HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

RCB AS LITIGATION GUARDIAN OF EKV, CEV, CIV AND LRV — PLAINTIFF

AND

THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA & ORS — DEFENDANTS

RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest
[2012] HCA 47
Date of Order: 7 August 2012
Date of Publication of Reasons: 7 November 2012
B28/2012

ORDER

1. *The proceedings be dismissed.*

2. *RCB, as litigation guardian, pay the costs of the fourth defendant.*

Representation

A J H Morris QC with S J Williams for the plaintiff (instructed by Nicholes Family Lawyers)

Submitting appearance for the first defendant

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar and M R Green for the second defendant (instructed by Crown Law (Qld))

J Brasch with R J Lyons for the third defendant (instructed by Barry Nilsson Lawyers)

P J Doherty SC with J P Lo Schiavo for the fourth defendant (instructed by Donnelly Lawyers)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with R Graycar and B K Lim intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor SA))

G R Donaldson SC, Solicitor-General for the State of Western Australia with C S Bydder intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

CATCHWORDS

RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest

Family law – Children – *Family Law Act* 1975 (Cth) – Family Law (Child Abduction Convention) Regulations (Cth) – Convention on the Civil Aspects of International Child Abduction – Wrongful removal – Order for return to country of habitual residence – Discretion to refuse to make return order – Objection of child to return – Ascertaining child's views and interests – Appointment of family consultant.

Practice and procedure – Procedural fairness – Mother removed children from country of habitual residence in Italy – Father sought children's return – Family Court has discretion not to make return order if person opposing return establishes child objects to being returned with strength of feeling beyond mere preference or ordinary wish and child has attained appropriate age and maturity – Family Court made return order notwithstanding children objected to their return – Family Court received evidence and report by family consultant about children's views – Children unsuccessfully applied at late stage to intervene by case guardian in proceedings between mother and father – No evidence of exceptional circumstances to suggest Family Court should have ordered independent representation for children under s 68L of *Family Law Act* 1975 (Cth) – Whether children denied procedural fairness in making of return order – Whether procedural fairness required children to have independent legal representation.

Words and phrases – "family consultant", "independent representation", "return order".

Family Law Act 1975 (Cth), ss 62G, 68L, 68LA, 69ZT, 92, 111B.
Family Law (Child Abduction Convention) Regulations (Cth), regs 14, 16, 19A, 26.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 Australia is a party to the Convention on the Civil Aspects of International Child Abduction ("the Convention") concluded at The Hague on 25 October 1980[1]. The objects of that Convention are[2]:

> "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

2 The Contracting States agree in Art 11 of the Convention that their judicial and administrative authorities "shall act expeditiously in proceedings for the return of children." In *De L v Director-General, NSW Department of Community Services*[3], the plurality said:

> "the Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access. This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to 'its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case'[4].
>
> *A decision under the Convention concerning the return of a child is not to be taken as a determination on the merits of any custody issue*". (emphasis added)

---

1 [1987] ATS 2.

2 Convention, Art 1.

3 (1996) 187 CLR 640 at 648-649; [1996] HCA 5.

4 Eekelaar, "International Child Abduction by Parents", (1982) 32 *University of Toronto Law Journal* 281 at 305.

Nevertheless there is provision in the Convention for consideration of the interests and views of a child who may be returned from one Contracting State to another.

3 Australia has enacted laws to enable it to give effect to its obligations under the Convention. They are to be found primarily in s 111B of the *Family Law Act* 1975 (Cth) ("the Family Law Act") and in the Family Law (Child Abduction Convention) Regulations ("the Regulations"). Those laws govern the outcome of this case. In so far as they provide for judicial proceedings to determine whether or not a return order should be made or if made should stand, they attract the requirements of procedural fairness which are an essential characteristic of any judicial proceeding. The question in this case is whether procedural fairness required that the children the subject of the proceedings be parties to them, or that their interests be otherwise legally represented.

4 On 23 June 2010, four sisters, all below the age of 16, were removed from their place of habitual residence in Italy. Their mother took them to Australia for what was said to be a one month holiday. Their father, from whom their mother is divorced, resides in Italy. By a consensual separation agreement which was made in Italy in November 2008, the parents had agreed to have joint custody of their four daughters. The sisters have remained in Australia since June 2010. At the request of their father, the Director-General of the former Queensland Department of Communities (Child Safety Services) made an application to the Family Court of Australia on 18 February 2011 for orders for the return of the children under reg 15 of the Regulations[5]. The Director-General is a "Central Authority" designated for that purpose pursuant to reg 8 of the Regulations. Protracted original and appellate proceedings followed in the Family Court. An order for the return of the children to Italy was made on 23 June 2011 and stands.

