Which country? Child abduction proceedings, undertakings and maintenance orders

Jacky Campbell
Forte Family Lawyers

International mobility continues to increase through greater travel and work opportunities, and the number of cases dealt with by the Family Law Courts continues to increase exponentially. The difficulties involved with resolving financial disputes at the end of a relationship are often more complicated if there are children. Parties often want to return to their "home" country and take any children with them.

If a child is removed from a Hague Convention country to a country which has acceded to the *Hague Convention on Civil Aspects of Child Abduction* ("the Hague Convention") or retained in another Convention country, the Hague Convention aims to have the child returned to the forum from which the child was removed and parenting proceedings determined in that forum.

The Hague Convention sets out the prerequisites to the Hague Convention being invoked and the defences upon which the removing parent can seek to rely. It does not set out the relationship between child and spousal maintenance orders or the undertakings which the left behind parent may be required to make, by the court making the return order, to ensure the "soft landing" of the child and the removing parent.

In *Sibly & Cassidy* [2015] FamCA 912, the Family Court of Australia determined the parties' competing applications for a property settlement and in doing so considered whether Canadian maintenance and cost orders should be enforced or discharged. It was also an interesting example of how the Convention is applied. Sometimes the brevity of a judgment can make it difficult to understand the full reasons why orders were made. Reading the numerous Canadian judgments about this family helps to better understand the ultimate outcome in Australia. This article draws on both the Australian and the Canadian judgments.

Sibly & Cassidy - the Australian proceedings

In *Sibly & Cassidy* the Family Court of Australia discharged the maintenance and child support orders made in Canada and discharged the arrears. The Canadian Courts accepted undertakings by the husband in the Hague Convention proceedings, and later made orders with respect to ongoing child support and spousal maintenance in favour of the wife. In between the Canadian proceedings and the 2015 Australian proceedings, the wife had

unsuccessfully sought orders that the child R be able to live with her and the child K for 6 months in Canada (*Cassidy & Sibly* [2011] FamCA 933) and that the child R live permanently in Canada (*Cassidy & Sibly* [2012] FamCA 245).

The country in which the parties were principally resident during the course of their relationship was not clear from the judgment. The parties met in Australia in 2002, started cohabitating in 2004 and married in Australia in 2005, but the two children were born in Canada (one born after separation). The husband visited Canada at various times and the wife resided in Australia from time to time. A significant proportion of their assets were in Australia. The husband was an Australian citizen, ordinarily resident in Australia and present in Australia.

The wife was expecting the parties' second child, K, when she travelled to Canada in September 2009. K was born in Canada, lived with the wife in Canada and had spent limited time with his father since his birth. The child R returned to Darwin, Australia to live with the husband, following orders made by the Supreme Court of Canada under the Hague Convention. The wife did not return to reside in Darwin and K lived with her in Canada.

The wife commenced proceedings for an alteration of property interests in the Family Court of Australia in September 2013.

In *Sibly & Cassidy*, the wife was not working and had the sole care of one of the children of the marriage. The husband was working and had the care of the other child. The Family Court of Australia, exercising its powers under the *Family Law Act 1975* ("the Act"), discharged the Canadian spousal maintenance order in favour of the wife and her entitlement to child support under Canadian law was offset against her child support liability under Australian law with respect to R. She received only a very modest property settlement: a few chattels and $10,000 of the husband's superannuation. The husband retained the bulk of his superannuation and his half interest in a house. His superannuation had increased in the period after separation in late 2009/early 2010 from approximately $49,000 to approximately $75,000. The wife retained substantial funds at separation, but had spent them on legal fees. It was a 5 year marriage with 2 children, but the court referred to it as a "short relationship", although a marriage of that length with children is not generally considered to be "short".

It seemed as if there may have been a punitive aspect to the outcome for the wife in that she had been found by the Canadian courts to have abducted the child R. The wife's skills and work history were not recorded in the Australian judgment, which makes it difficult to

understand the justification for the Australian property orders and the discharge of the Canadian maintenance and child support orders in her favour. The wife did not seek a significant property settlement in her favour. She sought the superannuation split that she ultimately received and a cash payment of about $10,000. She sought to maintain the Canadian child support and spousal support orders in her favour and had opposed the husband's stay application, which was successful, in *Cassidy & Sibly* [2015] FamCA 335. The Australian Child Support Agency had been garnishing the husband's wages for about 2 years.

