EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT**
**AT HAMILTON**

**I TE KŌTI WHĀNAU**
**KI KIRIKIRIROA**

**FAM-2020-019-000408**
**[2020] NZFC 7097**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | [CARL OWENS]<br>Applicant |
| AND | [SOPHIA HAMILTON]<br>Respondent |

Hearing: 29 July 2020

Appearances: D Bogers for the Applicant
A Cook for the Respondent

Judgment: 20 August 2020

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**RESERVED JUDGMENT OF JUDGE R PAUL**

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## Parties

[1] This is an application for determination pursuant to section 105 and Care of Children Act 2004 for an order for the return of the child from New Zealand to Australia.

[2] The application was filed by the applicant [Carl Owens]. The respondent is [Sophia Hamilton]. This application relates to the parties only child [Nicole Owens] born [date deleted] 2016 and aged four years.

**Background**

[3] Ms [Hamilton] immigrated from New Zealand to Australia in May 2012 and in December of that year commenced a relationship with Mr [Owens]. They planned to have a child and went to some lengths to conceive [Nicole]. [Nicole] was born in Australia. The parties married on [date deleted] 2017.

[4] On 30 January 2020 the family travelled to New Zealand for Ms [Hamilton]'s [sibling]'s wedding. Mr [Owens] returned to Australia for work on 11 February 2020. Ms [Hamilton] remained in New Zealand with [Nicole] to have time with family.

[5] There were later discussions about a relocation to New Zealand however on 16 April 2020 Ms [Hamilton] ended the marriage advising Mr [Owens] by way of letter.

[6] Proceedings were issued by Mr [Owens] on 28 May 2020 for the return of [Nicole] to Australia. That application was defended by Ms [Hamilton] and the matter proceeded to hearing on 29 July 2020.

**Interlocutory application**

[7] Ms [Hamilton] filed in interlocutory application for leave to file an affidavit out of time by Ms [Hamilton] dated 23 July 2020. At the outset of the hearing there was discussion as to that application but ultimately the application was granted by way of consent.

**The convention and the New Zealand implementation legislation**

[8] By way of introduction I set out the foundation and reasoning for this legislation.

[9] The convention was adopted by the Hague conference on Private International Law on 25 October 1980. New Zealand became a party to the convention with effect from 1 August 1991. Australia is also a party to the Convention. The convention is widely ratified and at May 2020 it had some 101 signatories.

[10] The rationale for adoption of the convention is summarised in its preamble:

> The state's signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to the custody,
>
> desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure the prompt return to the state of the habitual residence, as well as to secure protection of rights of access,
>
> have resolved to conclude a convention to this effect and have agreed upon the following provisions.
>
> The objects of the convention are set out in article 1 which provides:
>
> ARTICLE 1
>
> The objects of the present Convention are—
>
> 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.
>
> Article 3 provides that the removal or retention of a child is considered wrongful where it is in breach of a person's right of custody under the law of the state in which the child was habitually resident, and at the time of removal or retention of those rights were actually exercised.
>
> The term "rights of custody" is defined in article 5 to include rights relating to the care of the person of the child and in particular the right to determine the child's place of residence. Chapter 3 of the Convention provides for the return of children who have been wrongfully removed from a contracting state or wrongfully retained. The convention seeks to ensure the prompt return of an abducted child to the child's state of virtual residents, unless one of the prescribed exceptions applies and return is not appropriate.
>
> Article 11 requires judicial and administrative authorities of contracting States to act expeditiously and proceedings for the return of children. Article 12 and 13 sets out the requirement to order a return of a child and the exceptions which apply where return is not appropriate. If one of the exceptions exists, the judicial or administrative authority may refuse to order the return of the child.

[11] Article 12 and 13 are implemented in New Zealand by s 105 and s 106 of the Care of Children Act 2004.

[12] If the requirements set out in s 105 are satisfied, a New Zealand court must make an order for the return of a child to that state of habitual residence unless one of the exceptions in s 106 applies.

[13] In this case it is not disputed that the child subject to proceedings is present in New Zealand.

