Case No. FD13P01105

Neutral Citation Number: [2013] EWHC 2970 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Wednesday, 21st August 2013

Before:

MR. JUSTICE KEEHAN

B E T W E E N :

O — Applicant

- and -

O — Respondent

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*Transcribed by **BEVERLEY F. NUNNERY & CO***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

MR. H. SETRIGHT QC and MS. M. CHAUDHRY(instructed by Dawson Cornwell) appeared on behalf of the Applicant

MR. D. BARTLETT (instructed by Leonard & Co.) appeared on behalf of the Respondent

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J U D G M E N T

The judge gives leave for it to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people, places and companies.

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MR. JUSTICE KEEHAN:

1. I shall direct that a transcript of this judgment is prepared at the joint expense of the parties.

Introduction

2. I am concerned with one child, M, who is nine years of age. She has a sister, S is two years of age. The mother of both children is the applicant, who is 40 years of age and the father of both children is the respondent to this application, is the father, who is 46 years of age.

3. There are two applications before me, one under the inherent jurisdiction of the High Court to order the return of M to the United States of America and, secondly, a similar application under the Hague Convention. The father opposes both applications. He asserts in the first instance that M should remain in this jurisdiction and living with him or, if there is to be an order made under the Hague Convention, that she be sent with him to Australia for the Australian courts to determine welfare and, thirdly, if the court were to order a return of M to the United States of America, he would not go there to live with her although he may accompany her on the flight to the United States.

The Background

4. On 27 September 2003, the parties were married. As I have mentioned, M was born on [a date in] 2004. Both before and after her birth, the family were based in the United States of America but travelled, as I understand it, fairly regularly to Australia, to Thailand and to the United Kingdom. In or about March 2005, the parents and M moved to live in Australia and just over a year later in or about May 2006 they moved back to the United States. In November 2008, as asserted by the father, and in January 2009, as asserted by the mother, the parties once again moved to live in Australia and it was there that S was born on [a date in] 2011. In that same year sadly, in November 2011, the parents are separated but they agreed between them shared care arrangements for both of the girls.

5. Difficulties arose between them such that the mother sought the father's agreement to a parenting plan in July 2012, which is set out at C240 of the bundle. The father however did not sign it. In late 2012, the mother who worked as a pilot, was off work and it is asserted by the father that she began to drink to excess. She received help and treatment from a rehabilitation

centre. In late 2012, court proceedings were initiated in the Australian Family Court and competing applications were made by both of the parents.

6. On 11 March or thereabouts, the father told the mother that rather than going immediately back to the United States with her he was going to take M on a holiday to Thailand en route to the United States. On 14 March by consent, all applications before the Australian Family Courts were dismissed, both parents having filed and served notices of discontinuance. From that, I infer that any extant orders made as to residence and contact by the Australian court pursuant to those applications were terminated. On 19 March this year, the parents entered into an agreement. The agreement was that the family would leave Australia to go and live in the United States. It is at least agreed between the parties that the plan had been to live in California, where the father it was hoped would be able to obtain work as a yacht skipper.

7. The two versions of that agreement are set out at C302 of the bundle and C303. The fuller document is in manuscript drawn by the mother and it reads:

> "I withdraw my request for the order that my children, M and S, be placed on the airport watch list. I withdrew this order on 1 March 2013 through the Family Courts. S and I, the mother, will be moving to America permanently on 25 to March 2013 and M will be moving permanently to America, departing Australia 9 April to Bangkok and then on to America. M will be permanently moving to America with the father. Please allow travel for both of parties."

8. That is signed and dated by both of the parents. The father's version is a typescript document. That says:

> "This is a letter to bring to your attention recent orders that have been dismissed before the Federal Magistrates' Court of Australia. We are moving overseas next week and want to make certain there are no restrictions still in place for our children to be able to leave Australia."

