HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

LK APPELLANT

AND

DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES RESPONDENT

LK v Director-General, Department of Community Services
[2009] HCA 9
11 March 2009
S524/2008

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Family Court made on 24 June 2008 and 4 July 2008 and in their place order that:*

   (a) *the appeal to the Full Court be allowed; and*

   (b) *the orders of Kay J made on 29 August 2007 be set aside and in their place it be ordered that the application of the Director-General, Department of Community Services made on 15 March 2007 be dismissed.*

On appeal from the Family Court of Australia

Representation

P G Maiden SC with D L Ward for the appellant (instructed by the Legal Aid Commission of NSW)

B W Walker SC with V A Hartstein for the respondent (instructed by the Department of Community Services Legal Services Branch)

CATCHWORDS

LK v Director-General, Department of Community Services

Family Law – Children – Family Law (Child Abduction Convention) Regulations – Whether children habitually resident in convention country immediately before retention in Australia – Relevance of past and present intentions of each parent – Relevance of habitual residence of each parent – Weighting of relevant criteria – Appropriate time for determining habitual residence.

Family Law – Children – Family Law (Child Abduction Convention) Regulations – Meaning of "habitually resident" – "habitual residence" distinct from connecting factors of domicile or nationality – Whether intention decisive of habitual residence or whether consideration of wide variety of circumstances permitted – Relevance of a finding of "settled purpose" – Meaning of "settled purpose" – Whether parent ceased habitual residence in Israel without making a final decision not to return there.

International law – Treaties – Interpretation – Convention on the Civil Aspects of International Child Abduction – Consistent construction of terms by courts of contracting states.

Words and phrases – "habitual residence", "habitually resident", "settled intention", "settled purpose", "wrongful retention".

Family Law Act 1975 (Cth), s 111B(1).
Family Law (Child Abduction Convention) Regulations, regs 4, 15, 16(1A).
Convention on the Civil Aspects of International Child Abduction.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. A husband and wife, married and living in Israel, separated in September 2005. The four children of the marriage continued to live with the mother in the matrimonial home. All four children had been born in Israel but were entitled to Australian citizenship by descent from their mother[1]. In May 2006, the mother and the four children, then aged between 15 months and 8 years, travelled by air from Israel to Australia. They held return tickets to Israel for 27 August 2006.

2 Before the mother and the children left Israel, the father knew, and accepted, that they intended to travel to Australia. The father knew, and accepted, that the mother left Israel on the footing that she would return if she and her husband were reconciled, but would not if the husband persisted in his then stated intention to live separately from her. Both before she left Israel and immediately after arriving in Australia, the mother took steps for her and her children to establish a home in this country. Just over two months after the mother and children had arrived in Australia, the husband told the mother that he wanted the children to return to Israel but that, as he had said previously, he wanted a divorce. Were the children then habitually resident in Israel?

3 That question of habitual residence is the dispositive issue in this appeal from orders of the Full Court of the Family Court of Australia[2]. By those orders, the Full Court (Bryant CJ, Coleman and Thackray JJ) dismissed the mother's appeal against orders[3] of a single judge of the Family Court of Australia (Kay J) ordering the return to Israel of the four children pursuant to provisions of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"). Those orders of the primary judge were made in proceedings commenced by the Director-General, Department of Community Services, as the State Central Authority appointed pursuant to reg 8(1) of the Regulations for the purposes of the Regulations. The Director-General's application to the Family Court responded to a request by the Central Authority for the State of Israel for the return of the children.

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1 *Australian Citizenship Act* 1948 (Cth), s 10B.

2 *Kilah v Director-General, Department of Community Services* (2008) 39 Fam LR 431.

3 *Director-General, Department of Community Services v Kilah (No 3)* [2007] FamCA 1099.

4 The Full Court should have held that the children were not habitually resident in Israel when the father asked the mother to return them to Israel. The appeal to the Full Court should have been allowed and the orders made by the primary judge set aside. The appeal to this Court should therefore be allowed and consequential orders made to the effect described.

The Regulations

5 The Convention on the Civil Aspects of International Child Abduction ("the Abduction Convention") was signed at The Hague on 25 October 1980. The Abduction Convention entered into force for Australia on 1 January 1987 and for Israel on 1 December 1991. Section 111B(1) of the *Family Law Act* 1975 (Cth)[4] ("the Act") provides for regulations making "such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit" under the Abduction Convention.

6 The Regulations (made in accordance with s 111B(1) of the Act[5]) provide (reg 1A(2)) that they are to be construed having regard to the principles and objects mentioned in the preamble to and Art 1 of the Abduction Convention and recognising:

> "that the appropriate forum for resolving disputes between parents relating to a child's care, welfare and development is ordinarily the child's country of habitual residence".

Regulation 14 provides for the making of applications to a "court"[6] for any of several forms of order including[7] an order for the return of a child under the Abduction Convention "[i]f a child is removed from a convention country to, or retained in, Australia". Application for an order of that kind may be made by "the responsible Central Authority".