[14] It is disputed that the child was habitually resident in Australia immediately before removal or retention.

**Habitual residence**

[15] Section 105(1)(d) of the Care of Children Act 2004 provides that an application can only be made by an applicant who claims, "that the child was a habitual resident in that other contracting state immediately before removal".

[16] Habitual residence is defined in section 95 of the Care of Children Act

> …in relation to a Contracting State that in matters relating to the custody of children has 2 or more systems of law applicable in different territorial units, means habitual residence in a territorial unit of that State.

[17] Counsel for Ms [Hamilton] referred me to the case *of Punter v Secretary for Justice*[1] where the Court of Appeal at [120] – [121] sets out the following principles on habitual residence:

> (a) Even where residence is intended to be for a one-off limited defined period followed by a return to an existing habitual residence, this does not automatically lead to a finding that habitual residence has not moved to the new jurisdiction;
>
> (b) It depends on all the circumstances of the particular case;
>
> (c) A stay for a temporary purpose and a finding of strong ties to a former habitual residence and a weak connection to the new one leads to a conclusion that there has been no change in habitual residence; and

[1] *Punter v Secretary for Justice* [2004] 2 NZLR 28.

(d) A temporary purpose can cause a change in habitual residence after a period of actual residence long enough for it to be said with confidence that the child relative attachments to the two countries have changed to the point where requiring return to the original forum would be tantamount to taking the child "out of the family and social environment in which life has developed".

[18] I am referred to the case of *Basingstoke v Groot*[2]

> …the enquiry into habitual residence is a broader factual one, taking into account such factors as settled purpose, the actual and intended length of stay in a state, the purpose of this day, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state (including living and schooling arrangements), and cultural, social and economic integration. In this catalogue, settled purpose (and with young children the settled purpose of the appearance) is important but not necessarily decisive. Concentration on settled purpose should not obscure the broader factual nature of the enquiry.

[19] I have considered the case of *SK vs KP*[3] at paragraph [20] Justice McGrath states:

> ...to my mind, in this context, a principle of particular importance is that the court having jurisdiction should be slow to infer that there has been a loss of habitual residence arising from the prolonging of a child's stay in a new state beyond original expectations without protest or countering action because of the desire to achieve a reconciliation all reach an agreement between parents on arrangements for custody.

[20] He further states at [21]:

> …a relatively short period of extension in the course of attempted reconciliation, with a view to reaching agreement, in general should not change habitual residence as to allow it to do so would not do the policies of the Convention.

[21] It is Ms [Hamilton]'s position that habitual residence had changed to that of New Zealand on the basis of the consented position to relocate to New Zealand. That is a matter of evidence which is in dispute.

[22] In response Counsel for the applicant refers me to the case of *Langdon v Wyler*[4] Dobson J at [14] where the question of habitual residence requires a factual enquiry:

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[2] *Basingstoke v Groot* [2006] NZFLR 363.
[3] *SK vs KP* [2005] 3 NZLR 590.
[4] *Langdon v Wyler* [2017] NZHC 2535.

> …necessarily tailored to the particular circumstances of the individual case. Parental purpose may be a factor, but it is not determinative. Focuses on the actual situation of the child and his or her connection with and integration in the relevant country.

[23] Counsel for the applicant submits that at all material times the child's habitual residence remained Australia. The child came to New Zealand for a short visit only and Ms [Hamilton]'s intention to remain in New Zealand did not change that. She further submits that the child's primary connection and integration given her age and stage of development is with her parents and her home in Australia where she was born and has lived the whole of her life and was attending day care.

[24] What both Counsel proffer in fact is that an assessment of what contracting state is the habitual residence of the child is a matter to be determined on the evidence on a case-by-case basis.

**The relevant exceptions in this case**

[25] The grounds for refusing an order for return are set out in s 106 of the Act and are set out below:

> 106 Grounds for refusal of order for return of child
>
> (1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

[26] Ms [Hamilton] seeks to rely on s 106(1)(b)(ii) and s 106(1)(c)(i) and (ii), that being consent or acquiescence and\or grave risk to the child.

