

JURISDICTION : FAMILY COURT OF WESTERN AUSTRALIA

ACT : FAMILY LAW (CHILD ABDUCTION CONVENTION)
REGULATIONS 1986

LOCATION : PERTH

CITATION : COMMISSIONER WESTERN AUSTRALIA POLICE and
ABLET [2017] FCWA 182

CORAM : THACKRAY CJ

HEARD : 24 OCTOBER 2017

DELIVERED : Ex tempore

FILE NO/S : PTW 3420 of 2017

BETWEEN : CHRISTOPHER JOHN DAWSON COMMISSIONER
WESTERN AUSTRALIA POLICE
Applicant

AND

MS ABLET
Respondent

Catchwords:

CHILD ABDUCTION - Hague Convention - Child habitually resident in [Country A] immediately before her removal by the mother to Australia - Child had previously been living with her uncle in [Country A] - The child's uncle, mother and father are guardians under [Country A] law and therefore have "rights of custody" – There was a breach of rights of custody as the uncle was not consulted about the child's removal and had he been consulted, would have objected - The uncle is now imprisoned but made proper arrangements for the accommodation and care of the child - *Friedrich v Friedrich*, 983 F 2d 1396 (6th Cir, 1993) considered - Found the uncle was exercising rights of custody despite being incarcerated - Found the mother wrongfully removed the child - Held no 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 - Mother will return to [Country A] with the child if return order made - Found the child's stated wishes do not go beyond an expression of a preference and therefore do not satisfy the requirements in reg 16(3)(c) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) - Conditions made for return of the child.

Legislation:

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

Category: Not Reportable

Representation:

Counsel:

Applicant : Ms Eagling
Respondent : Mr Phillips
Independent Children's Lawyer : Ms Cruise

Solicitors:

Applicant : State Solicitor's Office
Respondent : S V Phillips & Co
Independent Children's Lawyer : Legal Aid WA

Case(s) referred to in judgment(s):

Friedrich v Friedrich, 983 F 2d 1396 (6th Cir, 1993)
Re M and J (Abduction International Judicial Collaboration) [2000] 1 FLR 803

WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT - PARTIES' NAMES AND IDENTIFYING DETAILS HAVE BEEN CHANGED

1 The application before the Court today is that filed on 2 June 2017 by the
Commissioner of the Western Australian Police as the Central Authority for the
purposes of the Family Law (Child Abduction Convention) Regulations 1986 (Cth)
("the Regulations").

2 The application is opposed by the respondent, [Ms Ablet], who is the mother of
the child the subject of these proceedings ("the mother").

3 The child is a young girl, [Alexa], who was born [in] 2006 and who will
therefore soon be 11 years of age.

4 The application was initiated at the request of [Mr RF] who is described in the
application as the foster father and guardian of the child. In the event the application
is successful, it is sought that the child be returned to [Country A] with a view to
living with [Mr DF], who is the brother of Mr RF.

5 The factual background is complex, but it is unnecessary for me to trace the full
history of the somewhat erratic arrangements that have pertained so far as they
concern Alexa, because much of that background will not make any difference to the
outcome. That fact highlights the nature of the application before the Court in which
I am not permitted to take into account issues concerning the best interests of Alexa,
other than in the limited circumstances that I will come to in a moment.

6 Instead, what I am obliged to do under *The Hague Convention of 25 October
1980 on the Civil Aspects of International Child Abduction* ("the Convention"), which
is given force in Australia by the Regulations, is to determine which jurisdiction is the
appropriate jurisdiction to make decisions in relation to the best interests of Alexa.

7 In order to provide some context to the decision that I am required to make, it is
noted that, from at least November 2012, Alexa was residing in the home of Mr RF
("[Uncle R]"). Significantly for one of the exceptions relied upon by the mother,
Uncle R at the time was residing with [Ms H], a woman who has been described as
Alexa's "namesake", who seems to have been a very close friend, almost a sister, of
the mother.