5 The proceedings in this Court were brought by the maternal aunt of the children as litigation guardian. The application invoked the jurisdiction conferred upon this Court by s 75(v) of the Constitution. The proceeding sought prohibition, certiorari and injunction: prohibition directed to the Judge of the Family Court who made the return order and who later refused to discharge it or to permit the children to intervene, through a litigation guardian, as parties in the discharge application; certiorari to quash the return order and certain other orders made in the course of the proceedings; and an injunction to restrain the Director-

---

5 The relevant department is now called the Department of Communities, Child Safety and Disability Services.

General and the children's parents from giving effect to the challenged order. The grounds upon which the relief was sought included:

> "the First Defendant
>
> (i) failed and refused to afford the affected children an opportunity to have separate and independent representation;
>
> (ii) failed and refused to take into account the interests of the affected children; and
>
> (iii) otherwise acted contrary to the rules and principles of natural justice with respect to the affected children".

It was alleged that s 68L(3) of the Family Law Act, which conditions a judge's power to order independent legal representation for the children's interests on there being exceptional circumstances, is unconstitutional.

6 This Court dismissed the application after hearing oral argument. We joined in the orders for dismissal for the reasons which follow.

Procedural history

7 On 23 June 2011, Forrest J made an order for the return of the children from Australia to Italy. The order was made pursuant to reg 15 of the Regulations. That order was varied by discharge and replacement of one paragraph pursuant to a consent order made on 24 June 2011. An appeal against the order was dismissed by the Full Court of the Family Court on 9 March 2012.

8 Further orders were made on 4 May 2012 requiring the children's mother to deliver the children to the Brisbane International Airport not before 16 May 2012 for return to Italy. On 14 May 2012, his Honour ordered the issue of a warrant under the Regulations authorising the delivery of the children to an officer of the Department of Communities, Child Safety and Disability Services.

9 On 16 May 2012, the mother made an application for the discharge of the return order[6]. On the same day EKV, the eldest of the children, made an application seeking leave to intervene in the proceedings and for the appointment of the children's maternal aunt as case guardian for them. As the mother had

---

6 Pursuant to reg 19A(1) of the Regulations.

failed to comply with the Court's previous orders, Forrest J refused to hear her application. His Honour gave leave for the discharge application to be filed and ordered that it be dismissed at the invitation of the mother's counsel and to facilitate the lodgement of an appeal. It also appears, although it is not clear from the record, that the application by EKV was dismissed.

10 On 21 May 2012, the children's maternal aunt, acting as their litigation guardian, filed an application in this Court which initiated the present proceedings. An amended application was filed on 28 May 2012 and a further amended application on 31 July 2012.

11 On 25 May 2012, Kiefel J made an order that the show cause application be referred to a Full Court of this Court.

12 Subsequently, further proceedings were initiated in the Family Court. On 6 June 2012, the mother filed a fresh application for discharge of the return order, a course which is permitted by reg 19A. The plaintiff in these proceedings filed an application for an order that she be appointed as case guardian for the children and that the children, by their case guardian, be granted leave to intervene in the discharge proceedings brought by the mother. On 6 July 2012, Murphy J dismissed the applications by the mother and by the plaintiff as well as other related applications. In the course of doing so, his Honour considered the question of whether the children's views had been adequately conveyed to the Family Court. A notice of appeal against that decision was filed in the Family Court on 3 August 2012. The appeal is still pending. It was suggested by the Solicitor-General for Queensland, representing the Director-General, that the fresh proceedings and the pending appeal deprived the application presently before this Court of any utility. The pendency of the appeal proceedings in the Family Court might have been a matter going to the discretion to grant or withhold relief in this case if grounds for relief had been established. However, it is not necessary, having regard to the disposition of this case, to decide that question.

The statutory framework – return orders

13 Section 111B of the Family Law Act provides that the Regulations may include such provisions as are necessary or convenient to enable the performance of the obligations of Australia under the Convention.

14 The purpose of the Regulations is to give effect to s 111B of the Family Law Act[7]. They provide for the making of a "return order" which is defined as "an order under Part 3 for the return, under the Convention, of a child who has been removed to, or retained in, Australia."[8] They are intended to be construed by reference to the principles and objects of the Convention[9] and "recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence"[10]. They are also intended to be construed "recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries."[11]

15 The Convention requires Contracting States to designate a "Central Authority" to discharge the duties imposed by the Convention upon such authorities. Federal States may appoint more than one Central Authority and specify the territorial extent of their respective powers[12]. The Regulations empower the Attorney-General to appoint a person to be the Central Authority of a State or Territory for the purpose of the Regulations[13]. A State Central Authority has all the duties and may exercise all the powers and may perform all the functions of the Commonwealth Central Authority[14]. The relevant Central Authority in this case is the second defendant, the Director-General of the former Department of Communities (Child Safety and Disability Services) of Queensland.