**Consented or later acquiesced**

[27] There is no evidence to suggest that when the child left Australia there was a settled purpose between the parties that there would be a relocation to New Zealand. The proposition put by Ms [Hamilton] is that Mr [Owens] acquiesced once the child was a New Zealand.

[28] Counsel have referred me to a number of decisions. Both Counsel accept that consent refers to acceptance before the removal and acquiescence refers to acceptance after it has occurred.

[29] I have been referred to the case of *R v K*[5] *(abduction: consent)* which may be summarised as follows:

(a) consent must be proved on the balance of probabilities by the person relying on that defence

(b) the evidence in support of consent must be clear and cogent and must be real, positive and unequivocal

(c) if the court is left in a state of uncertainty, the defence fails

(d) the court may be satisfied that consent was given even though it is not in writing: and

[5] *R v K (abduction: consent)* [1997] 2 FLR 212.

(e) there may be cases where consent can be inferred from conduct.

[30] I am referred to the cases of *L v Secretary for Justice*[6] and that of *Runge v Levine*[7]. Both these cases require that I consider on a subjective basis the state of the applicant's mind based on the evidence before me as to whether he had acquiesced to the relocation. I must also consider whether the actions of the wronged parent unequivocally allowed or leads the other parent to believe that the wronged parent does not oppose the retention.

[31] Counsel for Ms [Hamilton] submits that once in New Zealand and a decision made to relocate the child to New Zealand the previous habitual residence is immediately lost. She refers me to the case of *SK vs KP*[8] where it was considered that "it is widely accepted that a settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately".

[32] I was then referred to the case of *Basingstoke v Groot* where it was stated at:

> [31] where it is intended that the move to the new state is permanent, in our view habitual residence in the old state will almost inevitably be held to have been lost immediately upon leaving the old state."

[33] Counsel have also referred to the case of *RAC v ABC*[9] in their written and oral submissions.

[34] Though I appreciate the argument, it is clear that the cases referred to are in a situation where there has been a settled agreement to relocate prior to physically leaving. This is not the situation in this case.

[35] In summary it is fair to say that the issue of habitual residence and consent or acquiescence go hand in hand.

[36] I have the benefit of the *Greeve v Jenkin*[10]. That case is very similar to the present case. The parents lived in Australia. The mother and child went to New

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[6] *L v Secretary for Justice* (2007) 27 FRNZ645
[7] *Runge v Levine* [2017] NZFC 1017 at [20] to [22].
[8] *SK vs KP* [2005] 3NZLR 590 at [73].
[9] *RAC v ABC* [2012] NZFC 2688.
[10] *Greeve v Jenkin* [2016] NZFC 7265.

Zealand for the purpose of an operation. Both parties agreed that the return to New Zealand was not permanent and dictated by the respondent's health. The mother then determined to remain a New Zealander with the child. In that case the court determined there had been a wrongful detention and following that conclusion 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. In particular of the court held at paragraph [51] and [52]:

> …the discussion about the applicant coming to New Zealand did not evolve to a point where it replaced the early agreement that they would reside in Australia. It was simply a possibility that was been explored and it did not become more than that. 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.

[37] In that case the court determined that a return of the child to Australia was required.

**Grave Risk to child**

[38] The second exception raised is that there is a grave risk to the child's return which would expose her to psychological harm or otherwise place her in an intolerable situation.

[39] In *A v Central Authority for New Zealand*[11], also reported as *A v A*[12] the Court of Appeal discussed the relevance of best interests' considerations where a grave risk ground had been argued:

> Where the system of law of the country of habitual residence makes the best interests of the child paramount and provides a mechanism by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.

[40] The approach is that the country of habitual residence should be responsible for protection and best interests of the child. I have been referred to the case of *LRR*

[11] *A v Central Authority for New Zealand* [1996] 2 NZLR 517.
[12] *A v A* (1996) 14 FRNZ 348 (CA).