Sibly & Cassidy - the Canadian Hague Convention proceedings

The litigation in Canada covered such matters as:

- whether the husband should be required to give undertakings, and what undertakings, if R was returned to Australia;
- whether R should be returned to Australia, as the wife raised various defences to the Hague Convention;
- the wife's maintenance application with respect to herself and the children;
- a costs application by the husband;
- an unsuccessful appeal by the wife;
- a successful application by the husband to vary the return orders to enable him to collect the child R rather than for the wife to travel back to Australia with the child;
- interim orders for K to remain in the custody of the wife, for the husband to pay child support for K, that he pay spousal maintenance and a costs order in the wife's favour which was credited towards the costs she was required to pay the husband in connection with the Hague Convention application.

In the undertaking proceedings the wife unsuccessfully sought that the husband give up his residence in favour of herself and the children. This application was refused, primarily because the husband owned the residence with his brother. She also sought, based on the husband's income of $42,000 per year, that the husband pay the wife $2,000 per month and that the husband pay the airfares and other reasonable travel expenses for the wife and the 2 children from Canada to Darwin. The husband proposed that he accompany R back to Darwin and he was prepared to pay those travel costs. The Court found that the wife's

proposal to travel to Darwin with the 2 children would cost less than the husband's proposal. Although the evidence showed that the husband had a very good relationship with R, the Court found that it was better for R to travel to Australia with his mother and brother as he had been in the sole care of the wife for 2 years. The Court realised that there was an element of unfairness in requiring the husband to bear the costs of returning R to Darwin, but believed it was the only practical order. The Judge was not prepared to make an ongoing support order for the wife and the children but ordered that the husband pay $4,000 to the wife before the wife's departure to Australia.

The Hague Convention proceedings - Defences by the wife

The defences which the wife raised under the Hague Convention were:

1. The wife was not habitually resident in Australia before she flew to Canada with the child R in 2009 and that her habitual residence is, and always was, Canada. She said that the husband's habitual residence is, and always was, Australia. There was evidence that she had connections with Canada. For example, she maintained her fully furnished residence, filed income tax returns in Canada, received Canadian child tax benefits and GST credits, held an Ontario drivers licence and health care card and declared her Australian income on her Australian tax return.

2. There was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

3. That the husband had acquiesced in the wife's retention of the child when he lived with the wife and the children in Canada after he brought his application under the Hague Convention.

The Canadian Court found that there was significant evidence that the wife's habitual residence was Australia. She had permanent residency in Australia, she had an Australian job, pension, bank account, drivers licence and medical coverage. She made plans for pregnancy care for the second child in Australia well after her departure date, she had friends in Australia, she had a gym membership and had booked a return flight to Australia for November 2009.

The judge agreed that R was probably too young for the court to meaningfully enquire into whether R had become acclimated to Australia but disagreed with the submission on behalf of the wife that the child's activities in Australia were of no consequence. Those activities were of assistance in determining the parents' intentions. Prior to R's removal from Australia

he had completed the third of the four terms of his school year, was involved in swimming lessons, was involved with his mother in a playgroup, had bonded with his paternal grandparents and his uncle and had a group of young friends. All these matters pointed to a finding that his parents had formed a settled intention to stay in Australia as a family, even if their stay was not necessarily permanent. The child had a strong and readily perceptible link to Australia.

The Canadian Court found that the wife had not abandoned her residence in Canada. Maintaining her connections with Canada was consistent with Australia being the wife's habitual residence. Habitual residence did not equate to domicile. The test for habitual residence was not so high that the Court had to find that the wife had abandoned Canada and never intended to return to live there.

The Supreme Court also rejected the defences of acquiescence and intolerable situation.

***Sibly & Cassidy* - the later Canadian proceedings**

The Canadian judgments reveal that the parties met in Australia whilst the wife was working as a geologist, which work she had also done in Canada. She had tertiary qualifications and relatively recent work experience as an information technology coordinator. At various times during their relationship there were issues for each of the parties as to their ability to work because of the expiration of the appropriate visas in whichever country they were living in at the time. Sometimes they were both working, at other times they were both unemployed and at other times one party was working while the other stayed home and cared for the child R. The wife was not permanently R's sole caregiver.