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4 As inserted by the *Family Law Amendment Act* 1983 (Cth) and amended by the *Family Law Amendment Act* 2000 (Cth).

5 Reference is made in these reasons to the Regulations as they stood at the date of the initiating application in the Family Court.

6 Defined by reg 2(1) as a court having jurisdiction under ss 39(5)(d), 39(5A)(a) or 39(6)(d) of the Act.

7 reg 14(1)(a).

7 Regulation 16(1) provides that if an application is made under reg 14(1) for an order for the return of a child, the application is made within one year of the child's removal or retention, and the applicant satisfies the court that "the child's removal or retention was wrongful under subregulation (1A) [of reg 16], ... the court *must*, subject to subregulation (3), make the order" (emphasis added). In this appeal, the chief focus of attention is upon the third of those conditions: that the child's removal or retention was wrongful under reg 16(1A).

8 Regulation 16(1A) provides:

> "For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:
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> (a) the child was under 16; and
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> (b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and
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> (c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and
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> (d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and
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> (e) at the time of the child's removal or retention, the person, institution or other body:
>
> (i) was actually exercising the rights of custody (either jointly or alone); or
>
> (ii) would have exercised those rights if the child had not been removed or retained."

It will be observed that the requirements of each of the five paragraphs of reg 16(1A) must be satisfied if it is to be shown that a child's removal to, or retention in, Australia is wrongful. The first two requirements look to the age of the child (par (a)) and to whether the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia (par (b)). The remaining requirements hinge about the notion of "rights of custody in relation to the child". The rights that are to be considered are rights

"under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia".

9 Although, as indicated at the start of these reasons, it is the application of the second requirement of reg 16(1A) (habitual residence) that is dispositive, it is as well to say something more about the requirements which refer to "rights of custody". The provisions of reg 16(1A) about "rights of custody" are to be understood by reference to the terms of reg 4:

> "(1) For the purposes of these regulations, a person, an institution or another body has rights of custody in relation to a child, if:
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> (a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and
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> (b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.
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> (2) For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.
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> (3) For the purposes of this regulation, rights of custody may arise:
>
> (a) by operation of law; or
>
> (b) by reason of a judicial or administrative decision; or
>
> (c) by reason of an agreement having legal effect under a law in force in Australia or a convention country."

10 Argument of the present matter in the courts below proceeded without the parties directing close attention to questions of breach of rights of custody. There was some evidence before the primary judge about Israeli statute law governing guardianship and custody of minor children. The general tenor of the statute – the Capacity and Guardianship Law 1962 – is that parents have joint custody of their minor children. Argument proceeded, at least in this Court, upon the assumption that, if Israeli law were to be applied, the retention of the children

by one joint guardian (the mother) against the expressed wish of the other joint guardian (the father) would be in breach of the rights of custody of the father.

11 Approaching the matter in that way makes some assumptions about the content of Israeli law which it is neither necessary nor appropriate to examine further. They need not be examined because questions of breach of rights of custody given by Israeli law would arise only if the children habitually resided in Israel immediately before their removal to, or retention in, Australia. It is important to add, nonetheless, that if the parties were right to give Israeli law the operation that was assumed, their approach to the present matter properly reflected what was said by the plurality in *DP v Commonwealth Central Authority*[8]:

> "Nothing in the definitions of 'removal' and 'retention' or of 'rights of custody' requires that, before removal or retention, there shall have been any judicial decision about rights of custody and nothing in those definitions requires that at some later time there be any application to a court to determine who shall have future rights of custody in relation to the child. All that the definitions require is that by the law of the place of habitual residence immediately before removal or retention, the child's removal to Australia or the child's retention in Australia is in breach of the rights of custody of some person, institution or body. Often enough, that will be so where, by operation of the law of the place of habitual residence, both parents have joint rights of custody of children of their union. Sometimes, before any application to the courts in Australia, the parent who has not removed or retained the child will have approached the courts of the place of habitual residence for interim or permanent orders about custody of the child but that will not always be so."

The courts below

12 Both the primary judge[9] and the Full Court[10] concluded that, immediately before the retention of the children in Australia, they were habitually resident in Israel. The primary judge treated the retention of the children as beginning when

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8 (2001) 206 CLR 401 at 412 [27]; [2001] HCA 39.

9 [2007] FamCA 1099 at [38].

10 (2008) 39 Fam LR 431 at 439 [25], 452 [64], 459 [100].

the father withdrew his consent to their remaining in Australia and identified[11] this withdrawal of consent as occurring "no later than July 2006". Whether that withdrawal of consent was seen as requiring the immediate return of the children or only their return by use of the bookings made for 27 August 2006 was not explored. On its face the latter seems more likely but it is not necessary to examine that question further. The Full Court proceeded[12] on the basis that it had been conceded at first instance that retention in Australia occurred either when the mother did not use the return air tickets that had been booked for 27 August 2006, or when the mother told the father, in December 2006, that she did not intend to return to Israel.

