HIGH COURT OF AUSTRALIA

Public Information Officer

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MW v DIRECTOR-GENERAL OF THE DEPARTMENT OF COMMUNITY SERVICES

A New Zealand father had not established that he and the mother of his son had been de facto partners at the time of the child's birth so an order for the boy to be sent back to NZ after the mother had removed him to Australia should be quashed, the High Court of Australia held today.

MW was born in Poland in 1977 and moved to New Zealand with her parents. In 1996 she gave birth to a son, K. The father, born in 1964, is a New Zealander. MW and the father were not married and at least since shortly after the birth they have not lived together. K spent every second weekend and half the school holidays with his father under an access order made in 2000. Relations between the couple deteriorated. In 2006, without telling the father, MW departed with K for Sydney, where her parents now lived. The Director-General of the NSW Department of Community Services, as the State Central Authority acting on behalf of its NZ counterpart under the Hague Convention on the Civil Aspects of International Child Abduction, successfully applied to the Family Court of Australia for orders for the return of K to NZ. The application stated that the father had custody rights because he had the access order and because, as he was living with K's mother when the boy was born, he was a joint guardian. Evidence was by way of affidavits from the parents and others which were not the subject of cross-examination. The Full Court of the Family Court, by majority, dismissed an appeal by MW, who then appealed to the High Court.

The Court, by a 3-2 majority, allowed the appeal and dismissed the application to the Family Court. The Authority argued that the appeal should be dismissed on three grounds: that the access order conferred rights upon the father including the right to determine K's place of residence; that removal breached the rights of custody held by the New Zealand Family Court which had made the access order; and that the father had rights of custody as he was K's joint guardian. The High Court, by a 4-1 majority, rejected the first two grounds. It held that the father's access order gave no right of veto over K's removal from NZ. The Authority failed in its reliance upon the access order as the source of the father's custodial rights including a right to determine K's place of residence. As to the second ground, the Court held that Australia's Family Law (Child Abduction Convention) Regulations did not support a Convention application by a parent asserting breach of the rights of custody vested in a NZ court.

The NZ *Care of Children Act* provided that a mother was a child's sole guardian if she were neither married to nor living with the father as a de facto partner when the child was born. However, K's parents disputed whether or not they were living as de facto partners when K was born. In MW's first affidavit she said verbal and physical abuse started during her pregnancy and that when K was two months old she moved out and went to live with her parents. In her second affidavit she said she did not live with the father when K was born, but that after about a month and a half she stayed with the father for three nights a week for about six weeks to see if he could be a father to K. She said at no time was she the father's de facto partner. The High Court, by a 3-2 majority, held that the Full Court of the Family Court erred in concluding that the Authority had discharged its onus of establishing that K's removal from NZ was wrongful on this third ground. It held that the affidavit material was insufficient to found an inference that the parents had lived together as a couple in the nature of a marriage or civil union. The Authority had failed to establish its case that the father was a guardian who could thus determine K's place of residence.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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