FAMILY COURT OF AUSTRALIA

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES, CHILD SAFETY AND DISABILITY SERVICES & CORFIELD ***[2017] FamCA <Number>***

FAMILY LAW – CHILD ABDUCTION – Hague Convention – Application under the Hague Convention for the return of the children to Canada - Whether father wrongfully retained children in Australia – Habitual residence in issue – Findings that the parties intended for the children to indefinitely reside in Australia at time of departure - Findings that habitual residence was Australia – Retention not wrongful - Mother found to have acquiesced to children being retained in Australia – Whether the residual discretion to make a return order ought be exercised – Father primary carer for children – Children have always resided with father – Father and children have strong connections in Australia – No return order made.

Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 16

Cooper v Casey (1995) 18 Fam LR 433
In the Marriage of McCall (1994) 18 Fam LR 307
LK v Director-General, Department of Community Services (2009) 237 CLR 582
P v Secretary of Justice [2001] NZLR 40
Department of Community Services & Raelson [2014] FamCA 131

APPLICANT:	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES, CHILD SAFETY AND DISABILITY SERVICES
RESPONDENT:	TIMOTHY JOHN CORFIELD
FILE NUMBER:	BRC 2776 of 2017
DATE DELIVERED:	7 July 2017
PLACE DELIVERED:	Cairns
PLACE HEARD:	Cairns (by video link to Brisbane)
JUDGMENT OF:	Tree J

HEARING DATE:	17 May 2017

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Selfridge
SOLICITORS FOR THE APPLICANT:	Mcinnes Wilson Lawyers
COUNSEL FOR THE RESPONDENT:	Mr Shoebridge
SOLICITORS FOR THE RESPONDENT:	Madden Solicitors

ORDERS

1. The Applicant's Form 2 Application filed 21 March 2017 is dismissed.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym <*pseudonym*> has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT CAIRNS

FILE NUMBER: BRC2776/2017

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES, CHILD SAFETY AND DISABILITY SERVICES
Applicant

And

TIMOTHY JOHN CORFIELD
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. By Form 2 Application filed 21 March 2017, the Director General, Department of Communities, Child Safety & Disability Services ("the Director") seeks orders that four children be returned from Australia to Canada. Those children are Taelon Steven Corfield (born 20 December 2008 and hence presently 8 years of age), Auria-Jane Susan Corfield (born 21 March 2011 and hence presently 6 years of age) and Leia Carmin Corfield and Ryker Heath Corfield (both born 26 September 2014 and hence presently both 2 years of age) ("the children").

2. The children presently live with Timothy Corfield ("the father") and his partner at Gladstone in Australia, whereas their mother, Samaria Ketti Corfield ("the mother") resides in Calgary, Alberta in Canada.

3. The Director seeks the order on the basis that on and from 30 June 2016, the father wrongfully retained the children in Australia. The father opposes the Director's application on two bases. The first is that he says that as at 30 June 2016, the children habitually resided in Australia, not Canada. Alternatively he says that if the children were habitually resident in Canada on 30 June 2016, the mother subsequently acquiesced to the children being retained in Australia.

4. The hearing of the Director's application proceeded before me on 17 May 2017. Perhaps somewhat unusually, cross-examination of some witnesses then ensued. On that day I reserved my decision. This is that decision and the reasons for it.

BACKGROUND FACTS

5. The father was born in Australia on 18 August 1983, and hence is presently 33 years of age. He is a rigger by occupation.

6. The mother was born in Canada on 26 November 1981, and hence is presently 35 years of age. She is an exotic dancer by occupation.

7. The father and mother met and began dating in Australia in about January 2008 when they were respectively 24 and 26 years of age. After three weeks of dating they moved in together, and seven weeks later the mother discovered that she was pregnant with Taelon. The parties then moved to Alberta in Canada in May 2008 before Taelon was born there in December, and were married on 16 May 2009 when Taelon was nearly five months of age.

8. However in June 2009 the parties decided to travel back to Australia and they remained there until the mother returned to Canada in May 2013. The father, and by then the two children of the parties, remained in Australia.

9. On 29 December 2013 the father and the two children moved to Canada. The parties resumed cohabiting. Leia and Ryker were then born about nine months later on 26 September 2014.

10. Whilst in Canada the father was unable to work for visa reasons. The mother continued her employment and her income supported the family. She was however, it appears, regularly absent from the home for work reasons. Those absences extended for some days.