9. The mother did indeed leave Australia to fly to America on 25 March with S. Prior to that time, the contents of the family's household goods had been packed into a shipping container to be transported to California in the United States. The mother had resigned from her job and was accepting a new post with an Airline based in the United States. On 4 April, the father sent an e-mail to the mother stating: "We will be there" - I interpose the United States – "in June planned." C43. However, on 7 April, the father first indicated by a text message to the mother his intention to visit the United Kingdom after

the stay in Thailand. The mother did not, it is agreed, consent to that visit to the United Kingdom. On 9 April, the father and M left Australia to go to Thailand. On the mother's case, that was to be for a two week or a three week holiday. The father maintains that it was agreed that was an open ended holiday in Thailand, but he says it was agreed that he and M would go to the United States by the end of June, by which time the mother would have completed training with a new airline.

10. On 9 April, the mother requested contact with M because she had not spoken to her for a considerable period of time. On 5 May 2013, the mother sent an e-mail to the father asking him to communicate with her. On 6 May, there was an e-mail from the father to the mother saying: "We will be in the United Kingdom a few weeks, then the US." On 6 May, the same day, mother made clear by an e-mail that she did not consent to the father keeping M in Thailand for so long or taking her to the United Kingdom.

11. On or about 25 May 2013, the father and M arrived in the United Kingdom. They were and are staying with their father's mother in her two bedroomed house. M has a bedroom and the father told me that he sleeps downstairs on a bed. Just 18 days after arriving in the United Kingdom for the purposes of a purported holiday, the father sent an e-mail to the mother in which he indicated that it was his intention for him and M to remain in England and not travel to the United States. The mother replied that she did not consent to M being taken to this jurisdiction or remaining here. The mother issued proceedings in relation to the custody of both of the children in the United Sates, in the courts of Minnesota, on 6 June 2013: those proceedings are extant. On 11 July, subsequent to the issue of proceedings in this matter, the CAFCASS officer undertook an interview with M about her views. I shall return to those in a few moments.

12. The father prepared by himself, for at that time he was unrepresented, a statement which is dated 6 August.

The Evidence

13. Unusually but aptly, I heard oral evidence in this matter from the father and briefly from the mother. I have read and take into account all the position statements and skeleton arguments filed on behalf of the parties, the statements made by the parties, the report of the CAFCASS officer and I have been referred to various documents, e-mails and texts that were sent between the parties.

14. I first heard evidence over the course of a day or so from the father. He commenced his evidence by confirming that everything in his statements, including that statement of 6 August 2013, was true. He confirmed in the course of his examination in chief that he did enter into the agreement of 19 March, the plan and the purpose being that the family would live in the United States in close proximity to each other, the mother looking after, in the main, S, the father, in the main, looking after M, but being in close proximity it was the parents' plan and wish that there would be frequent and regular contact between the two sisters and between each of the girls and their parents.

15. The father asserted that when he signed that agreement of 19 March it had been his plan to go and live in the United States of America. Contrary to what is set out in his statement and in the first skeleton argument filed on his behalf by Mr. Bartlett, he asserted in evidence that it was only when he was in England that he decided that it was "not in my best interest to move to the United States." Prior to giving evidence, it had been asserted by him that he had changed his mind about going to the United States when he and M were in Thailand. He told me that "when I got to the United Kingdom, I finally made up my mind not to go to the United States."

16. He had made in the past various allegations against the mother and her capacity to care for one or both of the children. However, he confirmed that in recent times he knew nothing about any issues of concern in respect of the mother's care and ability to care for S. It quickly became evident when the father was cross-examined by Mr. Setright QC on behalf of the mother and that much of his evidence was wholly untruthful and lies. By way of example only and referring to his statement dated 6 August 2013 which starts at C334 of the bundle, he said at paragraph two:

> "I wish to make it clear there was no firm agreement between me and the mother that we would live together in the United States."

17. Mr. Setright QC rightly pointed out and put to the father, on the basis that no party had ever suggested that the two should live together in the United States or indeed anywhere else, that that was an attempt by the father to misrepresent the position and to mislead the court. He said at paragraph three:

> "I never told the mother that I wanted to relocate from Australia to live in the United States. I have no desire to live or work there."

18. In paragraph five, he asserted:

> “It was always my intention that I would live in the United Kingdom with M.”

19. He sought to suggest in his oral evidence that the words “one day” should be inserted at the end of that sentence. In so doing he was attempting to persuade the court that that was merely an aspiration on his part rather than a stated intention. That paragraph ends with the sentence:

> "We agreed that I would live here” - that is in the United Kingdom - "after travelling to Thailand."

