> " … [H]is Honour erred in failing to recognise that the conditions would result in the child not being returned to the country from which she was wrongfully removed, and that they therefore did not satisfy the requirement that they be 'appropriate to give effect to the Convention'".

PROPERTY

Long separation under same roof – Wife bought land five years after parties separated finances – Judge erred in finding contributions by husband

In *Zaruba* [2017] FamCAFC 91 (12 May 2017) the Full Court (Bryant CJ, Thackray & Murphy JJ) heard the wife's appeal against a property order made by Moncrieff J of the FCWA. The parties separated their finances in 1988, divorced in 1996 but lived separately under the one roof until 2005. The wife gave birth to twins in 1996 to another man, moving out with her children in 2005.

In 1993 she bought land at Mindarie (a Perth suburb) for $74 000 paid by a friend Mr S. A home was built in 2004 using $125 500 from her mother and another $146 000 from Mr S, the wife and children moving there in 2005. The Mindarie property was at trial worth $1m. Moncrieff J adopted an asset by asset approach, assessing the husband's contributions as 10% ($100 000). The Full Court said ([12]) that the husband made no financial contribution to the property and ([15]) that an asset by asset approach was proper but considered ([27]) that "it was not open … to conclude that it was just and equitable to make any order altering the wife's interests in Mindarie." The Court added ([28]-[29]):

> "… [W]e … are unable to see any evidentiary basis for his Honour's finding that the husband had made 'non-financial and indirect' contributions to Mindarie in the period between its purchase … and the wife's departure …
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> … [D]espite finding that … [he] had performed 'some parental responsibilities' for the [wife's] children … we are unable to see how that should translate into the husband acquiring an interest in a property to which the wife herself made virtually no financial contribution."

Allowing the wife's appeal, the Court declared that she held her interest in Mindarie to the exclusion of the husband.

INTERNATIONAL COMMERCIAL SURROGACY

Order for twins to live with sperm donor and his former male partner

In *Adair & Anor and Bachchan* [2017] FCWA 78 (22 June 2017) Duncanson J of the FCWA heard an undefended application under Part 5 of the *Family Court Act 1997* (WA) in respect of twin children aged 4 by Mr Adair and his former de facto partner, Mr Bonfils. While their relationship ended before the children were born they remained close friends who lived together as 'housemates'. The twins were born pursuant to an international commercial surrogacy arrangement entered into by Mr Adair and the birth mother in India.

The Court found ([10]-[19]) that the surrogacy was documented; the children were conceived with sperm from Mr Adair and an egg from an anonymous donor; both applicants were in India for the birth, spending three weeks there before bringing the children to Perth; the children were issued with birth certificates in Delhi naming Mr Adair as father and the mother as 'NIL'.

The children obtained citizenship by descent from Mr Adair and became Australian citizens in 2013 (prior to which DNA testing found him to be the genetic father of the children). An opinion was adduced from an advocate in New Delhi that Mr Adair and the surrogate were legally competent to make the contract and that she would have no enforceable right after giving birth. The agreement recorded ([27]-[30]) that the surrogate gave informed consent and was to be paid in rupees the equivalent of $3858 for a normal birth or $4458 for caesarean birth.

The Court said ([36]-[39]) that while Mr Adair was primary carer of the children he had been diagnosed with a terminal illness so "wishes to ensure that the children are cared for and loved by someone as he had hoped to do", Mr Bonfils being that person and the children having a close relationship with both applicants. Neither was a parent ([58]) but they were held ([59]) to have standing as "persons concerned with their care, welfare or development" (ss 88 and 185 FCA). The Court ([62]-[64]) took into account the considerations of s 66C (FCA's equivalent of s 60CC FLA) and was satisfied ([71]) that the orders sought were in the children's best interests.

It was ordered that the applicants share parental responsibility and that the children live with them, the birth mother to be served with the order.