EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE FAMILY COURT
AT NORTH SHORE

FAM-2016-044-000355
[2016] NZFC 7265

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	KIERAN GREEVE Applicant
AND	EMILY JENKINS Respondent

Hearing:	29 August 2016
Appearances:	Ms L Solnjan for the Applicant Mr L Herbke for the Respondent
Judgment:	12 September 2016

RESERVED JUDGMENT OF JUDGE M J HUNT

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[1] The Applicant and Respondent are the parents of Ava Greeve born [date deleted] 2015.

[2] The Applicant father is 26 years of age, Australian by birth and employed as [occupation deleted]. He lives in [location deleted] Victoria.

[3] The Respondent mother is aged 21 years and is a New Zealander by birth. She lives with her parents in New Zealand.

[4] The parties met when the Respondent travelled to Australia at the end of May 2014. She was employed by [details deleted] in Australia.

[5] She volunteered in July 2014 at [organisation details deleted]. The Applicant was a [occupation deleted] at [organisation details deleted]. A friendship developed and ultimately a relationship started around October 2014.

[6] The Respondent had some health issues over the period which required surgery and her health is a recurring factor in this case.

[7] The parties started living together in February 2015 in [Australian location deleted], approximately one week after the Respondent found she was pregnant with Ava.

[8] The Respondent accepts that when she found out she was pregnant she agreed that the couple would live in Australia[1] with the child.

[9] Ava was born in Australia on [date deleted] 2015.

[10] The Respondent came to New Zealand over Christmas 2015/2016 until February 2016. On 7 March 2016 she returned to New Zealand. She has decided she will not be returning to Australia and is intent on remaining in New Zealand with Ava. She is supported by her parents in New Zealand.

[11] The Applicant seeks return of Ava to Australia. This is opposed.

Hearing – Submission only

[12] The hearing proceeded by way of a submissions only hearing on 29 August 2016.

[13] Mr Herbke for the Respondent did indicate that facts were in dispute[2] however upon clarification the only material fact in dispute was the question of whether or not the letter which the Applicant wrote dated 4 March 2016 was in the Respondent's possession or known to her at the time of her travel.

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[1] Paragraph 29, Affidavit of 8 July 2016
[2] Paragraph 1 of Submissions

[14] The Applicant asserted that he had signed the consent to travel letter because he and the Respondent believed that she would not be allowed to take the child out of Australia without it[3]. He did not say it was used.

[15] The Respondent says that she recalled the conversation but that whilst it was discussed, nothing so far as she could recall was prepared, she did not have the permission letter and did not know of it[4] until it was exhibited to the Applicant's affidavit.

[16] Mr Herbke also pointed to some misspellings of the Respondent's name indicating she would not have seen the letter because she would have corrected it. They are not matters that required cross examination and Mr Herbke did not seek to do so. Further, it had not been raised previously when the hearing was scheduled as a submissions only hearing before Judge de Jong on 14 July 2016

[17] It has been possible to reconcile the two accounts without requiring cross examination. The Applicant asserts that he wrote the letter and signed it. The Respondent says she did not know about it and did not make use of it but accepts it was discussed.

[18] I find the letter was discussed but not required. The fact it was prepared but not used or approved means it serves only as a consistent prior statement.

[19] Both parties agreed that the return to New Zealand was not permanent and dictated by the Respondent's health. The letter adds little.

[20] I approach the affidavit evidence on the basis of the approach endorsed in *Basingstoke v Groot*[5] and look to the affidavits, the extraneous material, consistency of the parties and probabilities in terms of assessing the evidence.

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[3] That letter was produced as CTK03 to the Affidavit of 10 June.
[4] Paragraph 48, Affidavit of 8 July 2016
[5] [2007] BCL 76

[21] As it transpires there are a number of matters where the contemporaneous action or statements are documented. They speak strongly to the events and intentions at the relevant times.

[22] The hearing did not proceed with the benefit of submissions of Counsel for Ava. I was told that issue had been addressed and no appointment of lawyer to represent her interests was required or sought by either party.