---

7 Regulations, reg 1A(1).

8 Regulations, reg 2(1). Part 3 refers to Pt 3 of the Regulations, comprising regs 14-21 inclusive.

9 Regulations, reg 1A(2)(a).

10 Regulations, reg 1A(2)(b).

11 Regulations, reg 1A(2)(c).

12 Convention, Art 6.

13 Regulations, reg 8.

14 Regulations, reg 9.

16 The Central Authority must take action to secure the return of a child under the Convention if it receives a request from a person "that claims to have rights of custody in relation to the child who, in breach of those rights, has been removed from a convention country to Australia or has been retained in Australia", and "it is satisfied that the request is in accordance with the Convention."[15] The action taken by the Central Authority may include applying for an order under Pt 3 of the Regulations[16]. The application to the court for a return order for the child may be made under reg 14(1)[17]. The court is given power, by reg 15, to make orders of the kind mentioned in reg 14 and "any other order that the court considers to be appropriate to give effect to the Convention"[18]. Under reg 16, if an application for a return order for a child is made within one year after the child's removal or retention and the Central Authority satisfies the court that the child's removal or retention was "wrongful" under reg 16(1A), the court must, subject to reg 16(3), make the order[19].

17 The court in which an application is brought under reg 14, must, so far as is practicable, give to the application such priority as will ensure that it is dealt with as quickly as a proper consideration of each matter relating to the application allows[20]. If the court does not determine the application within 42 days from its filing, the responsible Central Authority may ask the Registrar of the court to state in writing the reasons for the application not having been determined within that period[21]. That requirement gives effect to Art 11 of the Convention. It reflects the purpose of the Convention as embodied in the Regulations "to provide a simple and summary procedure for returning to their country of habitual residence children who have been wrongfully removed from it."[22] It also underlines the proposition that "[t]he courts would not be true to the

---

15 Regulations, reg 13(1), Convention, Arts 7 and 10.

16 Regulations, reg 13(4)(d).

17 "[C]ourt" is defined in reg 2(1) as "a court having jurisdiction under paragraph 39(5)(d), 39(5A)(a) or 39(6)(d) of the Act."

18 Regulations, reg 15(1)(b).

19 Convention, Art 12.

20 Regulations, reg 15(2).

21 Regulations, reg 15(4)(a).

letter or the spirit of the Convention if they allowed applications to become bogged down in protracted hearings and investigations."[23]

18 A child's removal is "wrongful" if the child is under 16, habitually resided in a convention country immediately before the removal and the person 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 before removal[24]. For the removal of a child to be characterised as "wrongful" the removal must also have been in breach of the rights of custody of the person seeking the child's return[25]. It is also necessary that at the time of the removal the person seeking the child's return was actually exercising the rights of custody or would have exercised those rights if the child had not been removed[26]. It is not suggested in these proceedings that any of these criteria of "wrongful removal" were not satisfied.

19 The court may refuse to make a return order if "a person opposing return" establishes that the person seeking the child's return was not actually exercising rights of custody when the child was removed, or has consented or subsequently acquiesced in the child being removed, or there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation[27]. The court may also refuse to make a return order if a person opposing return establishes that the child objects to being returned, that the objection shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes and that the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views[28], or that the return of the child would not be permitted by the fundamental

---

22 *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 397 per Bingham MR.

23 *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 397 per Bingham MR.

24 Regulations, reg 16(1A)(a)-(c).

25 Regulations, reg 16(1A)(d); Convention, Art 3(a). As to "rights of custody" see *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 412 [26]-[27] per Gaudron, Gummow and Hayne JJ; [2001] HCA 39.

26 Regulations, reg 16(1A)(e).

27 Regulations, reg 16(3)(a), (b).

28 Regulations, reg 16(3)(c).

principles of Australia relating to the protection of human rights and fundamental freedoms[29]. The criteria for the exercise of the court's discretion to refuse to make a return order reflect Arts 13 and 20 of the Convention. They "represent important qualifications to the general rule for returning a child to the place of its habitual residence."[30]

20 It is in this context that the issue of procedural fairness and participation of the children in the proceedings in the Family Court arises. The discretion to refuse a return is enlivened by satisfaction of one or more of the criteria in reg 16(3), the onus of proof of which lies on the person opposing the return. Once it is enlivened "[t]here may be many matters that bear upon the exercise of that discretion."[31]

21 If a court makes a return order, the relevant Central Authority, the person whose rights of custody have been breached by the wrongful removal of the children, or a respondent to the proceeding can apply to the court for the discharge of the return order[32]. The criteria upon which a return order may be discharged are limited in their scope. The court must be satisfied that all the parties have consented to the return order being discharged[33], or that since the order was made circumstances have arisen that make it impracticable for it to be carried out[34], or that exceptional circumstances exist that justify the return order being discharged[35]. The order may also be discharged if the day on which the application for the discharge of the return order was made is more than one year

---

29 Regulations, reg 16(3)(d).

30 *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 416 [36] per Gaudron, Gummow and Hayne JJ.

31 *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 417 [40] per Gaudron, Gummow and Hayne JJ.