The home in which the parties had lived whilst they lived in Australia was half-owned by the husband and half-owned by his brother which gives a better understanding about why the Canadian courts refused the wife's request to live there pursuant to an undertaking by the husband related to the Hague Convention proceedings. The husband had made a substantial initial contribution to the purchase price. The parties and the child lived on the top floor whilst the husband's brother lived on the main floor.

In January 2011, the Supreme Court of Canada made orders in relation to child support and spousal maintenance to be paid by the husband to the wife. The husband was also ordered to pay the wife's costs. The wife had already been ordered to pay the husband's costs of the Hague Convention proceedings.

There were further proceedings in Canada which resulted in orders being made in January 2014 that the wife have final sole custody of K and that the husband pay to the wife child support and spousal support at higher rates than previous, taking into account his income and the Child Support and Spousal Support Advisory Guidelines. Orders were also made to ensure that the orders were enforceable in Australia.

Legislation relevant to the recognition of the Canadian orders

The Full Court of the Family Court of Australia recently approved the statement of the role of undertakings in Hague proceedings in *Wolford & Attorney-General's Department (Cth)* [2014] FamCAFC 197. The Full Court in *Wolford* referred to *McDonald and Director General, Department of Community Services NSW* [2007] FamCA 1400; (2006) FLC 93-297 where the role and application of undertakings and conditions made pursuant to reg 15(1)(c) of the *Family Law Regulations 1984* on an application for a return order was addressed. In *McDonald* the Full Court cited *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 at 1025 where Butler-Sloss LJ explained the role of undertakings. Butler-Sloss LJ said (at 27):

> "It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction."

The Act provides for the recognition of foreign orders. Pt XIIIAA of the Act is entitled *International Conventions, International Agreements and International Enforcement*. Sections 110, 110A and 111A deal with the overseas enforcement of maintenance orders.

In s 110(1), a *"reciprocating jurisdiction"* is defined as a country, or part of a country, outside Australia declared by the regulations to be a reciprocating jurisdiction for the purposes of this section. Countries or parts of countries can also be jurisdictions with restricted reciprocity.

Section 110(2) states that the *Family Law Regulations* may make provision for and in relation to:

> "(a) the registration in, and enforcement by, courts having jurisdiction under this Act of maintenance orders made by courts or authorities or reciprocating jurisdictions or of jurisdictions with restricted reciprocity;

(aa) the institution and prosecution, by an officer of a court having jurisdiction under this Act, a prescribed authority of the Commonwealth, of a State or Territory, or of another country or a part of another country, or a person for the time being holding a prescribed office under a law of the Commonwealth, of a State or Territory, or of another country or a part of another country, in his, her or its discretion, of proceedings:
(i) on behalf of the person entitled to moneys payable under a maintenance order made by a court or authority of a reciprocating jurisdiction or of a jurisdiction with restricted reciprocity, for the enforcement by a court having jurisdiction under this Act of that maintenance order; or
(ii) for the making of orders for the confirmation of provisional orders made by courts of reciprocating jurisdictions or of jurisdictions with restricted reciprocity, being provisional orders referred to in paragraph (d); …

(c) the making of orders (including provisional orders) for the variations, discharge, suspension or revival of maintenance orders registered in accordance with regulations under this section or of maintenance orders or provisional maintenance orders transmitted to other jurisdictions in accordance with regulations under this section, and the effect in Australia of orders under this paragraph;

(d) the making of orders for the confirmation of provisional orders made by courts in reciprocating jurisdictions or in jurisdictions with restricted reciprocity, being provisional maintenance orders or provisional orders varying, discharging, suspending or reviving maintenance orders, and the effect in Australia of orders under this paragraph; …"

Schedule 2 of the Regulations indicates that pursuant to Reg 25, Ontario is a reciprocating jurisdiction.

Section 110A provides that the Regulations may make provision for and in relation to the registration and enforcement in Australia of overseas maintenance agreements or overseas administrative assessments of maintenance liabilities.

Section 111A provides that the Regulations "may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations …"

Section 66E(1) of the Act restricts courts exercising jurisdiction under the Act from making a child maintenance order if application for an administrative assessment of child support can be made. Section 66E(3) provides that s 66E(1) does not apply to proceedings under regulations made for the purposes of sections 110 or 111A.