Burden of proof

[23] Ms Soljan for the Applicant conceded that the burden of proof as to the matters set out in s 105[6] fell to her client and in particular that as the child is present in New Zealand:

> [24] The Applicant has rights of custody which have been breached by virtue of the child's retention in New Zealand; and
>
> [25] He was exercising those rights at the time of removal; and
>
> [26] That the child was habitually residing in Australia immediately before the wrongful retention.

[27] It is conceded that the Applicant had right of custody and that he was exercising that right.

[28] It is the question of habitual residence which has assumed substantial proportion of the argument and both Counsel in writing and orally focused on this issue. The timing of the wrongful retention is significant, as it is the residence immediately prior to wrongful retention that is prudent.

[29] Once these matters in s 105 are established, it was accepted the burden shifts to the Respondent when issues of consent or grave risk are to be addressed.

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[6] Care of Children Act 2004

[30] Finally all agree there is a residual discretion to decline a return where otherwise the grounds are not made out to refuse.

Habitual residence/Wrongful retention

[31] Mr Herbke dealt with habitual residence and wrongful retention as a related issue. He argued that the date of wrongful retention was 1 June being the date of resignation from her job in Australia by the Respondent and that at that point the habitual residence was New Zealand or alternatively uncertain.

[32] Ms Soljan submitted that the relevant timeframe considering the habitual residence is the period immediately prior to the wrongful retention which she said was likely to be 7 May (being two months after return to New Zealand) or as early as 28 April.

[33] Wrongful removal is the term used in s 105 but this has the extended definition in s 95 to include retention. The issue here is the timing of retention and the habitual residence immediately preceding it.

[34] Wrongful retention is determined by reference to the point in time it became clear that the Respondent did not intend to return to Australia.

[35] It is important that it is not suggested now that the Respondent is remaining in New Zealand as a result of a need to continue medical treatment. She has determined that she does not wish to return to Australia under any circumstances.

[36] Accordingly there is no suggestion that the wrongful retention is yet to occur by virtue of the ongoing need for medical treatment consistent with the original agreed purpose of travel.

[37] Mr Herbke disavowed reliance on medical treatment as a reason for staying. Ms Soljan's point is well made that the medical treatment appeared to have run its course by March 2016[7]. There was no evidence of any ongoing surgical or other

[7] Exhibit C Affidavit of Applicant dated 8 July 2016

important medical interventions that necessitate the Respondent remaining in New Zealand. The specialist letters[8] are dated in January, and do no more than suggest the possibility of surgical intervention at some point. A more recent appointment was cancelled[9].

Discussion

[38] The sequence of events that lead to the unequivocal statement that Ava would not be returned started in March 2016 with the Applicant enquiring of the Respondent whether or not the removal of photos from their home in Australia indicated that she was not returning. Her response was reassuring to him that it did not[10]. It seems likely to me that in fact it did reflect the contemplation of not returning.

[39] However the parties both agree that there was a conversation between them on or about 21 April which the Respondent says was precipitated by a realisation that she no longer felt strongly towards the Applicant, that working through a long distance relationship was not acceptable and she did not see a future in the relationship. That had been a growing awareness for the Respondent through March and April[11].

[40] That unequivocal statement of that intent can be clearly seen in the text exchanges[12]. They are very clear and unambiguous statements of the Respondent's intention not to return to Australia but to remain in New Zealand with Ava and to end the relationship with the Applicant. These messages were sent on or about 28 April and it is that date that I conclude was the latest date of the wrongful retention. The statement, "*I am not coming back anytime Kieran*"[13] left no room for debate or argument.