32 Regulations, reg 19A(1).

33 Regulations, reg 19A(2)(a).

34 Regulations, reg 19A(2)(b).

35 Regulations, reg 19A(2)(c).

after the return order was made or after any appeal in relation to the return order was determined[36].

Ascertaining children's views and interests

22 Regulation 14 provides for the responsible Central Authority to apply to the court for orders including a return order for a child removed from a convention country. There is no provision in reg 14 for any other person to make such an application. The Regulations require the application to be served on the person who it is alleged has wrongfully removed or retained the child the subject of the application[37]. The child the subject of the application is not a necessary party to it. Australia is, apparently, the only Contracting State under the Convention in which the Central Authority applies for a return order[38]. The function of the Central Authority has been described in the Family Court as that of an "honest broker" whose obligation is "not to secure the return of the child but to implement the requirements of [the Convention]"[39]. That characterisation is appropriate. An application under reg 14 is not brought to resolve, in an adversarial setting between parties in conflict, questions about the care and custody of a child. It is brought to determine whether Australia's obligation under the Convention, to return a child wrongfully removed from a country of habitual residence, is engaged. If it is engaged, disputed questions of care and custody fall to be resolved in accordance with the laws of the country from which the child has been removed. That being said, the interests and views of the child are relevant to the existence of the obligation.

23 As set out above, there are criteria in reg 16(3), including grave risk of psychological harm to the child and the child's objections to return, which, if established by a person opposing the return, will enliven a discretion on the part of the court to refuse to make a return order. It is the objections of the children in the present case and the conveyance of those objections to the Court which

---

36 Regulations, reg 19A(2)(d).

37 Regulations, reg 27(1)(a).

38 *Harris v Harris* (2010) 245 FLR 172 at 181 [27], citing Lowe, Everall and Nicholls, *International Movement of Children: Law Practice and Procedure*, (2004) at 513.

39 *Laing v Central Authority* (1999) 151 FLR 416 at 481 [300] per Kay J, quoted in *Harris v Harris* (2010) 245 FLR 172 at 181 [28].

assumes relevance in these proceedings. There are a number of mechanisms by which the court can be informed of matters relevant to these criteria and by which children may participate in so informing the court.

A party adduces evidence

24 A party to the proceedings may provide evidence to the court of the child's views. Evidence of those views was adduced by the mother in the proceedings before Forrest J. The evidence took the form of a report prepared by a psychologist who had been commissioned by the mother and interviewed the children in three separate sessions. The report elicited that three of the children wished to remain in Australia and to return to Italy for holidays. The fourth child was content to return to Italy. Importantly, the psychologist observed:

> "This difference in choices has been influenced by the fact that [EKV, CEV and CIV] took into consideration also their mother [sic] wellbeing based on their knowledge of how she felt living in Italy and how she is feeling now living in Australia, while [LRV's] choice was based solely on her personal preferences related to her memories of her childhood in [P]."

25 As to the admissibility of such evidence, s 69ZT of the Family Law Act disapplies provisions of the *Evidence Act* 1995 (Cth) ("the Evidence Act") dealing, inter alia, with hearsay evidence[40]. The Court has a discretion to apply such provisions[41]. Even if the Evidence Act does apply, that Act provides for exceptions to the rule against hearsay. Evidence of a child's previous representation may be admissible under one of the general exceptions covering first-hand hearsay[42]. In the case of a child lacking capacity, such evidence may be admissible as a contemporaneous representation of the child's feelings[43].

Family consultant

26 The court may also, as Forrest J did, direct a family consultant to report on such matters as are relevant to the proceedings and as the court considers to be

---

40 Family Law Act, s 69ZT(1)(c).

41 Family Law Act, s 69ZT(3).

42 Evidence Act, Pt 3.2, Div 2.

43 Evidence Act, s 66A.

appropriate. Regulation 26 authorises the court to do so[44]. The family consultant may include, in addition to the matters required to be included in the report, any other matter relating to the care, welfare or development of the child[45]. The power thus conferred on the court is similar in terms to the general power conferred on the court by s 62G(2) of the Family Law Act, to direct a family consultant to give the court a report on matters relevant to proceedings before it as the court thinks desirable. Plainly enough the views of a child and, in particular, objections he or she may have to returning to the country from which he or she was removed, are matters which a family consultant can consider in the preparation of his or her report.

27 In some (perhaps many) cases, obtaining the report of a family consultant would avoid the difficulties and limitations inherent in receiving evidence of the children's views from one or both of the disputing parents. And in a case such as this, where it is suggested that one or more of the children objects to returning, it may be expected that a family consultant's report would ordinarily be obtained.