11. It seems likely that the parties began to experience financial difficulty for a number of reasons. The first was that they were dependent upon the mother's wage and the father was unable to work. The second was that it appears both parties (the mother admits it, the father less so) had regular recourse to recreational drugs and alcohol.

12. It also seems clear that the parties' relationship involved conflict and infidelity from time to time. It appears as though on occasion they ceased their relationship only to later resume it.

13. In August 2015 the father advised the mother that their marriage was over and the mother said that she wanted a divorce. However the parties did not proceed down that path and indeed remained cohabiting under the one roof and engaging in consensual sexual relations.

14. In November 2013 the father's brother-in-law committed suicide. Understandably this greatly distressed him and his family.

15. On 29 December 2015 the father and all four children returned to Australia. The circumstances surrounding that return are controversial and will need to be considered later. However it is not in dispute that initially the father resided

with his parents in Biloela and on 20 January 2016 he enrolled the children in a primary school there.

16. After the father left Canada, the mother says she discovered that he had been on a dating website, in consequence of which she herself commenced to date other men. The father found out about this and he then commenced dating other people too. In March 2016 the mother found out that the father was dating a woman who she regarded as one of her good friends, she having also been a stripper, working with the mother from time to time. The father remained in a relationship with that person at the time of the hearing before me.

17. The mother and father remained in intermittent communication with each other. Again I will need to consider the content and sequence of that communication in due course.

18. In about June 2016 the mother began to suffer serious problems in relation to her abuse of drugs and alcohol.

19. On 15 August 2016 the mother was hospitalised for depression, anxiety and suicidal ideation. She remained there for some time. Again I will need to discuss the circumstances preceding and succeeding that hospitalisation later in these reasons.

20. On 25 October 2016 the mother and maternal grandmother travelled to Australia. They spent extensive time with the children and during that time the mother communicated with the father. Again those communications are potentially significant and I will traverse them in detail in due course.

21. On 24 November 2016 after she had returned to Canada, the mother filed an application in the Court of Queen's Bench in Alberta. The application was not served on the father. Nonetheless an order was made on that day requiring the father to return the children to Canada within 60 days. The next day that order was provided to the father, together with the material upon which the application had been brought. The father has not returned the children.

22. As at the date of the hearing before me, the father and the four children remained living with his partner in Gladstone, and the mother remains living in Alberta.

HABITUAL RESIDENCE AS AT 30 JUNE 2016

Overview

23. Although in the Form 2 application the Director specified a cascading series of alternatives for the date of unlawful retention, as argued only one date was pressed, namely 30 June 2016. That date is no doubt relied upon because on 28 December 2015 – ie the day before the father and children left Canada – the mother signed a consent to permit the children to travel abroad which provided for a date of return to Canada of 30 June 2016. The mother says that date was

in accordance with an agreement that she had with the father; the father denies any such agreement and says the date is not correct, as the intention was to remain indefinitely in Australia when he departed with the children on 29 December 2015. I will therefore need to resolve that dispute, amongst others, in the course of determining where the children were habitually resident as at 30 June 2016.

The law

24. It is uncontroversial that Regulation 16 of the *Family Law (Child Abduction Convention) Regulations 1986* governs this application, and that in order to succeed, the Director must establish that the children habitually resided in Canada as at the date of wrongful retention.

25. Regulation 16(1A) provides five matters which must all be established in order to show that a child's removal or retention was unlawful. One of those is that the child habitually resided in a convention country immediately before their removal to, or retention in, Australia. The term "habitually resided" or like phrasing is not defined in either the regulations, or in the Hague Convention which the regulations are intended to give effect to.

26. However the following statements may be taken as established by the authorities:

- The question of habitual residence is a question of fact;[1]
- The question comprises two elements: the first is residence in a particular country, and the second is an intention to reside there habitually;[2]
- A broad factual enquiry is mandated;[3]
- "Such an enquiry should take into account all relevant factors, including settled purpose, the actual 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 into the State, including living and schooling arrangements, and cultural, social and economic integration."[4]
- Settled purpose of the parents is important but not determinative.[5]

Mutual intention

27. In many respects the application as argued before me focussed particularly upon the parties' intentions on 29 December 2015 when the father left Canada with the children. The father says that the parties agreed that when the

[1] *Cooper v Casey* (1995) 18 Fam LR 433.
[2] *In the Marriage of McCall* (1994) 18 Fam LR 307.
[3] *LK v Director-General, Department of Community Services* (2009) 237 CLR 582.
[4] *ibid* at [44], citing *P v Secretary of Justice* [2001] NZLR 40 at [88].
[5] *ibid*.

mother's then difficulties in entering Australia had passed, which was probably by about May 2016, she would travel to Australia and they would live there with their children indefinitely. The mother's case is that it was only ever intended to be a temporary stay in Australia, and the parties agreed that they would return to Canada by 30 June 2016.