20. The father in his oral evidence sought to persuade me that to the "we" in that sentence meant him and M. That was an obvious and blatant lie which the father was forced to admit. What he was in fact suggesting was that he and the mother had agreed that he would live here in this country with M after travelling from Thailand. Once more, he was forced to admit that that itself was a lie and there never had been an agreement by the mother to him and M living in this country. It was no doubt because of that admission that the defence of consent which had been presented by the father was withdrawn by Mr. Bartlett in the supplementary skeleton argument filed on the Monday of this week.

21. In paragraph seven of that statement he asserted:

> “She” - that is, the mother - "told me that if I wanted to I could make use of some of the spare space in the container and collect my belongings and then have them shipped to the UK at a later date."

22. The father was forced to accept in the course of his oral evidence that that too was a lie and that the mother had said no such thing to him. The final sentence of that paragraph reads:

> "I only stored memento and items of sentimental value in the container, nothing of any real financial value."

23. Mr. Setright QC on behalf of the mother put to the father the freight digest which plainly showed that that too was a lie, that items of furniture and tools of his trade were also in that container. When repeatedly asked why he had lied in that statement and in the course of his evidence to this court, he said: "I am not sure why I lied. I am confused." He then said that he believed that at the time he made his statement he thought it was possibly true. Once more, he had to concede that that suggestion too was a lie.

24. He said in evidence later on that between 25 May and 12 June it was then that he decided to stay in the United Kingdom. He said the supplementary skeleton argument filed on his behalf was wrong when it states that he had made that decision in Thailand. He denied that he had had a long-standing intention to live in the United Kingdom with M.

25. He asserted that when he was in Thailand he was still prepared to go to the United States, but he said, “I would be facing another court in the United States so I changed my mind." He said he had changed his mind because the mother had threatened to have him arrested. When further pressed on the question, he said: “We” - meaning him and M - “ do not want to live in the United States.” he said: "My life and family are here. My whole family are here and now I am home." He did accept that the whole purpose of the agreement of 19 March was to keep the children together. He said: "Yes, initially it was but that changed when we got to the United Kingdom.” When asked why it had changed, he said: "I did not see that I could live in the United States. I did not want to live in America."

26. It was during the course of his oral evidence that he made the somewhat surprising assertion that if an order was made for M’s return, he was prepared to go to Australia with M. Not merely, however, until such time as the Australian courts had made a welfare decision about future care of M but “We would go”, he said, “to Australia to live.” he asserted that he would go wherever, "where I can help my daughter" but then said:

> “If the court ordered M to go to the United States I would not go to the United States because I do not have legal standing.”

27. He then asserted that he did not want to go to California in the first place. In re-examination, when it was put to him that he had lied in his statement and lied in his evidence, he said: "I did not know at the time that I was writing a lie. I lied because I want to keep my daughter.” When I asked him whether he was taking any medication at the time that he wrote the statement which may have altered his ability to recollect events, he confirmed that he in fact knew that he was lying when he wrote that statement. He said that M had made it very clear many times both in Australia and after that she did not want to live with their mother. He also asserted that if a return order for M to go to America was made but without the father that would have a huge impact on her. It would be extreme. He said that he may accompany her to America but would return to this jurisdiction afterwards.

28. Those last answers were given in answer to a question from me. Prior to that time, the father had spoken solely of his own feelings, his own wishes and his own desires about where to live.

29. I have rarely, if ever, heard a witness give evidence which was so blatantly untrue and where he was forced to accept time and time again that he was lying. When considering the father's lies and evidence, I bear well in mind the recent guidance given by the Court of Appeal in the case of *Re. M. (Children)* 2013 EWCH Civ. 388. I have considered why the father lied. The answer to that is plain and obvious and it comes from the father's own mouth. He did it because he wanted to keep M. I am satisfied that the father has lied and consistently lied, not only in the statement of 6 August but also in his oral evidence because he will do and say anything which he believes will bolster his chances of keeping M in this country with him.

30. I had considered, when preparing this judgment, whether, given the blatant and admitted perjury of the father, I should refer this matter to the Attorney General for consideration of prosecution for the offence of perjury. I have decided against taking that course because it would complicate and cause further difficulties in this matter which, in my judgment, would adversely impinge on the best interests of M.