28 In the present case a report was prepared by family consultant Margaret Egan who swore an affidavit that the facts stated in her report were true and that the opinions expressed were her honestly held opinions. A section of the report was entitled: "The views of the children as to whether: The children object to returning to Italy." Ms Egan said she had explained the Convention to the children, who appeared to understand that they might be required to return to Italy while a decision was made with regard to parenting arrangements under Italian law. All of the children expressed a wish to remain living in Australia with their mother. They objected to returning to Italy on the basis that their father had perpetrated violence against their mother and had subjected each of them to inappropriate physical disciplining. They said they were happy in Australia, enjoyed their schools and were making friends. They said that if the Court ordered that they return to Italy for a decision about parenting issues to be made in the Italian jurisdiction, they did not want to live with their father in the paternal family villa. They said they would accept return if their mother accompanied them.

29 Ms Egan took the view that the children's objections were age-appropriate and based on their own views. She went on to say, however, that the younger

---

44 Regulations, reg 26(1)(a).

45 Regulations, reg 26(2).

children, CIV and LRV, lacked cognitive sophistication for their views to be taken into consideration fully. The two older sisters, EKV and CEV, had reached a more advanced degree of maturity. Nevertheless Ms Egan was of the opinion that their ability for abstract thought and future forecasting would not have been fully formed. They would lack the ability to truly predict what impact their choices or views would have for their future relationship with their father.

Intervention

30 Section 92(1) of the Family Law Act provides that in proceedings, other than divorce or validity of marriage proceedings, any person may apply for leave to intervene in the proceedings and the court may make an order entitling that person to intervene. Section 92(3) provides:

> "Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party."

31 In cases involving allegations of child abuse or the risk of child abuse certain parties are entitled to intervene. They include parents and guardians and the alleged abuser. They do not include the child[46]. Under the Family Law Rules a child may seek to intervene in a case only by a "case guardian"[47] unless the court is satisfied "that a child understands the nature and possible consequences of the case and is capable of conducting the case."[48] When a child starts a case without a case guardian the court may appoint a case guardian to continue the case[49]. The case guardian must be an adult with no interest in the case adverse to those of the child and must be able fairly and competently to conduct the case for the child. The person so appointed must consent to act as case guardian[50]. The Family Law Rules contemplate, without expressly so providing, that the court may order a case guardian to pay costs[51]. Prior to

---

46 Family Law Act, s 92A.

47 Family Law Rules, r 6.08(1).

48 Family Law Rules, r 6.08(2).

49 Family Law Rules, r 6.08, note 2.

50 Family Law Rules, r 6.09.

51 Family Law Rules, r 6.13, note 1.

16 May 2012 there was no application by any of the children, by case guardian or otherwise, to intervene in the proceedings.

Independent children's lawyer

32 Another mechanism which is relevant for present purposes is the power conferred on the court under s 68L(2) of the Family Law Act to order that the child's interests in the proceedings be independently represented by a lawyer. When the proceedings arise under regulations made for the purpose of s 111B, the court may make such an order "only if the court considers there are exceptional circumstances that justify doing so"[52]. The court must specify the circumstances in making the order[53].

33 Prior to the decision of this Court in *De L*[54], s 68L provided for a court to order that a child be separately represented in proceedings under the Family Law Act "in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration." This Court held that proceedings under the Regulations did not attract the requirement in s 64(1)(a) of the Family Law Act, as it then stood, that the welfare of the child was the paramount consideration in proceedings under the Act. Nevertheless, the welfare of the child was "a relevant consideration" such that separate representation could be ordered. On that basis the plurality observed that where issues of the child's wishes arose with respect to a child of the age and degree of maturity spoken of in reg 16(3)(c) "there ordinarily should be separate representation."[55] The plurality further observed[56]:

> "The presence of separate representation should not hinder, and indeed should assist, the prompt disposition of Convention applications."

---

52 Family Law Act, s 68L(3)(a).

53 Family Law Act, s 68L(3)(b).

54 (1996) 187 CLR 640.

55 (1996) 187 CLR 640 at 660 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

56 (1996) 187 CLR 640 at 660 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

It should be noted however that the plurality did not discount other methods by which the court could inform itself as to the wishes of a child. In conclusion their Honours said that it was to be expected that the Family Court would exercise its powers to obtain a report by a family and child counsellor or welfare officer and further that the Court would also give serious consideration to the exercise of its powers conferred by s 68L[57].

34 Section 68L was amended by the *Family Law Amendment Act* 2000 (Cth) by the enactment of s 68L(2A). That subsection applied specifically to proceedings arising under regulations made for the purposes of s 111B, and introduced the requirement that an order for separate representation in such proceedings could only be made in exceptional circumstances. The purpose of the amendment was to overcome the effect of the decision in *De L* and "restrict the availability of separate representation in these proceedings to exceptional cases."[58]

35 By the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) s 68L was repealed and re-enacted in an amended form providing for a court to order independent representation of a child's interests, rather than representation of the child. Where the proceedings arose under regulations made for the purpose of s 111B, such an order could only be made in exceptional circumstances. A new section 68LA set out the role of the independent lawyer which is referred to below.