13 In the particular circumstances of this case it will not be necessary to decide what date should have been fixed as the date of retention. That will not be necessary because even if that date was as early as July 2006, it should have been found that at that time the children were not habitually resident in Israel.

14 It is convenient to notice two points about the proceedings in the courts below. First, the initiating process filed by the Director-General in the Family Court did not distinctly identify whether it was alleged that this was a case of wrongful removal of the children or wrongful retention. And in so far as it was alleged that there was a wrongful retention, neither the initiating process nor the supporting material identified when the retention was alleged to begin. Of course, it was open to the Director-General to seek to make alternative cases and there may well be circumstances (of which this may have been one) in which that is at least desirable, even inevitable. It is ordinarily to be expected, however, that the case (or cases) which an applicant seeks to make will be distinctly identified.

15 The second point to make about the procedures followed at first instance concerns the resolution of disputed questions of fact. Three members of this Court pointed out in *MW v Director-General, Department of Community Services*[13] that the requirements of the Regulations[14] that applications by a Central Authority for an order for the return of a child are dealt with

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11 [2007] FamCA 1099 at [25].

12 (2008) 39 Fam LR 431 at 452 [65].

13 (2008) 82 ALJR 629 at 639-640 [45]-[50]; 244 ALR 205 at 216-218; [2008] HCA 12.

14 reg 15.

expeditiously does not yield any general, let alone inflexible, rule prohibiting cross-examination of deponents of affidavits filed in support of or opposition to the application. As the plurality reasons said[15], "prompt decision making ... is one thing, and a peremptory decision upon a patently imperfect record would be another".

16 In the present case (which was decided by the primary judge before *MW*), the affidavits before the primary judge deposed to conflicting accounts of what had been said between the mother and the father both before and after the mother travelled to Australia. Although no deponent was cross-examined, the primary judge found that "the mother's version of events is more probable than the father's"[16]. This finding was accepted[17] in the Full Court of the Family Court and was not challenged in this Court.

17 Both at first instance and on appeal to the Full Court, the intentions of the mother (perhaps the intentions of both parents) about where the children should live were treated as critical to the identification of the place of their habitual residence. It was said[18] that the determination of the "settled intention" or "settled purpose" of the mother was a necessary and integral part of determining the place of habitual residence of the children. The conclusion that the mother was not shown to have a "settled intention" or "settled purpose", before the date of the return booking, of abandoning her Israeli place of residence was treated[19] by the Full Court as determinative. It will be necessary to examine what is meant in this context when reference is made to "settled purpose". It is convenient to introduce that consideration by reference to a particular submission made in the Full Court.

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15 (2008) 82 ALJR 629 at 639 [49]; 244 ALR 205 at 217.

16 [2007] FamCA 1099 at [23].

17 (2008) 39 Fam LR 431 at 450 [57].

18 (2008) 39 Fam LR 431 at 454 [73].

19 (2008) 39 Fam LR 431 at 452 [64].

18 Counsel for the mother submitted in the Full Court that the Family Court should depart from earlier decisions in Australia[20] and the United Kingdom[21] about what matters are to be taken into account in deciding questions of habitual residence, and instead follow what was said to be a different approach adopted in New Zealand[22]. The approach adopted in Australia and the United Kingdom was identified[23] as treating questions of "settled purpose" as a necessary and integral part of the determination, whereas that adopted in New Zealand was described as requiring "a broad factual inquiry" into all factors relevant to determining the habitual residence of a child, of which the settled purpose or intention of the parents is an important but not necessarily decisive factor.

19 The Full Court concluded[24] that it did not need to resolve "the apparently significant departure of the New Zealand courts" from previous Australian and United Kingdom authorities. Yet as noted earlier, it is clear that the Full Court treated the finding that the mother did not have a settled purpose or intention to abandon habitual residence in Israel as dispositive.

20 These reasons will demonstrate that the Full Court erred in treating the absence of a "settled purpose" of abandoning habitual residence in Israel as determining the issue in this case about the habitual residence of the children. To do that it will be necessary to begin by saying something about the term "habitual residence" as it is used in the Abduction Convention and in other instruments, then to examine some of the difficulties and ambiguities which can arise in a search for a settled purpose or intention about a place of residence or its

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20 *State Central Authority v McCall* [1995] FLC ¶92-552; *Cooper v Casey* [1995] FLC ¶92-575; *Department of Health and Community Services v Casse* [1995] FLC ¶92-629; *Panayotides v Panayotides* [1997] FLC ¶92-733; *DW v Director-General, Department of Child Safety* [2006] FLC ¶93-255; *HBH v Director-General, Department of Child Safety (Q)* (2006) 36 Fam LR 333.

21 *Dickson v Dickson* [1990] SCLR 692; *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562; *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993; *Cameron v Cameron* [1996] SC 17; *M v M (Abduction: England and Scotland)* [1997] 2 FLR 263.