31. I turn then to consider the evidence of the mother. She was in my judgment entirely straightforward, consistent in her evidence and a credible witness. It was perfectly understandable that the mother sent angry and terse e-mails or texts to the father, wanting to know when she could have contact with M, wanting to know what the father's plans were and wanting him to, and hoping that he would, adhere to the plan and agreement to travel to the United States. Those e-mails and those texts were in my judgment entirely reasonable and appropriate and they provide no basis whatever, objectively or subjectively, for the father to change his mind and renege on the agreement to go to the United States.

32. I am satisfied on all of the evidence and on the concessions made by the father that there is no evidence post-February 2013 that there has been any issue about the mother's ability as a carer for S or indeed for M.

33. I also note that the mother readily agreed, as did the father in fact, that the contact that she had had with M in this country, albeit limited, had gone extremely well and without any issue. I was shown a large number of photographs which demonstrated a happy and normal relationship both between M and her mother and between M and her sister.

34. The CAFCASS officer, as I have mentioned, interviewed M on 11 July. The account of that interview is comprehensively set out in the report prepared by Miss Julian which is dated 12 July.

35. At D3, she recorded as follows:

> "I asked what life was like living with her parents. It was all right but her mum and dad moved houses because 'they fighted all the time. If I stay with mum she probably won't let me see dad again.' At one time she said that 'dad won't let me talk to her, but he is letting me talk to her.' I asked how she knew this and she told me her father had told her."

36. At D5, when discussing about what would happen if the judge said that M should go to America, she said:

> "'I don't want to go because I like it here and I want to stay with dad. He wants to live in England because he wants to be near the base and I want to stay with him and near the horses and I want to be with my favourite cousins.' If her father went to America 'he would not be able to get a job as he would not be near water; else he would have to live really far away from me and I want to live close to dad' but if M's father moved to America 'I'd move with him.' I suggested to M that it is more important for her that she lives with her father than the country in which they live and she agreed."

37. At D6 under the heading, "Wishes and feelings and objections", Miss Julian records:

> "She wants to stay in England to be with her father. If her father moved to America then M would wish to move with him. M would like direct contact with her mother in America and in England. She would also like Skype and telephone contact."

38. Finally, in the concluding paragraph at D7, she said as follows:

> "The Australian order was agreed and the children lived in the same country, albeit for some time in different homes. It therefore enabled good contact to take place between the siblings to maintain this very important relationship. Whatever the decision of the court, it is extremely important that arrangements are put in place to enable this close relationship between the sisters to continue. Parental conflict must not be allowed to thwart this."

39. At the directions hearing on 23 July, Mr Bartlett made an application for Miss Julian to be called to give evidence at this final hearing. I refused the application for the reasons set out in a recital to order made on that date, namely (a) the report was clear and comprehensive in setting out M's views and (b) she was not available to attend the hearing listed this week and if required to attend for the purposes of cross examination that would entail an adjournment of this fixture which, I ruled, was neither in the child's interests nor was it proportionate to do so.

40. I gave liberty to Mr. Bartlett to renew that application at this hearing. He did so. I refused the application for the same reasons that I gave on 23 July. The wishes, feelings and views of M are clearly set out in the Miss Julian's report. Contrary to the submissions made on behalf of the father, I find, as set out in paragraph 49 below, that those wishes, feelings and views do not amount to an 'objection' within the meaning of article 13 of the Convention, I am wholly satisfied that cross examination of Miss Julian would not have assisted the court in any way nor would it have informed or affected my finding.

Analysis and Findings

41. I accept that mother has had personal problems, particularly in the latter part of 2012, but I am satisfied that they have been dealt with. I am entirely satisfied that the father loves his children and that he has an especially close relationship, because of the circumstances of the last few months, with M. However, I am equally satisfied that the mother loves both of her children very dearly and accepts that there have been in the past some issues for M, but her view is that the recent contact they have had has been easy, meaningful and affectionate.

