

MW v DIRECTOR-GENERAL OF THE DEPARTMENT OF COMMUNITY SERVICES (S493/2007)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 30 April 2007

Date of grant of special leave: 31 August 2007

The main issue in this case is whether the parents of a child born in New Zealand in 1996 were in a de facto relationship at the time of their son's birth.

On 15 September 2006 the Appellant ("the Mother") brought her son to Australia from New Zealand without the Father's knowledge or consent. On 11 October 2006 the Respondent filed an application seeking orders under the *Family Law (Child Abduction Convention) Regulations* for the return of the child. The Mother however submitted that the Father did not have "rights of custody" at the time their son came to Australia. She further submitted that the Father had acquiesced to their son's removal or, alternatively, that the Court should exercise its discretion against ordering his return.

Justice Steele noted that, pursuant to section 17 of the *Care of Children Act 2004 (NZ)* ("the Child Care Act"), both parents would be joint guardians if they were in a defacto relationship at the time of their son's birth. The evidence of the parties however conflicted on this point. His Honour preferred the evidence of the Father who stated that he lived with the Mother until their son was born. His Honour therefore found that both parents were joint guardians. Pursuant to the orders of the Family Court of New Zealand on 4 December 2006, the Father also had "rights of custody" and the Mother could not unilaterally change their son's country of habitual residence. His Honour also rejected the argument that the Father had acquiesced to his son's removal, or that the discretion should be exercised to prevent an order for his return. His Honour accepted that the Courts of New Zealand could determine the parenting issues after a full hearing of the facts. His Honour ordered that the child be returned to New Zealand.

On 30 April 2007 the Full Court of the Family Court (May & Thackray JJ, Finn J dissenting) dismissed the Mother's appeal. The majority held that the Mother's own evidence justified a finding that she and the Father were in a de facto relationship at the time of their son's birth. The majority also found that it was appropriate to set a "relatively low threshold" when determining whether the parents were in a de facto relationship at the time of their child's birth. They found that this approach ensured that a child had both natural parents as guardians.

Justice Finn however was not satisfied that there was sufficient evidence to enable Justice Steele to conclude that the parents had lived together in a de facto relationship. Her Honour found that the Respondent had not discharged the requisite onus of proof.

The grounds of appeal include:

- The Honourable Justices May and Thackray erred in finding the Mother's own evidence was sufficient to justify a finding that at the time of the child's birth, the Mother was living with the Father as a de facto partner.
- Section 29A of the *Interpretation Act 1999* (NZ) was inapplicable to the construction of the relevant provisions of the Child Care Act.
- The Honourable Justices May and Thackray erred in setting a "relatively low threshold" for determining whether the child's parents were living together in a de facto relationship upon regard to the purpose of the Child Care Act.