*v COL*[13] where the Court of Appeal at [87] – [96] made the following observations about grave risk/intolerable situation exceptions:

(a) The terms "grave risk" and "intolerable situation" set a high threshold;

(b) The court must be satisfied the return of the child would expose the child to a grave risk;

(c) A situation is intolerable if it is a situation which this particular child in these circumstances could not be expected to tolerate;

(d) The enquiry contemplated is future looking;

(e) It is not the courts role to judge the morality of the abductors actions;

(f) The burden is on the person asserting the grave risk to establish;

(g) The impact of the returning parent may be relevant to an assessment of impact on the child; and

(h) The court has discretion even when the ground is made out however observed that we are the ground is made out it is impossible to conceive that it would be a legitimate exercise of discretion.

**The evidence**

**Was the child a habitual resident of Australia prior to retention?**

[41] The following is accepted evidence as between the parties:

(a) Ms [Hamilton] moved from New Zealand to Australia in May 2012;

(b) The parents commenced a relationship in Australia in December 2012;

(c) The parties planned and went to great lengths to have a child while residing in Australia;

(d) [Nicole] was born in Australia on [date deleted] 2016;

(e) [Nicole] was raised in Australia;

(f) The parties own a house in Australia and this is the family home;

[13] *LRR v COL* [2020] NZCA 209.

(g) There was no settled plan or agreement to relocate to New Zealand prior to January 2020;

(h) Mr [Owens] has employment in Australia;

(i) Ms [Hamilton] had secured employment in Australia;

(j) The parties and [Nicole] travelled to New Zealand for the purpose of attending Ms [Hamilton]'s [sibling]'s wedding;

(k) Mr [Owens] returned to Australia on 11 February 2020;

(l) Due to a back injury, Ms [Hamilton] remained in New Zealand with the child;

(m) Ms [Hamilton] indicated on 3 March 2020 that she was not ready to come back to Australia;

(n) In the month of March 2020 there was discussion about logistics for a relocation of the family to New Zealand and discussion about the party's marriage relationship. On 16 April 2020 Ms [Hamilton] sent to Mr [Owens] a letter ending the marriage;

(o) On 28 May 2020 Mr [Owens] filed an on notice application for the return of the child in New Zealand;

(p) Email of 3 May confirms that neither mother nor child will return;

(q) On 28 May 2020 Mr [Owens] filed a without notice application for interim orders/directions pending hearing which were granted.

[42] On the basis of the evidence the retention of the child occurred on about 3 May 2020. The question as to whether the child was a resident of Australia or not at the point of retention is dependent on the outcome of the following question.

**Did Mr [Owens] acquiesce to the retention of the child in New Zealand?**

[43] I refer again to the agreed evidence above.

[44] There is no dispute that Mr [Owens] consented to the child coming to New Zealand and then remaining past the original return date due to Ms [Hamilton]'s back issues. The issue is whether Mr [Owens] subsequently acquiesced to the child remaining in New Zealand. In support of Ms [Hamilton]'s proposition counsel set out the evidence upon which she relies at paragraph 33 of her submissions.

[45] Ms [Hamilton] deposes in her affidavit 29 June 2020 at paragraph [10] that Mr [Owens] raised moving to New Zealand and living here permanently, that he was starting to prepare a list of things to do for us to live in New Zealand as a family. Annexed and marked "A" to the affidavit is a "to do list" which is a list of matters to be considered. Annexed and marked "B" is a message dated 3 March 2020 from Mr [Owens] stating "I was going to talk to you *when you got home* about the options of moving to New Zealand. I have written down a whole list of things to go over to make it happen. Please please talk to me about this. I want to understand. God I am beside myself dear."

[46] The following communications from Mr [Owens] show a desire to continue a relationship as a family together by considering suspension of mortgage payments, cleaning a vehicle for sale and talking to other people about the move. In particular there is a message from Mr [Owens] on 29 March 2020 in which he states, "like I said to you last night everybody is keen to help me and believe moving is a great idea and will help us moving forward."