36 No order was made under s 68L in this case. Nor was it suggested that there were, disclosed on the materials before the Family Court, circumstances which, in the context of proceedings under reg 14, might properly be characterised as exceptional.

37 The plaintiff's further amended application set out as a ground for relief that s 68L(3) is "unconstitutional". As appeared from the plaintiff's written submissions the validity of the provision was challenged on the basis that the "exceptional circumstances" limitation constituted an abrogation of the procedural fairness "that must otherwise inure to a child who is the subject of the proceedings."

---

57 (1996) 187 CLR 640 at 663.

58 Family Law Amendment Bill 2000, Further Revised Explanatory Memorandum, pars 291-294.

38 In proceedings for a return order under reg 14, s 68L provides a specific but limited statutory mechanism by which the court can be assisted in ensuring that the interests of the child the subject of the proposed order are properly taken into account where they are relevant to the criteria for the making of the order or the exercise of the discretion to refuse to make the order. While the child's views (if the child be competent to express them) may be relevant to its interests, the statutory criteria and the court's discretion to refuse to make a return order, the independent representative must, according to s 68LA, form his or her own independent view of what is in the best interests of the child[59] and act accordingly[60]. He or she is not the child's legal representative[61] and is not obliged to act on the child's instructions[62].

39 What was said in this Court in *De L* about the former s 68L cannot be applied to s 68L as amended and read with s 68LA. The section has now been cast into a form in which orders for separate representation cannot be made on the basis set out in *De L*. The evident purpose of the section is to ensure, where exceptional circumstances exist, that the court is properly assisted and informed in the discharge of its tasks which are defined by the Regulations read with s 111B of the Family Law Act.

40 Debate about s 68L fell away early in the oral argument when it became clear that the plaintiff did not maintain her attack upon its validity. That is not surprising. The attack was untenable. Its outcome, if successful, would have been one of two absurd results. The first would be to invalidate a statutory mechanism for the independent representation of the child's interests. Alternatively, on the plaintiff's submissions, s 68L(3) could only have been salvaged by deleting the limiting condition of exceptional circumstances, that is to say reading up the subsection to avoid invalidity.

41 The question in these proceedings reduced to whether or not there had been a denial of procedural fairness to the children.

---

59 Family Law Act, s 68LA(2)(a).

60 Family Law Act, s 68LA(2)(b).

61 Family Law Act, s 68LA(4)(a).

62 Family Law Act, s 68LA(4)(b).

Whether the children were denied procedural fairness

42 Procedural fairness is an essential characteristic of judicial proceedings. However, its content is dependent upon the nature of the proceedings and the persons claiming its benefit. The present proceedings are not a contest between the father and the mother about the custody of the children. Even litigation between parents about parenting orders, while judicial in nature, is not entirely inter partes because in such cases, as s 60CA of the Family Law Act provides, the paramount consideration is the best interests of the child. The procedure available in such cases, pursuant to s 62A, for reports to be provided by family consultants at the direction of the court "demonstrates the special nature of the jurisdiction arising from the purpose of the inquiry undertaken by the court."[63]

43 The proceedings seeking a return order do not decide with whom a child will live. If a return order is made, disputed questions of custody of and access to the child are to be decided by the courts of the country of habitual residence. In a case such as the present, where there is evidence or other material suggesting that one or more of the children whose return is sought objects to being returned, the Regulations require the court to assess the strength of the objection and to decide whether the child is of an age and maturity "at which it is appropriate to take account of his or her views"[64]. That does not determine any legal right or duty of the child. In the present case there was no suggestion that the children wished to advocate any legal proposition different from those advanced on behalf of the Central Authority or either parent[65].

44 Determination of an application for a return order and, in particular, determination of any issues about the strength of a child's objection to return and the maturity of that child will affect the child's interests. Deciding issues about strength of objection and maturity of the child in a way that is procedurally fair to all who are interested in or affected by their decision – the parents, the child or children concerned and the Central Authority – presents an essentially practical

---

63 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 373-374 per Dawson J in dissent in the result but a dissent not dependent upon the cited observation. See also at 363 per Wilson J; [1986] HCA 39.

64 Regulations, reg 16(3)(c)(ii) and (iii).

65 Cf *In re D (Abduction: Rights of Custody)* [2007] 1 AC 619 at 642 [60]. See also *In re E (Children)* [2012] 1 AC 144.

issue. How is the court to be sufficiently and fairly apprised of what the child concerned wants, how strongly that view is held, and how mature the child is?

45 The need for the court to be sufficiently and fairly apprised of these matters can be, and in this case was, sufficiently met by the Court's appointment of a family consultant. As counsel for the Central Authority pointed out, a family consultant is an officer of the Family Court[66] and is skilled in advising the Court and others about questions of the kind that have been described. A child's views can be, and in this case were, heard and assessed by the family consultant and reported to the Court and to the parties.