28. However as has been seen when discussing the law, even if there were an agreement that the move to Australia was to be permanent, that by no means determines the question of habitual residence; conversely, even if there was an agreement that it was intended to be temporary, again that does not necessarily determine the question either. That said, I accept that mutual intention in this case is important in determining the question of fact of habitual residence.

29. There is a lot of material dealing with this issue in evidence. Some of it predates 29 December 2015, but most does not. I will traverse the evidence which I consider to be material chronologically. I particularly intend to focus, not upon the parties' affidavits or oral evidence, but upon the contemporaneous documentation.

30. On 1 December 2014 the maternal grandmother contacted a Canadian immigration consultant on behalf of the mother and father. In that email, having noted that they had moved back and forth between Canada and Australia, she said "since their eldest is now school age they have decided to settle in Canada." Unfortunately the fees of the consultant appeared to be too much at the time for the parties to pay, however the maternal grandmother was again back in contact with the agent on 29 September 2015. She attempted to negotiate a different fee arrangement, seemingly without success. The inference I draw from this is that, at least as at September 2015, the father's intention was to secure immigration in Canada that would enable him to work there. However it appears as though notwithstanding that intention, he was unable to achieve it.

31. As I have said, in November 2015 the father's brother-in-law committed suicide. It appears uncontroversial that greatly affected the father, who wanted to be with his family to grieve. Also at about that time, the father says that he found out that the parties were five weeks behind in their rent in Canada, and were without funds to pay it. He also says that their internet had been cut off and he had to ask his parents to help with money. Finally, his evidence was that the power bill was not paid and he had to get a food hamper. At paragraphs 59 and 60 of his trial affidavit the father further continued:

> 59. When [the mother] came back to the house to get something I asked her why she hadn't paid the rent or the electricity. I explained that I had come to Canada for the children to have a better life with her and that I needed to go home where I could work and provide for the children.

> 60. [The mother] told me I could go. She said that she would come back to live in Australia later once her visa issue had been sorted out.

32. One of the affidavits relied upon by the mother is that which she filed in the Canadian matrimonial proceedings on 7 April 2017, although it was in evidence before me as an annexure to an affidavit of the Director's solicitor filed 12 May 2017. The 7 April affidavit responds to an affidavit filed on 24 March 2017 by the father in the Canadian proceedings, by referring to the latter document's paragraph numbers. However the affidavit of 24 March 2017 is not in evidence. It appears likely that the father's affidavit in the Canadian proceedings is structured similarly to his Australian affidavit, but I cannot be certain.

33. Otherwise there does not appear to be an affidavit sworn by the mother which specifically traverses the father's affidavit in these proceedings. That said, her Canadian affidavit does provide some information, however it does not appear to contradict the father's assertions at [59] and [60] of his trial affidavit. Further, in the mother's affidavit filed in these proceedings on 26 April 2017, at paragraph 2 the mother concedes ".. The [father] was not working in Canada and our finances were tight; we both know that if he returned to Australia the [father] could work fulltime and earn a significant income."

34. Finally on this issue I note that, in her oral evidence, the maternal grandmother conceded one of the reasons why the mother stayed behind was so that she could clear some outstanding utility bills before herself travelling to Australia.

35. I am therefore satisfied that as at November 2015 the mother and father were in relatively dire financial circumstances in Canada, and both believed that the financial circumstances of the family would be far better in Australia.

36. The father says that the two school aged children were enrolled in schools in Biloela prior to them leaving Canada. The Director appears to not concede this. In evidence before me were the two relevant school enrolments. Although he does not know whose handwriting the information on them belongs to, the father believes it to be his sister's. He accepts, however, he ultimately signed the documents on 20 January 2016, after he was in Australia.