[47] There is discussion about transporting the campervan, moving personal effects and selling chattels. All conversations including and up until 4 April 2020 refer to arrangements being made as a family staying together. However, on that date Ms [Hamilton] messages "what if we don't work out? Are you going to stay in New Zealand for [Nicole] or go back to Aussie". That question is followed immediately by questions about the selling of property.

[48] The response was "I will do whatever is best for you and [Nicole]. I will only ever do that." Continued communication does not appear to refer to the idea of separation again. It is not until a letter dated 16 April 2020 is sent by Ms [Hamilton] to Mr [Owens] ending the relationship and stating how unhappy she is in the relationship.

[49] The response from Mr [Owens] dated 16 April 2020 is one of shock. In his view he thought the parties were working together on things. Given the communications which I have viewed between the parties, that would have been a fair assumption for him to have made. Up until that point the communications are positive and appear to be working together to relocate the family.

[50] From the evidence that I have received, I make the following findings,

(a) The parties were having a number of difficulties within their marriage;

(b) There was agreement to travel to New Zealand for the purpose of a holiday and to remain longer than initially planned;

(c) There were communications between the parties as to the practicalities of relocating to New Zealand to the extent that family chattels and items would be impact;

(d) All arrangements being considered for relocation were on the basis that this would be a relocation as a family unit remaining together;

(e) At no point in any of the communications was there agreement to the child [Nicole] remaining permanently in New Zealand on the basis that the parties were separated; and

(f) Once the mother confirmed the relationship was at an end and neither she nor the child would return an application was made within a reasonable timeframe requiring the return of the child to Australia.

[51] A short period of negotiation between these parents did not in my view evidence acquiescence on the part of the father nor displace the child's habitual residence. There is insufficient evidence to find on the balance of probabilities that there was a settled purpose for the child to remain in New Zealand with her mother or that the father acquiesced to the child remaining in New Zealand. Therefore, at the date of retention the child's habitual residence was Australia. There being no consent or acquiescence found the exception under section 106(1)(b)(ii) fails.

**Is there a grave risk to the child returning to Australia?**

[51] I turn to deal with the second exception that of grave risk to the child. Counsel's submissions in support of this exception referred to the relationship difficulties between the parties and possible financial matters. There is reference to Ms [Hamilton] taking antidepressants prior to leaving Australia, concerns regarding the father's possession of firearms, and issues relating to control.

[52] I refer to the evidence filed by Ms [Hamilton]. In her affidavit of 29 June 2020, she refers to the history of the relationship and concern in respect of the father's mental health deposing he would become verbally aggressive very quickly. This was a period in 2018. She refers to Mr [Owens] drinking alcohol daily and a lack of involvement with the care of the child. She he refers to Mr [Owens] smacking the child once a month between the ages of two and three but notes that he had reduced in the last 12 months. In her more recent affidavit of 23 July 2020 she refers again to these matters and expands somewhat on controlling behaviour referring to non-permission to cut her hair, playing music and feeling scared of him due to his emotional instability and volatile outbursts.

[53] Against that, counsel for the applicant submitted that the matters raised are not sufficient to meet the high threshold required. She says there is no safety concerns for the child and if the child returned to Australia this is to the country not into the father's care and therefore matters which Ms [Hamilton] has raised are irrelevant. She reminds me that welfare and best interests for the child are not a matter for me unless I determine that a s 106 exception is made out. It is conceded that there is no evidence of any Australian child protection agency or Court involvement with the family. There

is no evidence of family violence incidents reported to the police or protection orders sought.

[54] It is an agreed position that should the Court grant the application, Mr [Owens] will vacate the family home making it available for Ms [Hamilton] and child.

[55] Having considered the evidence before the Court I am not satisfied that there is a grave risk of harm or intolerable situation for this child in these circumstances should this Court order a return to Australia.

**Result**

[56] Having found Australia is the child's habitual residence and that I have not been satisfied that an exemption has been established, I grant the application filed by Mr [Owens] and direct that Counsel for the applicant provides to the registrar a draft order for sealing for the return of the child to Australia and provision of travel documents.

Judge R Paul
Family Court Judge