22 *SK v KP* [2005] 3 NZLR 590; *Punter v Secretary for Justice* [2007] 1 NZLR 40.

23 (2008) 39 Fam LR 431 at 454 [73].

24 (2008) 39 Fam LR 431 at 454 [74].

abandonment, and lastly deal with the proposition that New Zealand cases considering the Abduction Convention take a different path from that taken in Australia or in the United Kingdom.

Habitual residence

21 The expression "habitual residence", and its cognate forms, have long been used in international conventions, particularly conventions associated with the work of the Hague Conference on Private International Law[25]. Although the concept of habitual residence was used in a Hague Convention (on civil procedure) as long ago as 1896[26], and has since been frequently used in other Hague Conventions[27], none of those instruments has sought to define the term. Rather, as one author[28] has put it, the expression has "repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address

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25 The history of the Hague Conference is traced in North, "Hague Conventions and the Reform of English Conflict of Laws", (1981) 6 *Dalhousie Law Journal* 417 at 419-421.

26 See art 15 of the Convention relative to Civil Procedure (1896), 88 *British and Foreign State Papers* 555 at 558. (This Convention was done in French and used the expression "résidence habituelle".)

27 See, for example, Convention Relating to the Settlement of the Conflicts Between the Law of Nationality and the Law of Domicile (1955) (a Convention done in the French language using the expression "réside habituellement"); Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961); Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965); Convention on the Recognition of Divorces and Legal Separations (1970); Convention Concerning the International Administration of the Estates of Deceased Persons (1973); Convention on the Law Applicable to Maintenance Obligations (1973); Convention on the Law Applicable to Matrimonial Property Regimes (1978); Convention on the Law Applicable to Agency (1978); Convention on International Access to Justice (1980); and Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989). See also Cavers, "'Habitual Residence': A Useful Concept?", (1972) 21 *American University Law Review* 475 at 477-479 ("Cavers").

28 McClean, *Recognition of Family Judgments in the Commonwealth*, (1983) at 28 [1.38].

themselves directly to the facts". Thus the Explanatory Report commenting on the Abduction Convention said[29] that "the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, *differing in that respect from domicile*" (emphasis added).

22 To approach the term only from a standpoint which describes it as presenting a question of fact has evident limitations[30]. The identification of what is or may be relevant to the inquiry is not to be masked by stopping at the point of describing the inquiry as one of fact. If the term "habitual residence" is to be given meaning, some criteria must be engaged at some point in the inquiry and they are to be found in the ordinary meaning of the composite expression. The search must be for where a person resides and whether residence at that place can be described as habitual.

23 Having regard, however, to the stated determination to eschew definition of the expression in its use in the Abduction Convention, and other instruments derived from the work of the Hague Conference, it would be wrong to attempt in these reasons to devise some further definition of the term intended to be capable of universal application. Rather, it is sufficient for present purposes to make two points. First, application of the expression "habitual residence" permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance that is to be attached to particular circumstances like the duration of a person's connections with a particular place of residence.

24 Use of the term "habitual residence" to identify the required connection between a person and a particular municipal system of law amounts to a rejection of other possible connecting factors such as domicile or nationality. In particular, it may be accepted that "habitual residence" has been used in the Abduction Convention (as it has been used in other instruments) "[t]o avoid the distasteful problems of the English concept [of domicile] and the uncertainties of

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29 Pérez-Vera, "Explanatory Report", in Permanent Bureau of the Hague Conference on Private International Law (ed), *Actes et documents de la Quatorzième session 6 au 25 octobre 1980*, (1982), vol 3, 426 at 445 [66].

30 Cavers at 487-491.

meaning and proof of subjective intent"[31]. It was said[32] in the nineteenth century that the notion that lies at the root of the English concept of domicile is that of permanent home[33]. But it was soon recognised[34] that domicile, in English law, is "an idea of law". Thus, in considering acquisition of a domicile of choice, questions of intention loomed large, and the relevant intention had to have a particular temporal quality (an intention to reside permanently or at least indefinitely). Use of "habitual residence" in the Abduction Convention rather than domicile as the relevant connecting factor entails discarding notions like the revival of domicile of origin and the dependent domicile of a married woman which marked the English law of domicile[35]. More importantly for present purposes, use of "habitual residence" in preference to domicile entails discarding the approach of the English law of domicile which gave questions of intention a decisive importance in determining whether a new domicile of choice had been acquired.

25 It may well be said of the term "habitual residence", as it was of the expression "domicile"[36], that "if you do not understand your permanent home ...

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31 Scoles, Hay, Borchers and Symeonides, *Conflict of Laws*, 4th ed (2004) at 247 § 4.14 ("Scoles, Hay, Borchers and Symeonides").

32 Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed (2006), vol 1 at 123 [6-004] ("Dicey, Morris and Collins").