42. In the e-mail that the father sent to the mother on 12 June at C159 of the bundle, he said:

> "We are intending to stay here now and I want to give you all the information as best I have and know. It is an awful situation we find ourselves in, I know, but hear me out at least. We are amongst family and dear friends as you and S are at your mum's. M is very much at home here and insists she wants to be here. I in no way try to directly or indirectly influence her opinions. I keep asking if she can live apart from mummy and most of all S, she assures me she can live with the separation for now."

43. A little later:

"You have your family there for support and us here the same. Oz without family was the most awful and loneliest I've ever been and setting up in San Fran would be exactly the same for me. I am a much happier person now amongst loved ones and that is a huge positive for us all."

44. I find it quite extraordinary that just 18 days after arriving in the United Kingdom, when M at nine has never lived here and when it was purported to be for the purposes of a holiday, that a nine year old should express those strong views (a) about wanting to remain here in this country and (b) being content with being separated from her mother and her sister which she never had been before.

45. The issue is raised between the parties about when the father formulated a plan to live in this country and at what stage he decided that he was not going to abide by the agreement of 19 March for the family to move to live in America. That date is not without importance, for if the decision was made before he and M left Australia on 9 April then that would have been a wrongful removal; whereas if it occurred after that date, when they had already left Australia, it would be a wrongful retention. In those latter circumstances, issues arise about the applicability of the Hague Convention because, having left Australia, it is submitted on behalf of the father, M would have lost her habitual residence status in that country and would have had no state of habitual residence.

46. I am in no doubt that the father decided to renege on the plan to live in the United States of America before he and M departed from Australia on 9 April this year. I so find because:

a. The father's evidence is wholly unreliable. He has lied at so many points about so many important factors are that I simply do not believe him when he says the decision was made either (a) first in time, in Thailand, or (b), more latterly in his evidence, when they had reached the United Kingdom;

b. The vehemence of the objection that he now has to going to the United States of America belies any intention to see through the agreement that was reached between the parents on 19 March;

c. Perhaps most importantly, the father could give no adequate, cogent or credible explanation of what had happened to cause him to change his mind from 19 March to, as he asserted, when he arrived in this country. His reference to his uncertain status in the United States or to the barrage of e-mails and texts that he had received from the mother do not, in my

judgment, amount to any adequate explanation. Accordingly, in the absence of any explanation to account for the change of mind, I am satisfied that it was right for me to find that the plan to come to the United Kingdom was formulated and clear in the father's mind before he left Australia;

d. As I have just observed, the comments made by the father in the e-mail of 12 June when he first notified the mother of the plan to stay in this country I simply do not accept as credible, that M would so swiftly and so firmly have formed a view about wishing to stay in this country.

Accordingly, I find that the removal of M from Australia by her father was a wrongful removal and does not constitute a wrongful retention.

47. The father's defence to the application under the Hague Convention is that M objects. He relies upon Article 13 which says:

> "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of its views."

48. As I have mentioned, the defence of consent was withdrawn shortly before the start of this hearing. It is of note, as was raised by Mr. Setright QC, that the father does not rely on the defence of Article 13(b) of the Convention, that there is a "grave risk that his or her return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation".

49. I then have to consider whether M does object to going to the United States of America, whether she is of an age and maturity to make that decision and to what extent I should take account of her objection and/or consider it to be determinative of this application. In light of the views expressed by M to Miss Julian, I am satisfied that M does not object to going to the United States. What she objects to is being separated from her father. That, in my judgment, is a wholly different issue. What M did do was to express certain preferences, a preference that she remain in this country with her father, a preference that if she goes to America it is with her father, but in my judgment those views are no more than that and they do not reach the status of objection within the meaning of Article 13 of the Convention.

50. I am fortified in expressing those views and coming to those conclusions when I take account of the fact that M had lived in her father's sole care for nearly four months before that interview by the CAFCASS officer. I also

take into account that there had been little or no contact between the mother and M in the weeks prior to that interview. I also take account of the evidence of the father, both in his e-mail of 12 June and in his oral evidence, about how he had kept questioning M. It is not without significance, as recorded by Miss Julian in her report, that there were matters concerning the parents and their actions reported by M which she said she had been told by her father.

51. The mother has offered the father the standard Hague Convention undertakings if the court orders M to go to the United States of America, but she has gone over and above the standard undertakings and has undertaken to provide accommodation for the father and M in Minnesota near her family home and has also offered to provide financial support for the father during that time that he and M are in America if that is what the court orders.

