



Counsel Family Lawyers

Family Law Case Update #20: Cases with Protection Issues

Caroline Counsel

Counsel Family Lawyers

Wolford & Attorney-General's Department (CTH) [2014] FamCAFC 197

Strickland, Ryan and Murphy JJ - Sydney

Facts

- Appeal from decision of Justice Johnston for mother to return two children to the UK.
- Proceedings brought by the Cth A-G department Central Authority pursuant to the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).
- The parties commenced their relationship in late 2006, from early 2007 lived together in England.
- Children were born in the UK, where they lived with mum and dad until late 2013.
- On 24.12.2013, the mother removed children from UK and travelled to Australia.
- The parties moved to Australia in January 2008 and lived there until March 2009.
- A child was born in 2012 and the youngest child born 2013.
- Mother began to suffer symptoms of depression following first birth.

Mother argued the following defences -

- father consented to the children being returned to Australia; and
- If returned, the children would be exposed to a grave risk of psychological harm.

These defences to her actions and the implementation of the Hague Convention being invoked were rejected by the trial judge.

- Since returning to Australia mother had received counselling and medical treatment for her depression.
- Hearing commenced on 23 May 2014 before the trial judge- who made decision to adjourn the matter to July 2014, where a further date was



Counsel Family Lawyers

allocated to decide what conditions should be attached to the order to enable the mother and children to return to the UK.

- The parties could not agree on those conditions suggested by the trial judge and hence the adjournment to 9 July 2014.
- Proceedings adjourned again to allow father another opportunity to provide appropriate undertakings of support once children and mother returned including accommodation and day-to-day support for mother and children.
- If the undertakings were not provided, the trial judge intended to dismiss the application.

Appeal grounds of mother:

- holding that "grave risk of harm" meant "risk of grave harm"
- finding no grave risk of harm when found mother stressed at move and children likely to have adverse psychological consequences
- failing to give weight to psychological effect on children
- Finding that lack of family support could be ameliorated by conditions
- Finding in absence of evidence mother could manage her depression, anxiety and stress in England
- Accepting undertakings from father not providing for easy return of the children to England nor for their necessities until the court of habitual residence can become seized of proceedings brought in that jurisdiction

Reasons and Decision

- Appeal ultimately dismissed.
- Treatment of the mother's psychiatrist's evidence (i.e. weight)
- Full Court pted out context in which grave risk defence was mounted ie the mother tendering evidence of the father being emotionally abusive to their son and absent in any affection towards their daughter.
- Mother's psychiatrist had met mother on 3.03.2014 and completed report on 7 May 2014 by which time she had seen mother 8 times.
- Cited passages from the psychiatrist's report where opined that to return to matrimonial home would cause the mother to feel trapped and isolated
"[The mother] is convinced that, based on past experience, he will use the children as pawns in his control over her" [39]



Counsel Family Lawyers

- The trial judge commented the evidence suggested the mother would not be residing with the father. Also evidence that mother had availed herself of counselling and medical assistance not only in Australia but also in the UK.
- The factual basis of some of the psychiatrist's assumptions in the report were not born out in the evidence and trial judge was correct in not relying on these predictions and in any case it was not opined of any psychological harm to children.
- The trial judge said, in effect, there was an error in grave risk defence
- In the Full Court's opinion, the trial judge had appropriately summed up the test for defence in regulation 16(3)(b): “ ... *there is a grave risk that the return of the children under the Convention would expose them to physical or psychological harm or otherwise place them in an intolerable situation.*”

The Full Court set out below:

56. *As to what might constitute a grave risk of exposure to future harm, specific reference was made by his Honour to DP v Commonwealth Central Authority at [45] which is set out below.*

That is not to say, however, that reg 16(3)(b) will find frequent application.

It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence.

Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return.

57. *Reliant on In Re E at [33] the primary judge correctly proceeded on the basis that the predicted risk “... must have reached such a level of seriousness as to be characterised as ‘grave,’” and, from the same passage that although the word*

“grave” characterises the risk rather than the harm, “there is in ordinary language a link between the two.” It is useful that we now set out in full that paragraph and the following paragraph of In Re E:



Counsel Family Lawyers

[33] *Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.*

[34] *Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation' (our emphasis). As was said in Re D [2007] 1 All ER 783 at [52], ' "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" '. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. [Mr R] accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.*

- The trial judge accepted that it was likely children would reside independently of their father and that the mother would be stressed and anxious and this



Counsel Family Lawyers

would have a negative effect on the children, however he also found she could avail herself of counselling and medication for depression and anxiety.

- The trial judge also referred to undertakings i.e. to protect the children that father was prepared to offer and also a condition which would require the mother to apply to the English Courts for orders as soon as possible.
- The trial judge said there would be some adverse psychological consequences to the children, but this did not constitute a risk of harm.
- Full Court agreed with reasoning of the trial judge.

Adequacy of Undertakings

- There was evidence from a solicitor in England - that mother as dual citizen would qualify for income support. Mother would also have housing entitlements, could apply for child support and may have access to Legal Aid.
- Mother had argued her prospect of obtaining legal aid would not be so certain and that she would find it difficult to satisfy the merits test, which would require evidence of her being a victim of domestic violence.
- Mother had asked for an undertaking for the father to fund any future application in England and correctly, the trial judge declined to do this.

Full Court:

75."It follows that in making it easier for children in their place of habitual residence, undertakings or conditions should not be imposed which are unnecessary or, rather than give effect to the Abduction Convention, undermine it. We do not accept that it was incumbent on his Honour to require that the father pay the mother's legal expenses in relation to proceedings she would want to commence on her return."

This case summary does not constitute legal advice and CFL is not responsible for any reliance upon its contents in the absence of legal advice being provided to you in conference or in writing concerning your specific circumstances.

CONTACT US

COUNSEL FAMILY LAWYERS

(03) 9320 3900

ccteam@ccfamlaw.com.au