



The only appropriate redress for the family was the Family Court. Justice French referenced the "Conventions: Guide to Good Practice". In the circumstances such as this family were dealt, the two countries were urged to find "pragmatic solutions".

## High Court

RCL V APBL [2012] NZHC 1292 (11 June 2012) – Justice Gendall

Care of Children Act 2004 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Abduction Convention)

If a parent repudiates an agreement to return a child in situ, in the place of habitual residence, does this absolve a parent of later "wrongful removal or retention"? Or does the concept of "anticipatory breach" hold that parent to account under the Convention?

In this case, the mother and father reached an agreement via mediation in the UK, that the mother could remove their children from their place of habitual residence, the UK, to NZ for a limited period of time. The period was later varied/extended by joint agreement. Later, the mother, when in the UK on a holiday, repudiated that agreement, and the father never accepted/acquiesced that repudiation. Did the mother have to return the children to the UK under the Abduction Convention?

An important argument run by the mother's counsel was that as the mother told the father while in the UK on holiday, that the children would not be returning to the UK at the agreed extended time, they were not in NZ. Therefore, the Hague Convention does not apply at all to these children, because they were not outside the UK at the time of the claimed "retention on 12 June 2011". House of Lords authority was cited in support *Re H & Ors (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476.

Justice Gendall did not countenance that. In his Honour's view, that approach would give an effective 'hospital-pass' to abducting parents, something his Honour found unacceptable. It allowed the "possessing parent to time their anticipatory repudiation of the agreement by which they had been permitted to remove the children and/or retain them outside their habitual residence, with the effect that the wronged parent would be deprived of their rights," (at [83]).

Justice Gendall's preferred approach was concept of "anticipatory breach". "The communication of the intention not to honour the agreement for later return was fixed here, as counsel agreed in the Family Court, as the date of 'retention'. This is of course a legal fiction arising out of the necessity of application of the concept of anticipatory breach if, at the time of the communication to dishonor the agreement, the children were not in NZ." There was a unilateral intention of one party not to comply with an agreed arrangement communicated to the other party, clear and unequivocal, retention is a breach of rights of custody.

The perfection of anticipatory breach was in the leaving of the place of habitual residence, to act on the intention to breach. The "communication to retain in an anticipatory breach of a retention, ... is perfected by the act of

travelling to NZ, with that intention...wrongful retention is the arrival in NZ; the anticipatory breach having been intended and conveyed, or it may well be that the departure itself was the wrongful removal."

*Y & Anor v Y* [2012] NZHC 2774 (23 October 2013) - Justice Fogarty

This is an appeal from a decision under the *Children, Young Persons, and their Families Act 1989*, determining (among other things) is there a right of appeal from a Declaration (section 67)?

Section 341 of the Act provides for rights of appeal of decisions of the Family Court, decisions being defined in subsection 1 as to make or refuse to make order, dismiss proceedings, or otherwise finally determine the proceedings. None of these criteria appear to apply to a declaration made under section 67.

The issue had been previously considered by the Court of Appeal. Appeals against declarations had been heard before, but "whether they had a right of appeal is in doubt".

The Court agreed, that section 67 declaration is a decision which finally determines an application for declaration, meaning a right of appeal is available under section 341(1)(c).

## Family Court

In the matter of the *Entwhistle Adoption* [2012] NZFC 3136 7 May 2012 – Justice Boshier

In what circumstances is there a right to inspect adoption records under the *Adoption Act 1955*? This was an application by two sisters to inspect adoption records in relation to their deceased brother. After the death of their parents, the sisters learnt they had an older brother, and developed a warm, and close relationship.

Then, their brother died leaving questions unanswered for them. They wished to inspect the adoption file, to understand why their brother was adopted out by their mother.

The *Adoption Act 1955*, section 23(3) is highly restrictive as to who may inspect records. It was on the basis of the "special grounds" exception, that the applicants sought the information. Special grounds have been restrictively interpreted. "Special ground had to go beyond mere enquiry in order that: family history be evidenced or that unknown pieces of a jigsaw could be be positioned. There must be something about a case then that marks it out as truly special."

His Honour noted that this was a case that qualified, citing a decision of the Family Court of New Plymouth in 2011. The focus in that case being "to provide privacy against a background of consequence". As in that case, none of the having an interest in the case remained alive (other than the applicants). Only the sisters remain alive, with the adoptive parents also being deceased along with their parents. The special ground for these applicants, was "for them to want to know why their deceased brother, whom they came to know and love later in life, and who they comforted at his death, was adopted out and not retained by the mother." This was a qualifying special ground in the circumstances. ☺

## Judes Note

# Review of the District Court Rules 2009 Update

By Judge Susan Thomas, Judge Brooke Gibson, and Judge Paul Kellar of the District Courts Civil Committee

Work reviewing the *District Court Rules 2009* (Rules) continues to progress. Following the meetings with practitioners held throughout the country in 2012, the sub-committee of Judges

Rules, namely the different forms of trial and early judicial settlement conferences, while amending the Rules to require formal pleadings and align the Rules as much as possible with the *High Court*

of work required, and the demands on the Parliamentary Counsel Office, has meant that this has not proved possible. It is hoped that the meetings will be held before the end of 2013.

If you would like further information, or