37. I accept the father's evidence that efforts towards the children's school enrolment were made prior to leaving Canada, because that appears sensible, particularly given that when the father arrived in Australia, it would be around the Christmas/New Year period, and during school holidays. I accept that he would likely have been concerned to ensure that both children were able to attend school when the new school year opened. I am therefore satisfied that it is likely the information contained on this enrolment application was entered prior to him leaving Canada, albeit that he only signed it on 20 January. I am slightly buttressed in this conclusion because in relation to Taelon's enrolment application, it is said that his date of arrival in Australia was 31 December

2015, which seems unlikely. However what is important on that form is that under the heading "Visa Sub-Class" there appears "making application for citizenship." Even if I am wrong and the form was only completed on 20 January 2016, that entry is still significant. However because I am satisfied that the form was likely completed by the father's sister (in Australia) prior to him leaving Canada, to my mind the suggestion that there was an application for citizenship to be made in relation to Taelon who was only entering the country on a holiday visa, is significant in relation to his likely intended length of stay.

38. On 17 December 2015 the mother made a Facebook post. Relevantly it reads:

> …
>
> In late November [the father's] brother in law passed away. In the midst of this tragedy we realised that maybe it was time to move back to Australia, so [the father] could be closer to his sister, nephew and niece. The ever dwindling economy here in Alberta also has not helped.
>
> In saying that we figured we would let our family and friends know that [the father] will be moving back to Australia WITH all of the kids. I will hopefully be following hopefully at the latest April/May.
>
> This has been an extremely difficult decision. But we feel this is what's best for our children and their future. Thank you all so much for helping us during this difficult transition…

39. In her affidavit filed 26 April 2016 the mother says that this post "does not indicate that the move to Australia was meant to be permanent." She goes on to say "however at the time I believed that it was in the children's best interests to temporarily relocate to Australia with [the father]… I understood that we would be returning to Canada as a family once the economy in Alberta improved and the [father] was able to save some money. I advised my family that the respondent and I would be returning to Canada with the children in or before June 2016."

40. I do not accept the mother's evidence as to the meaning of the Facebook post. I accept the submissions of counsel for the father that the phrase "extremely difficult decision" is particularly inapt to describe a six month holiday, and that the words "best for our children and their future" is indicative of a stay in Australia far in excess of six months duration. Likewise the words "difficult transition" are hard to align with a six month stay.

41. Whilst still in Canada, the father had heard of a friend who had experienced difficulties in sole travel with children without written consent of the other parent. Accordingly he wanted the mother to provide him with a document which recorded her consent. She did. It was in evidence. Parts of it are

handwritten and parts are typed. Part of the typed form reads "Date of departure from Canada: 2015-12-29/Date of return to Canada: 2016-06-30."

42. The mother says that this date was the subject of agreement between the parties; the father denies it.

43. The mother is not able to explain the significance of the specificity of the date 30 June. Although it was approximately six months after the children departed from Canada, it was not precisely six months. Moreover, the date does not appear to align with any commitment of the mother or the parties, or indeed the children.

44. Moreover, this is the only document which contains any reference to a date of 30 June 2016. It does not appear in any of the mother's Facebook comments or indeed, at least initially, in her communication with the father after he had arrived in Australia.

45. I am not persuaded that there was an agreement between the parties to return to Canada on 30 June 2016. However that does not of itself preclude the parties having an understanding that the move would only be temporary.

46. On 29 December 2015 the father and children left Calgary. The mother made a Facebook post which (insofar as it comprises words) said:

> Having to say goodbye to my littles (sic) has literally been the hardest moment of my life thus far.. please take good care of them…

47. I do not discern any real assistance in that post as to whether or not the intention was to permanently move to Australia. Even on the mother's case there was to be a significant lapse of time between 29 December and when she would next see the children in Australia.

48. However an important event did occur at the airport, according to the maternal grandmother, who attended to farewell the father and the children. In her oral evidence in re-examination, she said that at the airport the father hugged her and said words to the effect "don't worry Mum, the six months will just fly by and we'll all be home before you know it."

49. If true, this would be a significant concession on the part of the father that he knew the absence would only be six months.

50. Because this evidence only came out in re-examination, there was no cross-examination on it. Nonetheless when the father later gave his evidence, he disputed that any such conversation occurred. Rather he said that she whispered to him when they were hugging "please take care of them."

51. If this conversation with the maternal grandmother occurred as she asserts, it is quite remarkable that there is no mention of it – whatsoever – in her affidavit in these proceedings filed 12 May 2017. Moreover, as shall be seen, there was no mention of it by her in the subsequent email communication between her and

the father which was in evidence before me. Although I shall traverse that material in detail in a moment, the perfect opportunity for her to refer to that intimate conversation was on 16 November 2016, in the course of an email exchange with the father. On that day, initially the maternal grandmother relevantly said "lastly its been 4.5 months since the kids were due back in Canada, what date will you be returning them?"