8 For reasons that I need not go into, Alexa's parents relinquished her care
effectively to Uncle R and his partner, and Alexa thereafter continued to live in
[Region A] of Country A from which the family comes. The mother otherwise resided
in Australia, at times with two siblings of Alexa. Sadly, in 2015, Alexa's namesake
suddenly passed away and she thereafter continued to live with Uncle R.

9 In early 2016 Uncle R was involved in two incidents which resulted in him
being charged with criminal offences, but nevertheless, in the course of proceedings in
Country A, Alexa continued to remain in his care. During this process an order was
made appointing Uncle R as an additional guardian of Alexa, along with the mother
and the father. The criminal proceedings were listed for trial in Country A in February

this year, and in anticipation of the trial and to support his brother, Mr DF travelled to Country A and took up residence with his brother and Alexa.

10 After the trial, Uncle R was convicted and was sentenced to a period of seven years in prison, which might give some indication of the severity of the criminal behaviour in which he had engaged. I am told that he is seeking to appeal both his conviction and his sentence, although I am uncertain as to what might have occurred insofar as that is concerned. Mr DF, who had originally travelled to Country A only on a temporary basis, at the request of his brother decided to remain in Country A with a view to continuing to provide care for Alexa within the family.

11 There were further proceedings in Country A immediately following the incarceration of Uncle R, and in the course of those proceedings it emerged that there were to be competing claims before the court: one by Mr DF, who wanted Alexa to continue to reside with him, and one by the mother, who wanted Alexa to reside with her. It appears that in the course of those proceedings, the mother indicated an intention to reside in Country A.

12 The Court has before it the benefit of a memorandum of a conference conducted by the judge with the conduct of the matter in Country A prognosticating about the future of the proceedings and indicating, first, a view that Mr DF ought be permitted to have leave to make the application, and also pointing out some features of the matter that might indicate that there was more than just a remote possibility that Mr DF ought to be able to provide for Alexa's needs on a longer term basis.

13 There is a contest on the evidence, noting that none of it has been tested by cross-examination, regarding the extent of Mr DF's involvement in Alexa's life to that point. However, Alexa was interviewed for the purposes of the proceedings in Country A, and she was at the time content to continue to reside with Mr DF. The evidence at the time indicated that she had a strong attachment to the area in which she was living and where she was attending school.

14 Although Mr DF had no orders in his favour, Alexa continued to reside with him and he made arrangements for her to spend time pursuant to the Country A order with her father and mother, who at the time were separated. Again, there is a dispute as to the extent to which he in fact complied with those orders, but some time was certainly spent, particularly, it is common ground, with the father.

15 During a school holiday in which an arrangement had been made for Alexa to spend time with her mother, the mother elected to remove Alexa from Country A. It is said that the mother did so with the agreement of the father, who is also one of Alexa's guardians for the purposes of Country A law. It was the removal of Alexa without the consent of the additional guardian, Uncle R, and without the consent of the court, which was then seized with the matter, which has led to this application.

16 Most unfortunately, it seems the community in which the family was living in Region A was inundated by a flood, which resulted in the evacuation of the home in which Alexa was living with Mr DF. This departure from that residence has been of a long-term nature. Following the flood, arrangements were made for the family to be accommodated in the outskirts of the village in which the family were living, meaning

it was and would be practicable for Alexa to return to the school she was attending where she has very close and fond connections at not only the school but also in the local community.

17 The provisions of the Regulations are set up around a concept of “wrongful removal”. Regulation 16(1A) provides that for the child’s removal from another Convention country to be “wrongful”, certain matters need to be established.

18 The first is uncontentious: that Alexa is under the age of 16 years. The second is whether she was habitually resident in Country A immediately before her removal, and that issue is properly conceded by the mother.

19 The third matter that needs to be established is that the person seeking the child’s return had rights of custody in relation to the child under Country A law. “Rights of custody” is a concept involving the right to have the care of the child, and includes the right to determine the place of residence of the child. In this case, this right arises pursuant to the order made in Country A on 16 February 2016 making Uncle R an additional guardian of Alexa, and thereby, in that capacity, giving him the right, along with the parents, to determine her place of residence.

