

RCB AS LITIGATION GUARDIAN OF EKV, CEV, CIV AND LRV v. THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA & ORS (B28/2012)

Date referred to the Full Court: 25 May 2012

The four children for whom RCB is litigation guardian are girls aged between 9 and 15 years. They were born in Italy and are Italian citizens. They became Australian citizens by descent on 16 November 2009. Their parents are the third defendant (mother) and the fourth defendant (father). The parents separated in Italy around January 2007 and in November 2008 they made a consensual separation agreement for joint custody of the four girls. Soon afterwards the mother decided to return, with the girls, to live in Australia and in 2010 she was able to secure the father's consent to the issue of passports for the four girls.

On 23 June 2010 the girls travelled to Australia with their mother. The ostensible purpose for travelling was to holiday for one month in Australia but they have been in Australia ever since.

The father remained in Italy and through the use of the provisions of the *Hague Convention* sought the girls return. On 18 February 2011, the second defendant, the Director-General, Department of Communities (Child Safety and Disability Services) filed an application under the *Family Law (Child Abduction Convention) Regulations 1986* ("the Child Abduction Regulations") seeking return orders for the children under regulation 14 of the Child Abduction Regulations. The first defendant, Forrest J, heard that application for return orders on 16 May 2011 and on 23 June 2011 ordered that the children be returned to Italy. The mother appealed to the Full Court of the Family Court. That appeal was dismissed on 9 March 2012. The mother filed an application for special leave to appeal which was subsequently discontinued. On 4 May 2012 Forrest J ordered the mother to deliver the children to Brisbane International Airport at a date not before 16 May 2012. Subsequently, on 14 May 2012 Forrest J issued warrants for possession of each of the children. On 21 May 2012 the plaintiff filed an application for an order to show cause seeking relief against the orders of Forrest J. The plaintiff claims a writ of prohibition to prevent Forrest J from continuing to hear and determine the proceeding in the Family Court and a writ of certiorari to quash certain orders of his Honour.

The issues raised in the application include:

- Whether procedural fairness requires that in proceedings under the Child Abduction Regulations a child must be independently and separately represented whenever it appears that a child may object to being returned?
- If so, is s 68L(3) of the *Family Law Act 1975* (Cth) invalid because it breaches Chapter III of the Constitution?

The plaintiff has filed a notice of a constitutional matter pursuant to s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General of the Commonwealth of Australia, the Attorney-General for South Australia and the Attorney General for Western Australia propose to intervene in this matter.