52. To this the father says "Returning them????? We all moved to Australia … and you know that. Your whole family knows that it was a MOVE TO AUSTRALIA. There was no holiday. Have you lost your mind?..."

53. About 45 minutes later the maternal grandmother responded. She said:

> You went to Australia telling everyone (including me, Cory and my whole family) that [the mother] would follow and you would be together as a family. You have changed that or never had any intention of it; I'm not sure which. Either way, everyone feels very betrayed by your actions.

54. To my mind this is quite inconsistent with the maternal grandmother's evidence of the airport conversation, and far more consistent with the father's version of it. I do not accept the maternal grandmother's evidence in relation to that conversation.

55. The mother says that by March 2016 the father was seeking to actively exclude her from the children's lives, and make her communication with them difficult. Not much turns on that, but I should note that on 12 March she made a Facebook post which in part reads:

> I miss my littles (sic) more then (sic) life but they are happy and blossoming with there (sic) amazing dad ... People can judge me but I know we are doing what's best for OUR KIDS despite my struggle and heartbreak.

56. Not only does this appear to be inconsistent with any view that she then had that she was being excluded from their lives, but to my mind it is quite consistent with her belief that they were likely to remain permanently living in Australia, or at least had no plans to shortly return to Canada. It is difficult to easily mesh such a post with the mother's case, that in two and a half months' time, the children would be returning to Canada to live there permanently.

57. Of course the mother did not in fact travel to Australia in May 2016, or at all prior to 30 June 2016. She says that that was because the father had taken up a relationship with her friend, and there was therefore no prospect of them resuming life together as a family.

58. In her affidavit sworn 18 January 2017, the mother says that by the middle of March 2016, she "began asking the [father] when he planned on bringing the children back to Canada." She annexed some text messages to that affidavit

which she says inferentially relate to that period, but they do not appear to be independently dated. Assuming that they are from that period, they do not speak of the mother demanding the return of the children to Canada. Rather what she proposes is "share custody overseas six months on six months off."

59. The mother would have me believe that 30 June 2016 was an important date, in that it was the day when the children were to return from Australia. Exhibit 14 to the father's affidavit is some text messages which the parties in fact exchanged on that very date. Although no such significance was attached by the father to that evidence (rather he annexed them as examples of him telling the mother to talk to the children, but her not responding) I am comfortably satisfied that indeed they were sent on 30 June 2016, which day was a Thursday in 2016 and which fell within Queensland school holidays at that time. (In one of his messages, the father says "Kids are on school holidays.")

60. Interestingly, far from demanding the return of the children to Canada, the mother asked for them to be made available for Skype sessions with her over the next four days. Further, she sent a photograph of her cuddling a kitten and asked the father to show the children that photograph. Finally, there was a text message sent by the mother to the father on 6 July that made no demand for the return of the children, but rather asked the father to Facetime her "when the kids are awake."

61. If it was the mother's contemporaneous view that, on and from 30 June 2016, the father was unlawfully retaining the children in Australia contrary to their express agreement, these communications are simply inexplicable. On the other hand, if it was her then belief that the children were permanently residing in Australia pursuant to the agreement which the parties had struck (accepting that she had not in fact followed) they are perfectly explicable.

62. On 2 August 2016 the mother made a further Facebook post. It reads:

> No I haven't deleted you or blocked you… for those that have asked. I took a break from social media circus/bullshit.
>
> It's been trying to focus on myself and my closest family and friends. This has literally been the worst few weeks of my life. I have been finding it hard to see any light at the end of the tunnel.
>
> In saying that I'm looking forward to getting the fuck out of Alberta. Even though it will only be a week starting tomorrow. In September I'll be FINALLY going to Australia. The light is finally peaking (sic) through.

63. On 12 August 2016 the mother sent a text message to the father. In considering its contents, it is important to bear in mind that only three days later she was hospitalised on psychiatric grounds. Nonetheless its contents are important:

> I sent you and your mom and (sic) email. You won't be hearing from me again. I have said everything I need to say. I'm completely done. I'll sign over all custody to you, and send whatever papers I can. I will not be seeing the children ever again. You were right this was all my fault, I have made my bed. The kids shouldn't have to pay the price for my misery. Goodbye.

64. To my mind, to this message the father tellingly responded "They are your children too Maria."

65. Even accepting that the mother was then likely distraught and suicidal, the text message does not assert that the father was then misconducting himself in any way.