52. The father has said that he would not return to America with M if that were the order of the court although latterly, as I mentioned in his evidence, he said that he might travel with her. He knows, as he told me in evidence, that the effect of separation of the two of them would have a huge, huge, adverse impact on M. It would be, in his word, extreme. I agree. I therefore ask myself why this father would refuse to go with her. He is, I have found and I am satisfied, a loving and caring father to his daughter. Why would he then take such a callous and ruthless course which is wholly contrary to his daughter's interests? It is not, in my judgment, because he is a callous or ruthless individual; rather, as part and parcel of the lies that he has told to this court, it is a litigation ploy. He fears, I infer, that if he were to accept that he would travel to the United States with M that would in some way undermine his case and his opposition to that course being taken.

53. A number of issues were raised by Mr. Bartlett in closing submissions in respect of the approach to be taken by the court. It was accepted by him on behalf of the father that, if the court found that the father had changed his mind about going to the United States before he and M had left Australia, that would be a wrongful removal. That finding I have already made.

54. It is asserted on behalf of the father that the Hague Convention should be interpreted that, upon a finding of wrongful removal having been made, the court must order M to be returned to Australia from whence she was taken. Mr. Bartlett asserted that Article 1 of the Hague Convention and the preamble thereto make plain that that is the course the court should take. The preamble to the Convention reads:

"The state signatories to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children and internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect and have agreed upon the following provisions."

55. Article 1 of the Convention reads:

"The objects of the present Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any contracting state."

56. That I entirely accept. However, as Mr. Setright set out in his submissions, the Child Abduction and Custody Act 1985, which incorporated the Hague Convention into English law, sets out in section 1(2):

"Subject to the provisions of this Part of this Act, the provisions of that Convention set out in schedule 1 of this Act shall have the force of law in the United Kingdom."

57. He rightly refers me to schedule 1. Schedule 1 of the 1985 Act does not contain the preamble to the Convention; nor does it contain Article 1. Schedule 1 commences with Article 3. Accordingly, on the basis of that interpretation of the 1985 Act, neither the preamble nor Article 1 of the Convention have the force of law in the United Kingdom. I was also referred to the explanatory report of Professor Perez-Vera and in particular to paragraph 110. That paragraph reads:

"One problem common to both of these situations is determining the place to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the state of its habitual residence before removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the natural jurisdiction of the courts in the state of the child's residents being evaded with impunity by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one which the fight against international child abductions seeks to protect. When the applicant no longer lives in what was the state of the child's habitual residence prior to its removal, the

return of the child to that state might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities in the state of refuge to return the child directly to the applicant, regardless of the latter's present place of residence."

58. Mr. Bartlett urged me to treat that explanatory note, in particular that paragraph, with caution because that particular paragraph is not referenced. He urged upon me that it was merely the opinion, in the main, of the author. I entirely accept that the explanatory note of the professor has often been cited in this jurisdiction and it has been found to be a helpful tool at times in interpreting the Treaty. I do not consider it determinative for any of the issues I have to decide, but bear it in mind.

59. Both counsel accept and submit that this case is unique in that there is no previously reported decision where it was contemplated returning a child to a third state because the family had left the country which had formerly been the state of the child's habitual residence at the time of the wrongful removal.

60. I was referred by Mr. Setright to the case of *Re. L* [1999] 1 FLR 433, a decision of Wilson J., as he then was, where he said:

> "Mr. Nichols may be right to submit that an order under the Convention need not be for the children to be returned to the state from which they are found to have been wrongfully removed. In *Re. A (A Minor) Abduction* [1988] 1 FLR 365 at 373B-C Nourse L.J. observed, particularly in light of its preamble, that an order for return to that state was what the Convention contemplated, but in paragraph 110 of the explanatory report upon the Convention, which may not have been drawn to the attention of Nourse L.J., Professor Perez-Nevera suggested the wording of the text of the Convention was deliberately left wide enough to cater for special cases such as where the applicant no longer lives in the state from which the children have been wrongfully removed and where, therefore, they should be returned to a different state."

