IN THE COURT OF APPEAL OF NEW ZEALAND

CA776/2008
[2008] NZCA 586

BETWEEN	MT	
	Appellant	
AND	DH	
	Respondent	

Hearing: 23 December 2008

Counsel: Appellant in person
J E Key for Respondent

Judgment: 24 December 2008   at 1 pm

JUDGMENT OF WILLIAM YOUNG P

The application for a stay is declined.

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REASONS

Introduction

[1]   On 10 September 2008 Judge Callinicos made orders under s 105 of the Care
of Children Act 2004 requiring the two children of the parties to be returned to
Australia: FC WANG FAM-2008-083-262. An appeal by the mother was dismissed
by Mallon J in a judgment delivered on 28 November 2008: HC WANG CIV-2008-
483-297. The mother, having applied for leave to appeal against that decision, now
seeks a stay.

[2]   I begin by noting that the mother has had a full hearing in the Family Court and a full merits appeal in the High Court. I am prepared to assume (although I am not actually sure) that the refusal of a stay will render the appeal nugatory. Nonetheless a stay should not be granted unless the proposed grounds of appeal are of substance.

[3]   The written submissions filed by the mother cover a good deal of ground. On the hearing of the stay application, however, she indicated that the proposed appeal was based on contentions that the jurisdiction requirements of s 105(1)(b) and (c) of the Care of Children Act had not been satisfied and that return of the children would expose them to grave risk for the purposes of s 106(1)(c) of that Act. Tied up with all of this was a contention that the children had never been wrongfully removed from Australia or retained in New Zealand. An argument as to habitual residence, which was made in the written submissions (but had not been raised in the Family Court or High Court), was not pursued.

[4]   None of the live arguments is cogent.

[5]   The arguments raised in the Family Court and High Court, and to some extent before me, that the father did not have any rights of custody and that he was not exercising such rights are inconsistent with the judgments of this Court in *KMA v Secretary for Justice* [2007] NZFLR 891 and *Chief Executive of the Department for Courts v Phelps* [2000] 1 NZLR 168. In the Family Court (but not the High Court) the mother contended that the father had consented to the removal of the children, a conclusion which was rejected on the facts by the Judge.

[6]   Leaving aside the arguments just mentioned, the mother did not in the Family Court or High Court advance any other affirmative argument as to why the removal or retention of the children did not breach the father's custody rights. Before me, the mother sought to argue this on the additional ground that when she first removed the children she intended to return them to Australia and that the removal was thus not in breach of the father's rights and that her subsequent retention of the children in New Zealand was mandated by court orders. I regard it as too late in the day for this argument to surface and I do not see any substantial merit in it anyway. I think it

clear that there has been either a wrongful removal or a wrongful retention in New Zealand for the purposes of s 105(1)(b).

[7]   The grave risk issue was not raised in the Family Court. It was, without objection from the father, addressed in the High Court and resolved primarily on the basis that the Judge was confident that the Australian Central Authority would take appropriate steps to ensure that the interests of the children are properly looked after on their return to Australia. It would appear that in any event the children's maternal grandmother will return with the children to Australia. That this situation has arisen is simply a result of the mother saying that she will not return to Australia.

[8]   In short, the grounds upon which the mother seeks leave to appeal lack sufficient substance to warrant me granting a stay.

[9]   Accordingly, the application for stay is declined.

Solicitors:
John W Key, Feilding