66. On 15 August 2016 the mother was hospitalised, and then on 18 August the maternal grandmother emailed the father. In the email she said:

> One thing I think we will need to work on together is her contact with the children and what that will look like. In the near future, I hope that will be either speaking with them on the phone or possibly Facetime as much as possible. And without any drama or stress of other matters. Down the road I believe it is imperative for her wellbeing that she have physical access to them. What that looks like at this point – I don't know. I do know it is a goal we cannot ignore and must do what we can to attain it. I am open to hearing any and all ideas.

67. Even accepting that the maternal grandmother was not purporting to act as the mother's agent, that communication is inconsistent with the father then misconducting himself by having the children with him in Australia.

68. That email appears to have precipitated some Facebook communication between the father and maternal grandmother, although the chain is not complete in the evidence. On 1 September 2016 (so it seems) the maternal grandmother sensibly provided the father with a link to something for him to read in relation to long distance parenting. To that message the father responded:

> The kids and I won't be moving to Canada again. It will be up to [the mother] to move here, just like the plan was when we moved here. I will never get child support money from [the mother] so it should be my decision as to where we live as I pay all the bills for my kids. [The mother] has told me to "get fucked" every time I have asked for help with paying the nanny. I make a good living here and the kids are happy in Oz. Taelon hated Canada and so happy to be back here in Oz, no one can take that away from him.

69. It appears as though that message did not come to the maternal grandmother's attention until 13 September. When she responded on that date, she said:

..

> No one is asking you to move to Canada, just as no one can ask [the mother] to move there. Her moving there was originally based on you two reconciling. Needless to say that is no longer viable since you have a girlfriend.

70. On 31 August 2016 the maternal grandmother messaged the father suggesting that the children might come to Canada at some point. To this the father responded "the kids won't be travelling for some time as it costs way too much money and they won't go to Canada until they are completely signed into my name…"

71. On 3 September the mother made a Facebook post. It reads:

> I've made a LOT of mistakes in my lifetime. None of which were having 4 beautiful children with [the father]. I'm actually grateful I had kids with someone whose such an outstanding dad. I hope he has a great Aussie Father's Day and those little turds snuggle the absolute crap out of him.

72. Then on 12 September she again posted in relation to the father:

> I wish him love and light and happiness. Happy dad equals happy kids, that's it, that's all.

73. In October 2016 the mother and maternal grandmother travelled to Australia to visit the children. By arrangement with the father, they had unrestricted access to his home (save that he locked his own bedroom door) and the children. The mother says that she was terribly concerned about the living conditions of the children, and particularly the fact that they had not been receiving proper medical attention and the like. It seemed to precipitate some angry discussions between the parties. The father's affidavit annexed an exchange on Tuesday 8 November, while the mother was still in the country. In that she initially said "I am partitioning for full custody of the kids," and later "I'm moving to the sunny coast that the kids are coming with me." A little later on she said "the kids move with me to the sunny coast. Or I will call in The Hague convention and they will forcefully remove them from you and will bring them back to Canada." A little later again she said "no wonder you didn't want me here. You know full well no court will give you full custody once I move here.."

74. However tellingly in the course of that exchange she said "[W]ant to know what I did that was best for our children? I let you bring them here thinking you would provide a BETTER life than they had in Canada."

75. To my mind this exchange, even accepting it was likely the product of some anger – is wholly inconsistent with the Director's case, which would have me believe that the mother was only seeking to keep the peace; however plainly this angry exchange was doing no such thing. Nowhere in it does she assert

that the father is wrongfully retaining the children after 30 June 2016. Moreover the last quote is particularly telling – the reference to "BETTER life" is quite contrary to it only being a six month vacation, at the conclusion of which the children were to return to Canada.

76. Exhibit 15 to the father's affidavit are some further text messages (but not able to be assessed as to date) between the parties. In that exchange the mother said to the father:

> Don't ever contact me again. EVER. You have chosen your path. You've chosen a new mom. I'm blocking you everywhere now. You call me a narcissist and selfish all you want, but don't you dare forget whose idea it was to send you all over there. Who gave up everything for you to be happy FINALLY!!! I regret it every fucking day I wake up and I can cuddle my babies, tell them I love them. Have them know I'm sorry for the person I was when I was with you. I did this for them. And for you. But you forget that don't you. You live in your little dream world where I don't exist anymore. So fine you get your wish.