61. Mr. Bartlett urged upon me a course of interpreting the Convention as requiring me, if I found a wrongful removal, to order the return of M to Australia. He could not identify, however, that there was anything either in the Convention or in the case law which prevented or prohibited, in the particular circumstances of the case, the court taking a different view about the place to which the child should go after a wrongful removal.

62. In his helpful submissions, Mr. Setright QC on behalf of the mother referred to a number of authorities, in particular to the case of *S & B (Abduction and Human Rights)* [2005] 2 FLR 878 and to the judgment of Sir Mark Potter, then the President of the Family Division, at paragraphs 48 and 49. At paragraph 49, Sir Mark Potter said this:

> "The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as a broad and instinctive approach to the defence raised under Article 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not to the wrongful conduct of the abducting parent. By reason of the provisions of Articles 3 and 12, such wrongful conduct is a given in the context of which defence is nonetheless made available if its constituents can be established."

63. I accept that it would be wholly wrong for the court to refuse to make an order in this matter solely because of the father's stated aim that he would not go to the United States with M. That is not referring to or relying upon his wrongful conduct in wrongfully removing her, but it is relying upon his stated intentions which, as I find, are made to support his case against an order and seeking to frustrate and undermine the case presented on behalf of the mother.

64. I have had recourse to a number of other authorities provided by both counsel, for which I am extremely grateful, but I do not consider it necessary to refer in detail to those in this judgment. I am clear that the Hague Convention should be given a purposive interpretation and not a narrow and restrictive interpretation. The object of the Convention is to ensure that there is a summary and expeditious return of a child wrongfully removed or wrongfully retained from its state of habitual residence. The Convention, in my judgment, seeks to promote the welfare of children. It would be strange indeed if the Convention required steps to be taken which were positively contrary to the interests of the subject children.

65. In my judgment, it would be utterly absurd and wholly contrary to the interests of M for this court to direct that she be returned to Australia, where there are no family members, there is no family home, where the father would have, it would appear, no employment and, most importantly, the mother and S would not be there. It would be a crass and wholly artificial

exercise to invite the courts of Australia to make welfare interest decisions in respect of M when, certainly at the outset, both of these parents had made a clear and reasoned decision to leave Australia and to base their new home back again in the United States of America.

66. I am in no doubt that the Convention, properly interpreted, enables me to order that M should be returned to the United States of America and that it should be the courts of that country that make the welfare decisions about M, possibly including S too. There are, of course, proceedings relating to the custody of the children afoot in the United States which I have taken into account when considering the appropriate order to make in this case.

67. In a world where there is such regular, global travel and where families, such as this one, regularly settle and then move between different countries, it would be manifestly wrong to take a narrow interpretation of the Convention and to order the return of a child to a jurisdiction with which the parties now have no ties and no connections at all. If I am wrong in my interpretation of the Convention, I am entirely satisfied that I am entitled to use the inherent jurisdiction of this court to order the return of M to the United States. I entirely accept the submissions made by Mr. Setright QC as to the effect of Article 18 of the Hague Convention which reads as follows:

> "The provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of a child at any time."

68. I am satisfied that that Article undermines the submissions made on behalf of the father that, if recourse cannot be had to the Hague Convention, to use the inherent jurisdiction would in any way be to usurp the function of that Convention.

69. In considering an order for return under the inherent jurisdiction, I take account of the judgments I was referred to by Mr. Setright QC of *Re. J (A Child Returned Abroad, Convention Rights)* [2006] 1 AC 80 and the decision of Hedley J. in the case of *W&W v H (Child Abduction Surrogacy No.2)* [2002] 2 FLR 252.

70. On the basis that M was wrongfully removed from Australia, on the basis that she has never lived in the United Kingdom before, on the basis that both parents rightly and properly at an early stage believed it was important for the two girls to live close to each other so they might have regular contact with each other and have regular contact with both parents, it is overwhelmingly, in my judgment, in M's best interests that she is returned to the United States so that that intent on the part of the parents can be given effect. It enables the

US courts to make the appropriate decisions in respect of her. In ordering that return, one takes account of the comity and trust which exists between the courts of the two jurisdictions and the trust that one reposes in the courts of the United States to make the appropriate decisions, not only in respect of M but also in respect of S.