20 The fourth matter that has to be established is that the child’s removal to Australia was in breach of those rights of custody. In my view, it is clearly established that there was such a breach here, as Uncle R, being one of the persons entitled to determine the child’s place of residence, was not consulted in relation to her removal. Although it is the case that the mother and father, who had similar rights, apparently agreed to the removal, Uncle R who also had rights of custody, was not consulted and it was clear that had he been consulted he would have objected to the removal.

21 The fifth and final matter that has to be established is that at the time of the removal, the person who had the rights of custody was actually exercising those rights or would have exercised those rights if the child had not been removed. It is in this context that Mr Phillips, who has ably represented the mother today, seeks to make one of the arguments to oppose the return of the child. Understandably enough from a layman’s perspective, the argument is that Uncle R, being incarcerated for such a long period of time, might appear not to be exercising, or able to exercise, rights of custody, as he is unable to leave the place in which he is incarcerated and is separated from Alexa for an extended period, subject to what happens with the appeal.

22 Appropriately, as a model litigant, the Central Authority, through the most able submissions of Ms Eagling, has provided a summary of argument setting out the law and relevant authorities in relation to each of the matters that need to be established, and especially those which are in issue between the parties. Those submissions have properly been accepted by counsel for the mother as accurately stating the law, and they too are supported by the Independent Children’s Lawyer (“ICL”), who has ably put the position from the perspective of the child.

23 I pause to note that the ICL in such matters as these is always in a somewhat invidious position, given that their traditional role in this Court is to advocate in relation to the best interests of the child. In many instances, notwithstanding the clear provisions of the Convention, one does see ICLs overlook that whilst they have a

responsibility to the child; they also have a responsibility to the Court. It is of no use to the Court to have an ICL advocating only from the perspective of the best interests of the child, ignoring the fact that the law does not permit the Court to take those matters into account, save in limited circumstances.

24 It is therefore very much to the credit of Ms Cruise that she recognises the complementary obligations that she has, and it is clear from her submissions today that she recognises that the Court is confined by the Convention; indeed, her submissions were a model of how such matters ought to be approached by ICLs.

25 Returning to the question of whether the rights of custody were being exercised, Ms Eagling has drawn attention to authorities which I find persuasive and in relation to which I am not aware of any competing authority of relevant precedent, to show that it is, contrary to what might be first thought, entirely within the scope of the Convention to proceed on the basis that even a person who is in jail can nevertheless be exercising rights of custody.

26 Uncle R was exercising those rights, I think, in at least two ways.

27 First, being unable himself to provide for the child's day-to-day care, Uncle R made what would appear to be appropriate arrangements with a relative. In this instance, the relative in question, putting to one side the issue as to how well he knew Alexa, had an occupational background that equips him to provide care to children generally and in particular those who have experienced trauma (which clearly would apply to Alexa, who had lost a person who she might well have regarded as a second mother, only then to see Uncle R sent to prison).

28 So, notwithstanding his imprisonment, Uncle R made appropriate arrangements for the accommodation and care of Alexa, and then, according to the evidence, communicated with her to the extent he could via telephone.

29 The other manner in which Uncle R was either exercising his rights of custody or would have exercised them if Alexa had not been removed was, in effect, seeking to support his brother in opposing the mother in her desire to change Alexa's place of residence by taking her to another country to live.

30 In those circumstances, based on the authorities referred to in submissions, including *Friedrich v Friedrich*, 983 F 2d 1396 (6th Cir, 1993), which is a well-known authority, I am satisfied that Uncle R was exercising rights of custody.

31 Therefore, the requirements for an order for a return have been made out.

32 This then leads to what are sometimes called 'defences' or 'exceptions' in the Convention to an order for return being made. There are many of these, but in this case the mother relies on three in opposing the order for return.

33 First, and perhaps oddly, given the discussion that has been had between counsel and the bench today, although in order to activate the Convention it is necessary to show that rights of custody were being exercised or would have been exercised, one of the exceptions is that the rights of custody were not actually being exercised or would not have been exercised if the child had not been removed (reg 16(3)(a)(i)).