The Family Court also considered Chapter 13 of the *Interjurisdictional Support Orders Act 2002* of Ontario. The regulations pursuant to the Ontario Act indicated that the Commonwealth of Australia was a reciprocating jurisdiction under the provisions of the Ontario Act.

Consideration of s 79(4) matters

In determining the parties' competing applications under s 79 of the Act for a property settlement, the court was required to consider the contributions of the parties (financial, parenting and homemaking) and the other matters listed in s 75(2). The wife conceded that for the period 2004 to 2009 the contributions of the parties were equal. She did not have any health issues which prevented her from seeking employment. She was studying, but said she might look for work once K started school.

In June 2007 the husband used $80,000 of his savings to purchase a one-half interest in a house for $200,000. The wife made no direct financial contribution towards the purchase. When the parties resided in Canada from time to time, they lived in properties owned by the wife's family.

During the trial the parties agreed that the Court should consider the contributions of the parties, both financially and non-financially, during the relationship as equal. However, Dawe J found that the original contribution of the husband's savings to the home was significant.

After the parties' separation, considerable costs were incurred by the parties in legal fees and travel costs. Most of the legal costs were incurred due to the wife's travel to Canada with R, her refusal to return to Australia and her appeal from the order that R be returned to Australia.

The parties had net assets, mainly in Australia, of $184,200 which primarily consisted of the husband's equity in a home he owned with his brother. The parties' debts to each other for child support, souse maintenance and legal costs and to other people for legal costs were not included in these calculations. In addition, the husband had superannuation of about $75,000.

Dawe J took into account the following matters:

- There had been considerable money spent on legal fees and travel costs associated with the Hague Convention proceedings in which the husband was successful. The husband had spent over C$57,000 in Canada and had also had substantial legal fees in Australia. The wife had spent at least C$100,000 on legal fees. Both parties had borrowed money to fund the litigation. They has also depleted assets to pay their legal costs;

- The debts due by both parties in relation to child support orders and spouse maintenance orders, together with the specific order of the Canadian Court requiring the wife to pay the husband's legal costs;
- The husband's substantial initial contribution of approximately A$120,000;
- The income earning capacity of both parties;
- The ongoing responsibilities of each of the parties to care for a child of the marriage;
- The short period of cohabitation;
- The husband's contribution to the increased value of the superannuation since the separation.

Was it just and equitable to alter the parties' legal and equitable interests?

Before making a s 79 order, the Court had to be satisfied that it was just and equitable to alter the parties' legal and equitable interests as required by the High Court in *Stanford*. Considering the length of the marriage and the contributions of the parties during the period they resided together, the steps taken since separation and the impact upon the financial circumstances of the parties, Dawe J considered (at para 120) that it was just and equitable for a s 79 order to be made (*Stanford v Stanford* [2012] HCA 52; (2012) FLC 93-518).

It was also just and equitable for the Court to take into account when considering whether s 79 orders should be made:

1. The Canadian orders for child support, spousal support and costs,
2. The Australian child support assessment, and
3. The Court should deal with these outstanding debts and finalise the financial arrangements between the parties where possible.

Dawe J discharged the unpaid child and spousal support orders made in Canada and reduced the liabilities owing to nil, including any penalties and interest. The costs payable by the wife to the husband under the Canadian Hague proceedings were also discharged. An order splitting the husband's superannuation so that there could be a payment to the wife's fund of $10,000 was made. Certain personal items of the wife were to be delivered by the

husband to the wife when she next visited Darwin. Orders were made that the parties have no child support liability to each other.

The husband retained the equity in the real estate, which was an asset that he had acquired using funds which he owned prior to the relationship with the wife. He retained the bulk of his superannuation, which had increased substantially since the parties' separation.

Conclusion

Sibly & Cassidy is a property settlement case, but it illustrates the ability of Australian courts to discharge child support and spousal maintenance orders made by overseas courts which are enforceable in Australia. The Hague Convention proceedings and the costs incurred in those proceedings, and the Canadian proceedings more generally, were significant in the context of a relatively modest asset pool.

Dawe J took a practical approach with the objective of finalising the financial relationship between the parties. This involved giving significant weight to the husband's initial contributions, which were largely to a home in which he and one of the children of the marriage lived and #.

The writer thanks Louise Fairbairn of Forte Family Lawyers for her helpful comments in an earlier draft of this article.