33 *Whicker v Hume* (1858) 7 HLC 124 at 160 [11 ER 50 at 64]. See also *In re Craignish* [1892] 3 Ch 180 at 192; *Winans v Attorney-General* [1904] AC 287 at 288.

34 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 320.

35 Dicey, Morris and Collins at 122-164. See now the *Domicile Acts* of the Commonwealth and of each State, each of which came into force on 1 July 1982. Those Acts made a number of alterations to the law of domicile. They abolished the rule of dependent domicile of a married woman and the rule of revival of domicile of origin. They also provided (see, for example, *Domicile Act* 1982 (Cth), s 9(1)) that where, at any time, a child has his or her *principal home* with one of his or her parents and the parents are living separately or the child does not have another living parent, the domicile of the child is the domicile of the parent with whom the child has his or her principal home.

36 *Whicker v Hume* (1858) 7 HLC 124 at 160 [11 ER 50 at 64].

no illustration drawn from foreign writers or foreign languages will very much help you to it". Yet it may be accepted that "[h]abitual residence, consistent with the purpose of its use, identifies the center of a person's personal and family life as disclosed by the facts of the individual's activities"[37]. Accordingly, it is unlikely, although it is not necessary to exclude the possibility, that a person will be found to be habitually resident in more than one place at the one time. But even if place of habitual residence is necessarily singular, that does not entail that a person must always be so connected with one place that it is to be identified as that person's place of habitual residence. So, for example, a person may abandon a place as the place of that person's habitual residence without at once becoming habitually resident in some other place; a person may lead such a nomadic life as not to have a place of habitual residence.

26 In deciding where a child was habitually resident at an identified time it is, no doubt, important to consider the context in which the inquiry is required. Here, the chief contextual consideration is that, in accordance with the Abduction Convention, the purpose of the Regulations[38] is to facilitate resolution of disputes between parents relating to a child's care, welfare and development in one forum – the child's country of habitual residence – rather than any other forum. While that may tend in favour of finding that a child does have a place of habitual residence, neither the Regulations nor the Abduction Convention provides for a particular vindication or enforcement of rights in relation to the child. Vindication and enforcement of rights is to be a matter for the forum to which the Regulations and the Abduction Convention point: that of the child's habitual residence.

27 When speaking of the habitual residence of a child it will usually be very important to examine where the person or persons who are caring for the child live – where those persons have their habitual residence. The younger the child, the less sensible it is to speak of the place of habitual residence of the child as distinct from the place of habitual residence of the person or persons upon whom the child is immediately dependent for care and housing. But if, as the writings about the Abduction Convention and like instruments repeatedly urge, the question of habitual residence of a child is one of fact, it is important not to elevate the observation that a child looks to others for care and housing to some principle of law like the (former) law of dependent domicile of a married woman.

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37 Scoles, Hay, Borchers and Symeonides at 247 § 4.14.

38 reg 1A(2)(b).

Purpose and intention

28 Although intention is a necessary element in deciding domicile of choice, and "habitual residence" is chosen as a connecting factor in preference to domicile, examination of a person's intentions will usually be relevant to a consideration of where that person habitually resides. Sometimes, intention will be very important in answering that question. The example of a person who leaves a jurisdiction intending not to return is one such case. But unlike domicile, considerations relevant to deciding where a person is habitually resident are not necessarily confined to physical presence and intention, and intention is not to be given controlling weight.

29 First, individuals do not always act with a clearly formed and singular view of what it is intended (or hoped) that the future will hold. Their intentions may be ambiguous. The facts of this case provide one example of such circumstances. The mother left Israel on the understanding that if the marriage was reconciled she would return, but if it was not, she would not return. In those circumstances, it is not possible to say that the mother then had a settled intention which was sufficiently described either as being an intention to reside permanently in Israel or an intention to reside permanently in Australia. Neither description would acknowledge the significance attached to the possibility of reconciliation.

30 Both before and after she left Israel she set about establishing important connections with Australia consistent with her and her children establishing the centre of their lives here rather than in Israel. In particular, before she left Israel, she registered the children as Australian citizens and procured enrolment of the two older children at an Australian private school. In Australia she soon sought and obtained Centrelink benefits, the two older children started school and the next oldest was enrolled at preschool, the older children joined a soccer club and took music lessons. Later, with the assistance of her parents and the local Jewish community, she rented and furnished a home for her to live with the children.

31 All of these steps (except the last) were taken before the father asked, in July 2006, for the children to be returned to Israel. All of the steps identified are consistent with, indeed support, the view that by registering the children as Australian citizens and enrolling the older ones in school before she left Israel, the mother was then set upon a course from which she did not thereafter deviate: to move to Australia unless the father decided (contrary to the then state of affairs between them) to live with her and the children.

32 Because the possibility of reconciliation and return was not excluded when the mother left Israel, it may be said that her intentions, when she left, were to that extent ambiguous. Even accepting that to be so, because the notion of habitual residence does not require that it be possible to say of a person at any and every time that he or she has a place of habitual residence, it is important to recognise that a person may cease to reside habitually in one place without acquiring a new place of habitual residence.