34 The apparent tension between these two parts of the Regulations can only be successfully resolved by understanding matters that are set out in the Explanatory Report by Elisa Perez-Vera, who is the leading commentator on the Convention and whose work has authority in the proper interpretation of the Convention.

35 At paragraphs 73 and 115 of the Perez-Vera report, one sees how the tension is to be reconciled, and that is by recognising that in order to activate the Convention, certain assumptions are made about a person who has rights of custody; they are taken to be exercising them. The real work of the Convention in this regard comes when one turns to the exceptions in relation to which the respondent carries the burden of proof. It is for the respondent to satisfy the court that the person who is seeking the return of the child was not actually exercising rights of custody, or would not have exercised them, but for the removal of the child. It follows from what I have already said that I am not persuaded that the mother has made out that exception.

36 The next matter upon which the mother relies in seeking to prevent an order for return is that 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 (reg 16(3)(b)). It is properly conceded by the mother that there is no evidence that the child would be at risk of physical harm if an order for return was made, and in this regard it must be stressed that an order made in these matters is not for the return to a particular person, but an order for the return to a particular country.

37 In this case, the mother says that the child is at risk of psychological harm in the event an order for return is made. In particular, she draws attention to what Alexa has already experienced in her life. The mother focuses on the death of Alexa's namesake, which must have been a most traumatic event for the child, and she focuses also on the incarceration of Uncle R, which again must have been very traumatic. Combined with these calamities, the inundation of the family home added to the misery. Then, of course, there was the unplanned removal to Australia. However, earlier on in Alexa's life there were other events to which the evidence indicates the mother has been a party, which would have also resulted in a most unsettling effect.

38 In summary, the mother argues that Alexa's departure from Australia, to where I find she was brought wrongfully, would add another layer that would lead to psychological harm to the child. However, this harm can be ameliorated in a number of respects. First, the mother has told the Family Consultant and continues to say, that if the order is made for a return, she will herself return with Alexa. That is an appropriate and maternal response to the difficult circumstance in which Alexa finds herself, and that would have to be a great comfort for her, given that Alexa has now been living with her mother since her removal from Country A.

39 This is not to say that there will not be severe disruption for Alexa. She will need to leave the school in which she has been enrolled and where she has now made friends. Whether or not she will have to leave her siblings is not entirely clear. But, on the other hand, the extent to which she has lived with her siblings in the past is also not entirely clear. And I accept, given this is a family that would appear not to have much in the way of financial resources, that there are difficult times ahead for Alexa if an order is made for return.

40

Once again, I turn to the submissions of the Central Authority which set out the relatively high bar that needs to be reached before a court can properly find that there is a “grave risk” of psychological harm to a child. In determining whether this high bar has been met, I must take into account what I hear of the report in Country A and what I read in the report of the Family Consultant, which relevantly states:

24. [Alexa] said she misses her friend from [Town B], and explained she had “*lots of friends and then the [J] crew*”. [Alexa] said she had attended [Primary School A] since pre-primary and therefore had the same group of friends from then until Year 6, when she moved to Western Australia. [Alexa] said the ‘[J]’ crew was her closest group of friends [and she] “*miss those friends...so close*”...

25. [Alexa] said she has begun to make new friends at [Primary School B] ... [Alexa] said making new friends “*has been hard, still miss my friends*” from [Town B].

...

27. [Alexa] was asked about each of the relationships she shares with the important adults in her life ... [Alexa] first spoke of [Ms H] saying “*she’s my namesake, lived with her for four years*” and then mentioned her [Uncle R]. The third person [Alexa] spoke about was [Ms D] saying “*she’s [Ms H’s] cousin, used to see her very often...she was my second coach in [sport]...I miss her*”. [Alexa] then mentioned her father, mother and [Mr L] (her mother’s partner).

28. When she was asked about the relationship she shares with her [Uncle R], she became quiet and it seems took time to consider her response. [Alexa] first said “*he’s been there for me*” and she “*liked it when he lets me see my friends...when we both laugh at each other, when we do facials, like funny faces*”. [Alexa] considered her [Uncle R] took good care of her and there was nothing about their relationship or him that she considered needed to change.

...