46 Contrary to the plaintiff's central submission, resolution of questions about a child's objection to return does not in every case require that the child or children concerned be separately represented by a lawyer. A universal proposition of that kind may be thought to assume, wrongly, that the child whose maturity is at issue in the proceeding can nonetheless instruct lawyers to advocate a particular position. And to the extent to which the proposition depended upon the lawyer for the child making his or her own independent assessment of the child's views, it was a proposition which assumed, again wrongly, that only a lawyer could sufficiently and fairly determine the child's views and transmit that opinion to the court for the court to take into account in deciding, on the whole of the material before it, whether the requirements of reg 16(3)(c) are met.

47 There was no suggestion of any practical unfairness resulting to the children from their non-intervention as parties in the proceeding. Until 16 May 2011 they had made no application to do so. There was no occasion for the primary judge to raise the issue. As to s 68L, questions of validity apart, the plaintiff said in oral submissions that it was no part of her case that Forrest J should have made an order for the appointment of an independent children's lawyer. Nor was it part of her case that the children should have been represented by such a person at public expense.

48 Having regard to the nature and purpose of the proceedings in the Family Court and the steps taken by the primary judge in obtaining a report from a family consultant, and by the children's mother in adducing evidence from a psychologist, there was no procedural unfairness to the children.

---

66 Family Law Act, s 38N(1)(d).

Conclusion

49 For the above reasons the application was dismissed and the plaintiff ordered to pay the costs of the fourth defendant.

50 HEYDON J. These proceedings concern an application under the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"). The Regulations were made under s 111B of the *Family Law Act* 1975 (Cth) ("the Act"). Their function is to enable Australia to perform its treaty obligations in relation to international child abduction. The application arose out of a claim that a mother took her four children from their ordinary residence in Italy to Australia and then unlawfully refused to return them to their father in Italy. The application was made by the Director-General, Department of Communities (Child Safety and Disability Services), as the office was styled in these proceedings. The application was made to the Family Court of Australia under reg 16 of the Regulations. It sought orders that the mother return the children to Italy. The Family Court of Australia (Forrest J) made those return orders. An appeal by the mother to the Full Court of the Family Court of Australia failed. An application for special leave to appeal to this Court was discontinued.

51 The proceedings in this Court were brought by the children's maternal aunt as litigation guardian. She made but later abandoned various allegations. Three allegations remain. Underlying those allegations is a contention the plaintiff advanced in written submissions concerning natural justice. She contended that natural justice would not have been afforded to any of the children involved in this case unless they were represented by "an independent legal practitioner" who was "under [an] obligation … to act on the particular child's instructions, … to pursue the outcome which the particular child desires[,] to challenge evidence and submissions advanced against the child's preferred outcome, [and] to advance evidence and submissions in favour of the child's preferred outcome." This contention assumes that each child can be equated with a capable adult. It assumes that each child was capable of giving instructions to the ends described in the contention.

52 These assumptions are factually false in respect of many children. And they are legally incoherent in respect of most children. Contrary to the assumptions, unlike most capable adults, a child is almost invariably under the control of other people who owe the child legal duties. Inevitably, that child is vulnerable to their influence. Further, the assumptions do not fit in with the conceptions which underlie the Act and the Regulations. Under those enactments, even children whose capacity can be equated with that of a capable adult are not generally to be treated as persons who can become conventional parties to litigation between their parents. Some specific provisions in the Act reinforce that conclusion. One example is s 60CE of the Act. It provides that children cannot be compelled to express their views, whether by being called as witnesses or otherwise. Another example is s 100B of the Act. It provides that children are not to be called as witnesses, or to be present in court, unless the Court makes an order permitting it.

53 So far as the present type of litigation, litigation under the Regulations, is concerned, neither the Act nor the Regulations provide affected children with an

absolute right to be represented by "an independent legal practitioner" in the manner advocated by the plaintiff. But there are mechanisms for the Court to ascertain the content, materiality and weight of a child's views.

54 One mechanism is intervention by an affected child through a "case guardian" under s 92 of the Act and r 6.08(1) of the Family Law Rules. In the initial proceedings before Forrest J, no application by the children to intervene was made. At a later stage, on 16 May 2012, an application to intervene on their behalf was made and rejected.

55 Section 68L of the Act affords another mechanism. That section applies, inter alia, to proceedings under the Act in which a child's welfare is a relevant consideration. Sub-sections (1) and (3) of s 68L suggest that the expression "proceedings under the Act" includes proceedings under regulations made pursuant to s 111B of the Act. And reg 16(3)(b) requires the Court to consider the welfare of an affected child when determining whether to make a return order. Accordingly, s 68L applies to the Director-General's application to have the children returned to Italy. Section 68L(2) gives the Court power to order that a lawyer independently represent a child's interests in the proceedings. However, s 68L(3) provides that if, as here, the proceedings arise under regulations made pursuant to s 111B, a s 68L(2) order can only be made in exceptional circumstances. No application for a s 68L(2) order was made at any stage in this case. In any event, a s 68L lawyer would not answer the claim made on behalf of the children in this Court. That is because a s 68L lawyer is not the legal representative of the relevant child, and is not obliged to act on the instructions of the relevant child (s 68LA(4)).