33 Secondly, because a person's intentions may be ambiguous, in asking whether a person has *abandoned* residence in a place it is necessary to recognise the possibility that the person may not have formed a singular and irrevocable intention not to return, yet properly be described as no longer habitually resident in that place. Absence of a final decision positively rejecting the possibility of returning to Israel in the foreseeable future is not necessarily inconsistent with ceasing to reside there habitually.

34 Thirdly, when considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child. It will usually be necessary to consider what each parent intends for the child. When parents are living together, young children will have the same habitual residence as their parents. No less importantly, it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence. The assent of the other parent (or a court order) would be necessary. But again, if it becomes necessary to examine the intentions of the parents, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged.

35 It follows from each of the three considerations just mentioned that to seek to identify a set list of criteria that bear upon where a child is habitually resident, or to attempt to organise the list of possible matters that might bear upon the question according to some predetermined hierarchy of importance, would deny the simple observation that the question of habitual residence will fall for decision in a very wide range of circumstances. And examination of decided cases in the area does not require the identification of a closed set of criteria, or the attribution of predetermined weighting between them.

A division of authority?

36 International treaties should be interpreted uniformly by contracting states[39]. Although the questions in this matter turn immediately upon the proper construction and application of the Regulations, the Regulations provide[40] that, unless the contrary intention appears, an expression used in the Regulations and in the Abduction Convention has the same meaning in the Regulations as in the Abduction Convention. It follows that, unless it is shown that the term is used in the statute law of other contracting states in a sense different from the way in which it is used in the Abduction Convention, care is to be exercised to avoid giving the term a meaning in Australia that differs from the way it is construed in the courts of other contracting states. But it is no less important to recognise that, because the term is not defined in the Abduction Convention, and the absence of definition reflects the stated intention that it should be treated "as a question of pure fact", conclusions reached in the courts of other jurisdictions are not lightly to be treated as establishing principles of law which govern the term's meaning and application. Rather, they are to be read and understood as resolving the particular controversy tendered for decision.

37 The Full Court concluded[41] in the present matter that its own previous decisions, and decisions in the United Kingdom, had held that "a settled purpose is a necessary and integral part of a finding of habitual residence". What is meant by "settled purpose"?

38 Use of the expression "settled purpose" in this context is often traced to the statement in the reasons of Lord Scarman in *R v Barnet London Borough Council; Ex parte Shah*[42]:

> "I agree with Lord Denning MR that in their natural and ordinary meaning the words ['ordinarily resident'] mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration'. The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Sumner in

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39 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [25]; [2005] HCA 33.

40 reg 2(1B).

41 (2008) 39 Fam LR 431 at 454 [73].

42 [1983] 2 AC 309 at 342.

> *Lysaght's* case[43], namely residence adopted voluntarily and for settled purposes."

Two points may be made at once. First, both *Shah's Case* and the case to which Lord Scarman referred (*Lysaght's Case*) were decided in contexts very different from the present. *Shah's Case* concerned the making of educational grants to students "ordinarily resident" in the United Kingdom. *Lysaght's Case* was a decision about the liability to pay income tax by a person "ordinarily resident" in the United Kingdom. Secondly, the reference to "settled purposes" in neither case was amplified. But in *Shah's Case*, in the course of considering other cases in which the expression ordinary residence had been examined, Lord Scarman pointed out[44] that it would be erroneous to hold that demonstration of an intention to live in a place permanently or indefinitely was necessary to show ordinary residence. Such a conclusion would be erroneous, Lord Scarman held[45], because it would import into the law, from the old law of domicile, those questions of subjective intention which the use of the concept of ordinary residence was intended to exorcise.

39 It will be observed that reference was made in *Shah's Case* to residence "adopted voluntarily and for settled *purposes*" (emphasis added). Subsequent decisions, both in Australia and in the United Kingdom, have often referred to "settled *purpose*" or "settled intention". So, in *In re J (A Minor) (Abduction)*[46], Lord Brandon of Oakbrook, having first noted[47] that the term "habitually resident" is nowhere defined, is not to be treated as a term of art, and presents "a question of fact to be decided by reference to *all* the circumstances of any particular case" (emphasis added), expressed the opinion[48] "that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B". Leaving a country with a "settled intention not to return to it but to take up

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43 *Inland Revenue Commissioners v Lysaght* [1928] AC 234 at 243.

44 [1983] 2 AC 309 at 343.

45 [1983] 2 AC 309 at 343.

46 [1990] 2 AC 562.

47 [1990] 2 AC 562 at 578.

48 [1990] 2 AC 562 at 578.

long-term residence" elsewhere was identified as sufficient to terminate habitual residence in the first country, whereas "[a]n appreciable period of time and a settled intention will be necessary to enable" a person to become habitually resident in the second country[49].