34. [Alexa] spoke fondly of her father, and said she used to visit him every second weekend when she was living in [Country A]. [Alexa] said although she has not seen him since April 2017, she has “*spoken with him a lot since here...yes a lot, mostly everyday*”. [Alexa] said her father used to take her to skate parks and they enjoyed watching movies together. [Alexa] said she was “*sad he’s living so far away...miss him, yes a lot*”.

35. In regards to [Mr DF], [Alexa] said before he spent the “*three or four weeks*” taking care of her, she “*didn’t know him well...but spoke on the phone*”. [Alexa] described him as “*cool*” and that she

enjoyed him taking her to church every Sunday during that period
...

...

44. [Alexa] was asked if there was anyone else she would like to maintain a relationship with in [Country A], besides those she has mentioned and her [Primary School A] friend. [Alexa] said she would like to speak with [Ms C] ... [Alexa] also spoke of [Ms D] who is [Ms H's] cousin. [Alexa] said she used to see [Ms D] "*very often...I miss her*". [Alexa] also said she misses her Nan, and she used to spend a lot of time with her Nan and other extended family members.

45. [Alexa] said if she were to return to [Country A] she would be more worried than anything else that she would not be able to see her mother. [Alexa] also said she would be "*sad, I'd have to leave my mum...worried I'd have no one to live with*" ...

...

47. ... [Alexa] said she had no worries or concerns about remaining in Western Australia and living with her mother, however she was worried about returning to [Country A] as she would miss her mother, she was worried about where she would live and who she would live with on her return [to Country A].

48. Throughout the interview [Alexa] said that her preference was to remain living with her mother and in Western Australia ... [Alexa] said her reason was due to wanting to remain in her mother's care and her worries were about who and where (what house) she would live on her return to [Country A]. [Alexa] also spoke throughout the interview of missing her friends and extended family members in [Country A].

...

84. [Mr DF] said if [Alexa] was returned to [Country A] he would support the Consent Orders from 2016 of which allow for [Alexa to have] time and communication with both of her parents ...

...

95. It would seem [Alexa]'s primary concern with returning to [Country A] was missing her mother, and her other worries were related to not knowing [Mr DF] well enough to live with him and also uncertainty of what home she would be living in. These worries need to also be considered within the context of a young person who has experienced considerable loss and possibly trauma in her short life, from not being raised for significant periods by her parents ... the loss of both primary carers ([Ms H] and [Uncle R])

in two different but distressing ways, the floods in her home town in April 2017 of which left her family home uninhabitable ...

98. ... To return to [Country A] would in some ways return [Alexa] to familiar places and faces and she would undoubtedly receive support from many children and adults who she spoke fondly about. However to return her would also mean another loss and change to the relationship she has with her mother and her two older siblings.

99. Based on the current situation and information it would seem if [Alexa] was returned to [Country A] she would not be placed in any physical harm, however consideration needs to be given to whether returning her would possibly expose her to psychological harm; given the losses she has experienced in her short life. Any decisions that are made on [Alexa]'s behalf need to consider ensuring that future changes and possible loss is managed in a way that supports her emotional wellbeing, especially as she is on the cusp of adolescence.

41 From this, it is apparent to me that the ground of "grave risk" is not made out.

42 I accept the submission of the ICL that notwithstanding all of the trauma that this young girl has suffered during her life, the order for return to Country A would not take it beyond the trauma experienced in all other cases where a child, wrongfully removed, is then required to move again and go back to the country from which she was removed. In this case, we have seen what Alexa said to the Family Consultant about aspects of returning to Country A which she would, in fact, find comforting. Further, there are other important people in her life in Country A with whom she will be able to more readily have contact than she would if she remained in Australia.

43 The final matter on which the mother relies is the exception found in reg 16(3)(c) which states that a court may refuse to make an order for return if each of the following applies:

- (i) the child objects to being returned;
- (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
- (iii) the child has attained an age, and degree of maturity, at which it is appropriate to take account of his or her views ...