77. Irrespective of the date that it was sent, it plainly is inconsistent with the Director's case that the father and children were only temporarily in Australia.

78. The first mention that I can find in the evidence of an alleged agreement to return the children to Canada on 30 June 2016 (other than the consent form itself) is a message from the maternal grandmother to the father of 16 November 2016. I have already recited the pertinent parts of that exchange at paragraphs 51-52 hereof. That exchange was only eight days before the mother filed and obtained orders in the Alberta Courts. Unfortunately it seems to me that the reference to "4.5 months" has to be viewed in the context of the imminent Canadian litigation. At paragraph 18 of the mother's affidavit filed in support of those proceedings on 24 November 2016, she exhibited the travel authorisation letter. That appears to be the first mention of it in any of the communication between the parties.

79. I am persuaded that the intention of both the father and the mother when the children and father left Canada on 29 December 2015 was that they would indefinitely stay in Australia, because it provided them with a better future, unlike the difficult financial situation the parties were then experiencing, in Canada. I accept however, that the mother likely thought that the parties would eventually reconcile, as they had on occasion in the past. However I am not satisfied that her consent to the children leaving the country was on the basis that the parties would in fact reconcile. Her contemporaneous communications, both prior to and after 29 December 2015, leave me in little doubt that that was her position.

Other considerations

80. As I have indicated, although the case before me was largely fought as if the question of intention was determinative, it is not. I therefore need to consider the additional facts germane to the question of habitual residence as at 30 June 2016.

81. Firstly, of significance is the uncontested fact that for most of their lives the father has been the primary carer of these children. Indeed it appears likely that the mother has never been their primary carer, except perhaps when they were infants and breastfeeding. In a sense, the children have always resided where the father resides. A telling illustration of that is that, when in May 2013, the mother returned without the children to Canada (accepting there were then only two children) they remained living with the father until he moved to Canada in December 2013.

82. Secondly, as at 30 June 2016, the children had been schooled in Australia for six months. Some criticism was made of the father that he excluded the mother from the enrolment process; I do not accept that as a matter of fact. It must have been within the mother's contemplation that the children needed to be schooled in Australia, and yet it appears as though she made no enquiry about, or sought any input in relation to, that.

83. Thirdly, the father has a strong connection with the Central Queensland region. It appears as though he grew up in Biloela where his parents still reside, and he and the mother have previously resided in the Gladstone region where he now lives.

84. I have no evidence as to the children's cultural, social and economic integration, but on the other hand I have no evidence that that have not culturally, socially or economically integrated.

Evaluation

85. The following support the habitual residence of the children as at 30 June 2016 being in Australia:

- When the children left Canada on 29 December 2015, the parties intended that the children would thereafter indefinitely reside in Australia;
- The children have always been primarily cared for by the father, and have resided where he resides;
- The father has strong connections with the Central Queensland region;
- The older two children have spent extensive periods of time in Australia.

86. I am satisfied that the children's habitual residence as at 30 June 2016 was Australia; their habitual residence at that date was not Canada. The requirement established by Regulation 16(1A)(b) is not made out, and it

therefore follows that the father's retention of the children in Australia after 30 June 2016 was not wrongful.

ACQUIESCENCE

Overview

87. Strictly speaking it is not necessary for me to go on to consider the question of acquiescence, as I am satisfied that the children's retention by the father in Australia is not wrongful. However to cover the eventuality that I am in error in that conclusion, it seems appropriate that I should nonetheless go on to discuss acquiescence. If acquiescence is established, then it does not automatically mean that the return order should not be made; rather it only enlivens a discretion not to make the return order.

The law

88. Regulation 16(3)(a)(ii) states:

> A court may refuse to make an order … (for the return of the child) … if a person opposing return establishes that:
>
> (a) the person, institution or other body seeking the child's return:
>
> …
>
> (ii) had consented or subsequently acquiesced in the child being removed, or retained in, Australia.