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[8] Exhibit D and E of Applicant's Affidavit dated 8 July 2016 which indicates even then that recovery is progressing well
[9] Exhibit I Affidavit dated 8 July 2016
[10] CTK02 in the Affidavit of the Applicant dated 5 August
[11] Paragraphs 51 and 52 Affidavit dated 8 July 2016
[12] Applicant's Affidavit as CTK11 and in particular CTK05 of the Applicant's Affidavit of 10 June 2016
[13] Exhibit CTK06 Affidavit of Applicant dated 10 June 2016

[41] The act by the Respondent of terminating her employment which she was on maternity leave from on 1 June 2016 was procedural and only incidental to the clear decision she had come to over the period leading up to advising the Applicant on 21 April. Resignation was prompted by the inquiry from her employers but was a decision she had made earlier. The Respondent said she intended to resign after her trip in February making the argument in favour of the later date of her resignation unsustainable as the date of retention[14].

[42] At the latest, her intention was expressed unequivocally in the texts on 28 April and there is no basis for concluding there had been any change of heart or ongoing equivocating to extend a final decision to the time of the resignation or any later date.

[43] Accordingly the period immediately preceding 21 to 28 April is the period where I have to determine whether or not the child was a habitual resident in New Zealand or Australia or as Mr Herbke submitted, possibly neither.

Habitual residence

[44] Both parties drew on the decision of the Court of Appeal in *Punter v Secretary for Justice*[15] where the Court said:

> "In *SK v KP*, the enquiry into habitual residence was held, at paragraph 80 to be a broad factual enquiry. Such an enquiry should take in to 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 currently), the degree of assimilation in to the state, including living and schooling arrangements and cultural, social and economic integration. In this catalogue, SK and KP held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily determinative. It should not in itself override…the underlying reality of the connection between the child and the particular state."

[45] Mr Herbke urged regard to objective manifestations of intent, in particular the matters such as Plunket care arrangements and other issues related to Ava's stay in New Zealand. He also acknowledged that unilateral purpose cannot change the

[14] Paragraph 38 Affidavit dated 8 July 2016
[15] [2007] 1 NZLR 40

habitual residence of the child but that a very long period of residence in such a situation could eventually change a child's habitual residence.

[46] Mr Herbke made much of the total time spent in New Zealand. There was an initial visit from 24 December 2015 until February 2016, a return to Australia for a brief period (about 3 weeks), and then subsequently a return to New Zealand on 7 March 2016. Based on his assertion of the relevant date of retention, there was some four and a half months of Ava's life spent in New Zealand up to and including 1 June.

[47] I have found the date of retention is not the date he submitted which undermines the strength of submission but in any event the arbitrary calculation of time as a proportion of a very young child's life or simply as a lengthy period overstates the significance of time only as a factor.

[48] He submitted that on a calculation of days, more time had been spent in New Zealand and that in effect Ava's habitual place of residence had changed during the period she had been in New Zealand and that the outward manifestations of that included Plunket, a doctor, friends and a familiar and settled family environment that amongst other things means the habitual residence had changed.

[49] A significant factor in my thinking is that for Ava as an infant child, considerations such as socialisation, schooling and matters of that kind are of limited assistance in determining habitual residence. Habitual residence is a factual concept that can adapt to modern conditions and circumstances including long term relationships with parents in different countries but also has to reflect the reality of a situation where a young child is with her mother in a circumstance where the only agreed purpose was of a limited duration. The significance of being in New Zealand was simply that Ava was in the safe care of her mother and her mother was here for a particular purpose.

[50] In this case, the settled and agreed purpose for which the Respondent came to New Zealand was to receive and then continue to receive medical treatment. That is reflected in my view in the internet posting where she indicated that she was

returning to New Zealand in a few weeks for, "*another holiday*"[16]. Her advice to the Applicant was that she was coming for a few months[17] in March.

[51] The discussion about the applicant coming to New Zealand did not evolve to a point where it replaced the earlier agreement that they would reside in Australia. It was simply a possibility that was being explored and it did not become more than that.

[52] The communication of the Respondent of the decision not to return came at a point where there was an expectation that she would be returning and followed the growing awareness for her that she did not wish to resume a relationship with the Applicant or return to Australia and so wanted to stay in New Zealand.

[53] The timing of this decision was determined by her in large measure but also a sense that resolution was required as at some point the Applicant would have become insistent on her return and the issue therefore had to be dealt with. My strong sense is that her return to Australia in February served to confirm her thinking that she did not intend a permanent return to Australia and she acted consistently with that by taking her photos and resolving to resign from her job at that point.