44 I accept the submissions made by the Central Authority and by the ICL that this too simply has not been made out.

45 I accept the ICL's submission that Alexa has attained an age and degree of maturity at which it is appropriate to take her views into account. But for the reasons that were expressed by the ICL, I accept that care should be taken in giving weight to those expressions of opinion, particularly in light of what was said to the ICL in Country A about Alexa's wish at that stage to continue with her current arrangements.

46 It is apparent from reading the most recent report from the Family Consultant that Alexa has expressed a preference to remain with her mother and a preference to remain living in Australia. Whilst she initially said that she would not comply if an order was made for her to return to Country A, on immediate reflection, she changed her mind and said that she would. It is inconceivable, if the mother is prepared, as she is, to go home to Country A with Alexa, that there is going to be the strength of feeling that goes beyond a mere expression of a preference. Accordingly, this exception is not made out.

47 In the course of submissions, certain things were said about some overriding discretion under the Convention. But, as I pointed out in the course of argument, there is no discretion to refuse to return a child once the preconditions have been established and once the exceptions have failed. The discretion only arises when an exception is made out. In cases where an exception is made out, the discretion is, in fact, to nevertheless order the return.

48 This brings me to the question of conditions. It is open to the court to lay down conditions related to the return of the child, but care needs to be taken to ensure that the conditions are not such as to frustrate the order for return. It is also necessary to recall that conditions or undertakings, which are sometimes given in place of conditions, are not meant to provide long-term solutions and that to use the expression of Singer J in *Re M and J (Abduction: International Judicial Collaboration)* [2000] 1 FLR 803 at 808–9:

undertakings [or as here conditions] should not be accepted by the court save to the extent that they regulate affairs relating to the child up to but not beyond the door of the court of the children’s habitual residence.

49 In this case, although it was originally suggested that an order might be made that the child remain in the mother’s care pending an order in Country A, for the reasons that were put by the ICL, I accept that no such requirement is necessary here. Mr DF does not have an order in his favour. I do not think he would be permitted under Country A law to remove Alexa upon her return to that country. Alexa’s father is apparently in full agreement with the mother that Alexa should remain with her if she is returned to Country A. Therefore, it is not necessary to impose that condition.

50 The parties were given a brief opportunity, after I indicated that I was going to make the return order, to agree the terms of any conditions. To their credit, they have done so. In summary, the conditions provide for the return of the child to Country A within 21 days in the company of the mother, for the mother to arrange for the airline tickets, for the discharge of paragraphs 1, 2, 3, 4, 6 and 7 of the orders made earlier by this Court and for other ancillary orders to ensure the passports are released to the mother. They also provide for the ICL to be at liberty to provide a copy of the Family Consultant’s Report to the appropriate people who will be participating now in proceedings in Country A, and for the dismissal, otherwise, of the application.

51 There will be orders accordingly.

Orders

1. Within 21 days from the date of these orders [MS ABLET] (“the respondent”) shall return [ALEXA] born [in] 2006 (“the child”) to [Country A] in her company.
2. The respondent do all acts and things necessary to ensure the return of the child to [Country A] pursuant to Order 1 above.
3. The respondent provide the applicant and the Independent Children’s Lawyer (“ICL”) with a copy of airline tickets for the return of the child pursuant to Order 1 above by the close of business on 5 November 2017.
4. Paragraphs 1, 2, 3, 4, 6 and 7 of the Minute attached to the orders made on 7 June 2017 by the Honourable Justice Duncanson be and are hereby dismissed.
5. For the purpose of giving effect to these orders, the passports and airline tickets of the respondent and the child be released to the respondent.
6. The ICL be at liberty to provide a copy of the Family Consultant Report dated 6 September 2017 to the lawyer representing the child in the [Country A] proceedings with permission for that lawyer to provide the report to the [Country A] Court and to the lawyers for the parties to the proceedings in [Country A].
7. Within two working days of the respondent arriving in [Country A], she shall notify [Mr RF], [Mr DF] and any lawyers on the record in the [Country A] proceedings, including the lawyer representing the child, of her place of residence and keep them informed of any change of residence.
8. The application be otherwise dismissed.

I certify that the preceding [51] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate
24 October 2017