89. In *Department of Family and Community Services & Raelson* [2014] FamCA 131, at [100] Kent J helpfully distilled principles relevant to acquiescence in this context as follows (footnotes omitted):

> …The following propositions are distilled from *Re H (Abduction: Acquiescence)* [1998] 2 AC 72; *Director-General, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785 per Lindenmayer J; *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 (EWCA); *Kilah v Director-General, Department of Community Services* (2008) FLC 93-373 (Bryant CJ, Coleman and Thackray JJ); *Police Commissioner of South Australia v Temple* (1993) FLC 92-365; *Laing v Central Authority* (1996) 24 Fam LR 555.
>
> a. The onus of establishing acquiescence rests upon the respondent. Acquiescence must be proven by clear and cogent evidence.
>
> b. The right to which acquiescence is directed is the right of the applicant parent to the immediate return of the children. It is not acquiescence in the child or children remaining permanently in the forum that needs to be established.

c. Acquiescence operates to effectively estopp the applicant parent from demanding the immediate return of the child or is to be seen as waiver by the applicant parent of the right to immediate return.

d. The applicant parent must be shown to have the subjective intention not to insist upon a right to summary return. If that subjective intention is not established it is only if the words or actions of the applicant parent clearly and unequivocally show, and have lead the respondent parent to believe, that the applicant parent is not asserting or going to assert a right to summary return, and are inconsistent with such return, that acquiescence is established.

e. Words or conduct of the applicant parent (including passive inaction over time where action ought be expected) have the potential to inform the enquiry as to acquiescence in two ways. First, and most commonly, the court infers from the words or conduct (or both) that the applicant parent had the requisite subjection intention despite later claims by the applicant parent as to his or her intentions being otherwise. In so doing the court is determining as a fact that the applicant parent had the requisite subjective intention. Second, and perhaps less commonly, the words or conduct (or both) of the applicant parent may be sufficiently clear and unequivocal as to demonstrate that the other parent was lead to believe that the applicant parent was not going to insist upon summary return. Later claims that the applicant parent always secretly intended to seek summary return, even if true, will not displace acquiescence in those circumstances.

f. In both categories of case the context or contextual matters surrounding the words or the conduct may be important considerations in determining that clear and unequivocal acquiescence is established.

g. Acquiescence, once established is irrevocable. To conclude otherwise would render the acquiescence exception illusory because it will only arise when the applicant parent, who has previously acquiesced, has changed his or her mind and seeks immediate return. Prompt attempts to displace or withdraw acquiescence might be relevant to the court's exercise of discretion, as might be the reasons for those attempts and indeed the consequences of acquiescence, but acquiescence once established cannot be revoked.

90. I gratefully adopt that statement as still reflecting the current law.

The facts

91. I have already extensively recited the material germane to determining whether or not the mother's conduct after 30 June 2016 comprises acquiescence.

92. Critical are her text messages to the father on that day, which are completely inconsistent with her demanding the return of the children, much less even expecting them home on that occasion. Next, even accepting that it is likely she was psychologically unwell when she sent it, there is the mother's Facebook post of 2 August which makes it plain that, far from wanting to remain in Alberta with the children, she was "looking forward to getting the fuck out" of there.

93. Ten days later there were then her text messages of capitulation. Again even accepting that she was likely unwell at the time, it nonetheless does not speak of an insistence upon her rights: far from it.

94. Accepting that she was likely out of hospital by the time of her Facebook posts of 3 and 12 September, there is nothing in them which speaks of an insistence upon rights.

95. Finally there are the mother's text messages to the father while she was visiting the children in Australia. Particularly the comment "..Don't you dare forget whose idea it was to send you all over there.. I did this for them. And for you…" is significant.

96. That correspondence, to my mind, taken in its totality, establishes acquiescence in this case.

Discretion

97. The finding of acquiescence means that there would be a discretion to be exercised under Regulation 16(3). The points in favour of the discretion being exercised in favour of refusing to make an order are as follows:

- The children have now been in Australia since about 29 December 2015;
- The children have connections with the Central Queensland region, as does the father;
- The children have likely now settled in Gladstone, including established connections with schools and friends;
- The older two children have spent extensive periods of time in Australia;
- The children have always been in the father's primary care and it appears as though he would now have great difficulty being able to settle in Canada, given that it is said that there are criminal proceedings outstanding against him there.

98. On the other hand the following points tell in favour of the return order being made:

- The children have close connections with the maternal family which appears to exclusively reside in Canada;
- A judge of the Supreme Court of Alberta has ordered the children to return;
- There are extant proceedings in relation to the children in the Alberta Supreme Court.

99. Weighing those matters in the balance persuades me that, if I have erred in my conclusion that the children were habitually resident in Australia on 30 June 2016, then nonetheless any discretion thereby enlivened should be exercised in favour of refusing to make a return order.

CONCLUSION

100. For these reasons the Director's application will dismissed.

I certify that the preceding one hundred (100) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 7 July 2017.

Associate: T Ranson

Date: 7 July 2017