40 But for the reasons given by Lord Scarman in *Shah's Case*, it would be wrong to treat the references to settled purposes (or settled purpose or intention) as importing the old law of domicile by directing an inquiry in cases arising in connection with the Abduction Convention into whether the person whose place of residence is in issue is shown to intend to live there permanently or at least indefinitely. Rather, as Waite J rightly said in *Re B (Minors) (Abduction) (No 2)*[50], the effect of decisions in the United Kingdom about the Abduction Convention, particularly the decision of the House of Lords in *re J*, is that:

> "Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted *voluntarily and for settled purposes* as part of the regular order of their life for the time being, whether of short or of long duration.
>
> *All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.*" (emphasis added)

41 As was pointed out by the majority of the Full Court of the Family Court in *DW v Director-General, Department of Child Safety*[51], the conclusions expressed by Waite J may be seen as at odds with the view of Rattee J, sitting at first instance in the Family Division of the High Court of Justice in *A v A (Child Abduction)*[52]. In *A v A*, Rattee J said[53] that the reference in Lord Brandon's speech in *re J* to settled intention should be understood as "a settled intention to

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49 [1990] 2 AC 562 at 578-579.

50 [1993] 1 FLR 993 at 995.

51 [2006] FLC ¶93-255 at 80,329-80,331 [32]-[37].

52 [1993] 2 FLR 225.

53 [1993] 2 FLR 225 at 235.

take up long-term residence in the country concerned". It is to be noted, however, that the conclusions expressed by Waite J about the state of the law in the United Kingdom were later adopted by the Full Court of the Family Court in *Cooper v Casey*[54] and *Panayotides v Panayotides*[55].

42 To the extent to which the Full Court in the present matter is to be understood as preferring the view of Rattee J to that of Waite J, it would constitute the adoption of a view that does not appear to command general acceptance in either the English courts or the earlier decisions of the Full Court of the Family Court mentioned above[56]. And, as earlier explained in these reasons, if references to settled intention were to be understood as requiring inquiries about intention like those that are necessary to the application of the law of domicile, such an understanding would be sharply at odds with the use of the expression "habitually resident" in the Regulations and the Abduction Convention in preference to domicile.

43 In its reasons in the present matter, the Full Court examined whether its earlier decisions required it to apply principles different from those adopted in New Zealand. Particular reference was made[57] to *SK v KP*[58] and the reasons of McGrath J and Glazebrook J.

44 It is, however, not necessary to examine the decision in *SK* in detail. Rather, it is sufficient to observe that in *Punter v Secretary for Justice*[59], the effect of the decision in *SK* was described[60] in the plurality reasons of the Court of Appeal of New Zealand (Anderson P, Glazebrook, William Young and

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54 [1995] FLC ¶92-575 at 81,695.

55 [1997] FLC ¶92-733 at 83,897.

56 See also *DW* [2006] FLC ¶93-255 at 80,331 [37], 80,334 [51].

57 (2008) 39 Fam LR 431 at 444-445 [38]-[39], 452-453 [66]-[67], 454-455 [74]-[77].

58 [2005] 3 NZLR 590.

59 [2007] 1 NZLR 40.

60 [2007] 1 NZLR 40 at 61 [88].

O'Regan JJ) as holding that the inquiry into habitual residence is "a broad factual inquiry". The plurality went on[61] to say in *Punter*:

> "Such an inquiry should take into 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 into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called, at para [22], the underlying reality of the connection between the child and the particular state".

As the plurality rightly said, the search is for the connection between the child and the particular state. That being the nature of the search the plurality's references to settled purpose are to be read as directing attention to the intentions of the parents. But as explained earlier in these reasons, the relevant criterion is a shared intention that the children live in a particular place with a sufficient degree of continuity to be properly described as settled. So understood, there is no disconformity between the approach of the New Zealand courts and the need, identified[62] by Lord Brandon in *re J*, to decide the question of habitual residence "by reference to *all* the circumstances of any particular case" (emphasis added).

45 Moreover, the approach described in *Punter* accords with the general tenor of decisions in the United States of America[63]. It may be observed of those decisions that there is seen to have been a division between the Circuit Courts of Appeals about the relevance of the parents' subjective intentions for the child or children concerned[64]. When it is also observed, however, that the resolution[65] of

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61 [2007] 1 NZLR 40 at 61-62 [88].

62 [1990] 2 AC 562 at 578.

63 See, for example, *Feder v Evans-Feder* 63 F 3d 217 at 224 (3rd Cir 1995); *Mozes v Mozes* 239 F 3d 1067 at 1081 (9th Cir 2001); *Karkkainen v Kovalchuk* 445 F 3d 280 at 295 (3rd Cir 2006); cf *Robert v Tesson* 507 F 3d 981 at 992-993 (6th Cir 2007).