[54] I am not prepared to conclude that time in New Zealand is a significant factor of itself and certainly not in the rather mechanical way urged upon me. The time in New Zealand was for a particular purpose, being the return to good health for the Respondent. The Respondent's apparent recovery which is documented by a last medical appointment on or about 29 March 2016 was not communicated to the Applicant and had the return occurred at that point, the time spent in New Zealand would have been relatively brief.

[55] I do not accept the notion in this case that there is uncertainty about habitual residence. This is not a scenario where Ava moved regularly between two countries to have a home in each country. Those circumstances will be rare. There was no agreement here that there would be extended time spent in New Zealand and

[16] Exhibit CTK13 Affidavit of Applicant 5 August 2016
[17] Exhibit CTK02 Affidavit of Applicant dated 5 August 2016

corresponding time spent in Australia. The only agreed purpose of this trip and Ava's presence in New Zealand from 7 March was health related and intended to be relatively short in tenure. Ava's time in New Zealand will be of little significance to her having regard to her age.

[56] At the point immediately prior to the wrongful retention in late April I conclude that Ava was still a habitual resident of Australia. Her habitual residence from the period prior to her travelling to New Zealand in December and in March had not changed. The circumstances of her coming to and returning to New Zealand did not constitute a change of habitual residence.

[57] None of the extraneous matters persuade me that habitual residence has been established in New Zealand.

[58] I conclude in this case that the timeframe prior to wrongful retention is much shorter (and less significant) then Mr Herbke argued and I am not prepared to afford any significance to the time spent subsequently as that would be serve only to encourage delay.

Consent

[59] It follows having concluded that there is a wrongful retention and that the child was habitually resident in Australia at the time of retention the onus shifts to the Respondent to determine whether or not the Applicant consented.

[60] That premise however was only sustainable on the basis that the Applicant consented to the Respondent staying for medical treatment and that treatment has not concluded. This was not pursued because there was no suggestion that there was a continuing need for medical treatment in New Zealand. Had that been so then at the conclusion of medical treatment Ava would have to be returned to Australia. The only evidence in support of ongoing treatment of that is a doctor's letter dated 4 July that refers to the last appointment being on 29 March. There is no evidence of impending surgery or other ongoing treatment necessitating a stay.

[61] The question of consent is raised also in the context of the residual discretion but I am satisfied no consent to a change of habitual residence or permanent stay in New Zealand was given.

Grave risk

[62] The matter of grave risk has not been advanced as the Respondent plans to return to Australia with the child if this is ordered, avoiding the circumstance of concern that she raises relating to the Applicant's brother.

Discretion

[63] As to the residual discretion, I am required to consider the welfare and best interests of the child and the general purpose of the Convention.

[64] The Respondent makes plain she will return to Australia with the child if ordered and in that regard it seems to me that questions of her ongoing health and wellbeing as well as the welfare and best interests of the child cannot be said to weigh in favour of an exercise of discretion to decline an order for return.

[65] Also time spent in New Zealand is not such as to make a return to Australia difficult for the child.

[66] The purpose of the convention is to facilitate return of children in circumstances where they have been wrongfully retained. The question of whether the Respondent can relocate can now be determined in Australia if it remains an issue.

[67] I am not prepared to excise the discretion to decline return.

Outcome

[68] The outcome of this case is that I make an order for the return of Ava to Australia.

[69] I was asked if such an order was to be made to adjourn for a directions conference.

[70] Because I am not a local Judge I will convene a telephone conference in approximately 10 days to see what can be achieved by agreement but my expectation would be that arrangements are made within no more than 28 days for the return to Australia by the Respondent and Ava.

[71] The Applicant had offered to assist with travel and cost and I would expect he would give effect to that offer.

[72] The Registry is to arrange a time and date for a phone conference.

Costs

[73] Costs are reserved noting that neither party is legally aided.

M J Hunt
Family Court Judge