56 A third mechanism arises under reg 26 of the Regulations. Regulation 26(1)(a) provides that the Court may direct a family consultant to report to the Court on such matters as are relevant to the proceedings as the Court considers to be appropriate. Regulation 26(3) provides that the Court may make orders in relation to the attendance on the family consultant of the child. Under s 38N(1)(d) and (2) of the Act, family consultants are officers of the Court.

57 In this case, the third mechanism was employed. On the application of the Director-General, Forrest J made an order under reg 26. The application specifically requested a report as to whether the children objected to being returned to Italy, as to their reasons for any objection to being returned to Italy, as to their maturity and as to whether it would be appropriate to take account of their views. Under reg 16(3)(c), the Court can refuse to make a return order if it is satisfied that the relevant child objects to being returned, the objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes, and the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views. Thus these matters were plainly relevant to the proceedings. A family consultant provided a report. It revealed that she had interviewed the children. It set out their views. In addition,

although the mother did not appear before Forrest J, a psychological assessment procured by her was tendered. Its author interviewed the children. He stated and took into account their views.

58 Forrest J considered these reports. His Honour concluded that the children had not reached an age and a degree of maturity which would render it appropriate to take account of their views. In consequence, reg 16(3)(c)(iii) of the Regulations was not satisfied. That defeated one ground on which the mother had attempted to resist the making of a return order. No submission was made to Forrest J that the method adopted to obtain the children's views was wrong. No submission was made that one or more independent legal practitioners be appointed to represent the children or present their views. If the mother had attended the proceedings before Forrest J, she could have advanced that submission. In her unsuccessful appeal to the Full Court of the Family Court of Australia, the mother did not rely on the contention which the maternal aunt advanced in this Court.

59 It is necessary now to turn to the three allegations made against Forrest J in these proceedings.

60 The first allegation was that Forrest J "failed and refused to afford the affected children an opportunity to have separate and independent representation". The form in which this allegation was made underwent variations at different stages of the proceedings before this Court. There was the ambitious contention already recorded that an independent legal practitioner should have been appointed to represent the children. The allegation later metamorphosed through a series of increasingly less extreme positions. However, in all its forms, the allegation must be rejected. So far as the initial proceedings before Forrest J are concerned, his Honour did not refuse to afford the children an opportunity to have separate and independent representation: he was not asked to afford it. What Forrest J did was set in place a regime by which an expert who was an officer of the Court ascertained the affected children's views. The maternal aunt described this as "fatuous". It was not fatuous. It was, with respect, an entirely sensible course. In oral argument in this Court, the maternal aunt submitted that Forrest J should have allowed the children to be represented by a "litigation guardian". The precise meaning of this expression was not elucidated, though on 16 May 2012 application was made for the appointment of a case guardian. As the maternal aunt acknowledged, Forrest J was not asked to appoint a case guardian in the initial proceedings. The furthest of the fall-back positions advocated was that Forrest J should have "informed" the children "of the right and opportunity to apply to be represented by a litigation guardian." The maternal aunt did not demonstrate why, in the circumstances of this case, Forrest J should have done this. So far as later proceedings in which the appointment of a case guardian was requested and refused are concerned, there was no reason why Forrest J should have acceded to

that application in view of the careful conclusions his Honour had reached in the initial proceedings.

61 The second allegation was that Forrest J "failed and refused to take into account the interests of the affected children". This allegation must be rejected. His Honour did take account of their interests, but decided, in a manner about which no complaint is made, that their age and immaturity made it inappropriate to take into account their views.

62 The third allegation was that Forrest J "otherwise acted contrary to the rules and principles of natural justice with respect to the affected children". This allegation too must be rejected. Forrest J accorded the affected children a measure of natural justice which was appropriate to the circumstances.

63 For those reasons I agree with the orders made on 7 August 2012.

64 Notices were issued under s 78B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") foreshadowing a challenge to the constitutional validity of s 68L(3) of the Act. That challenge caused the Solicitors-General of the Commonwealth, South Australia and Western Australia to intervene. It also caused the matter to be set down for two days. The Solicitors-General filed very detailed written submissions on the constitutional challenge. They attended the oral hearing fully prepared to present oral argument about it. But at the start of the hearing the challenge was abandoned. The challenge was hastily made. It was lightly dropped. Thus the 78B notices caused the valuable time of busy people to be wasted. They caused costs to be thrown away. Half a day turned out to be sufficient for oral argument. No intervener applied for a costs order. But nothing in ss 78A or 78B of the Judiciary Act prevents an intervener from seeking a costs order in the circumstances of this case. That is to be borne in mind by those minded to issue s 78B notices.