64 See *Robert v Tesson* 507 F 3d 981 at 989-990 (6th Cir 2007).

65 *Robert v Tesson* 507 F 3d 981 at 992-993 (6th Cir 2007).

the competing approaches has been to invite attention to whether presence at a place has a "degree of settled purpose *from the child's perspective*"[66] (emphasis added), the difference in expression of the relevant considerations may not be great. At all events, a thread common to the leading decisions in the United States remains the need to look at all of the circumstances of the case. And it is that approach, as described in *Punter*, which should be followed.

46 How, then, should the present case have been decided?

The present case

47 When the mother left Israel with the children she was not shown to have the concluded intention that, come what may, she and the children would settle in Australia. The father did not agree to the children leaving Israel on any basis other than that expressed by the mother: that if the marriage was reconciled she would return, if it was not she would not. It follows that, when the children left Israel, the intentions of their parents could not be completely and accurately stated as being that the children would thereafter live in Australia. In that limited sense, it could not be said that the parents intended to "abandon" Israel as the place where their children habitually resided. But that statement could not be made because the parents' intentions were more complicated than the bald proposition of abandonment acknowledges. The more accurate statement of the parents' intentions, when the mother and children left Israel, was that mother and children were going to make their home in Australia unless the father chose to alter his then stated determination to live separately from the mother.

48 The absence of an agreed and singular purpose or intention at the time of departure from Israel (which could be completely described by reference only to residence in Australia or in Israel) was not to be treated as deciding the question of habitual residence. First, the question in this case was not to be asked in relation to the time of the children's departure from Israel; it was to be asked in relation to the time of their allegedly wrongful retention. And as earlier indicated, that time may be assumed to be when the father first asked in July 2006 for their return to Israel. But secondly, and more importantly, the intentions of the parents are not the only factors which bear upon whether in July 2006 the children were habitually resident in Israel.

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66 *Feder* 63 F 3d 217 at 224 (3rd Cir 1995); *Karkkainen* 445 F 3d 280 at 292 (3rd Cir 2006); *Robert v Tesson* 507 F 3d 981 at 992-993 (6th Cir 2007).

49 Where, as here, the parents' intentions at the time of departure from Israel were expressed conditionally (to live in Australia unless ...) *and* the mother took the steps she did, both before and after arrival in Australia, to establish a new and permanent home for the children in Australia, it should have been found that the children were not habitually resident in Israel in July 2006. The possibility that they might again take up habitual residence in Israel (if their parents were reconciled) does not deny that they had ceased to be habitually resident there. Whether they were habitually resident in Australia when the father asked for their return need not be decided. What is decisive is that the children left Israel with both parents agreed that unless there were a reconciliation they would stay in Australia, and their mother, both before and after departure, set about effecting that shared intention.

Conclusion and orders

50 Having regard to the decision reached about whether the children were habitually resident in Israel it is not necessary to consider the further issues agitated in the courts below and in this Court about whether, if they were, the case was one in which an order for return should have been refused on the basis that the father had consented to or subsequently acquiesced in the children's retention in Australia[67].

51 Nor is it necessary, if there was consent or subsequent acquiescence, to examine whether or how the delay that occurred between the hearing of the appeal to the Full Court of the Family Court on 5 December 2007 and delivery of judgment on 24 June 2008 bore upon the exercise of the discretion given by reg 16(3)(a)(ii) to refuse to make an order for return. It is enough to say that prolonged consideration by the Full Court of its decision in the matter was undesirable, especially when the primary judge had already pointed out[68], correctly, that the proceedings at first instance had not been dealt with sufficiently promptly.

52 Further, it is not necessary to examine whether the Full Court erred in refusing to admit the additional affidavit evidence relied on in that Court by the mother and by the Director-General. None of that additional evidence contradicted or detracted from the description of circumstances touching the

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67 reg 16(3)(a)(ii).

68 [2007] FamCA 1099 at [60]-[63].

question of habitual residence provided by the facts as found by the primary judge.

53 No order for costs was made at first instance or on appeal to the Full Court of the Family Court. That is, the power given by reg 30 of the Regulations to order the person who in those courts was found to have retained the children to pay the costs of the application for an order for return was not exercised either at first instance or on appeal to the Full Court.

54 As was pointed out in *MW*[69], the matter of costs in this Court is controlled by the general provision of s 26 of the *Judiciary Act* 1903 (Cth). In the circumstances of this case there should be no order for the costs of the proceedings at first instance or in the Full Court of the Family Court. The appellant should have her costs of the appeal to this Court.

55 The appeal to this Court should be allowed with costs. The orders of the Full Court of the Family Court made on 24 June 2008 and 4 July 2008 should be set aside. In their place there should be orders that the appeal to the Full Court is allowed, the orders of Kay J made on 29 August 2007 are set aside and in their place there be an order that the application of the Director-General, Department of Community Services made on 15 March 2007 is dismissed.

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69 (2008) 82 ALJR 629 at 650 [120]-[121]; 244 ALR 205 at 231.