Kirsh v Kirsh

CAPE OF GOOD HOPE PROVINCIAL DIVISION
VAN HEERDEN AJ
Date of Judgment: 18 MARCH 1999 Case Number: 17230/98
Sourced by: G JOSMAN SC AND ML SHER SUMMARISED BY J TYRRELL

Courts – Jurisdiction – Foreign Courts – Custody disputes in respect of minor child – Weight to be attached to orders of foreign courts in custody disputes heard in South Africa.

Custody – Abduction of minor child – Child abducted from area of jurisdiction of court having jurisdiction in state of child's habitual residence – Best interests of the child – Duty of the Court having jurisdiction over the child.

Custody – International child abduction – Prior to effective date of Hague Convention on the Civil Aspects of International Child Abduction (1980) – Issue to be resolved according to the best interests of the child – Weight to be attached to orders of foreign courts in custody disputes heard in South Africa.

Editor's Summary

The Applicant was the father of a minor child born of his previous marriage to the Respondent, who had removed the child from South Carolina in defiance of two court orders ordering that Applicant be granted access to (and later temporary custody of) the minor child, and that Respondent should not remove the child from South Carolina without giving the Applicant 60 days' written notice of her intention. The Applicant sought an order for the return of the child to the jurisdiction of the York County Family Court in South Carolina.

Held – The preliminary issue was to determine the applicability of the Hague Convention on the Civil Aspects of International Child Abduction (1980). The Hague Convention provides that it shall only apply in Contracting States after its entry into force in that State. States may agree between themselves to make the Convention retroactively applicable and may also individually, in their enabling legislation, make the Convention retroactively applicable. Since neither of these circumstances arose in the instant case, the Hague Convention came into effect between South Africa and the United States of America on 1 November 1997. The abduction of the minor child *in casu* occurred before that date, therefore the Hague Convention was not directly applicable.

The matter was therefore before the Court in its capacity as upper guardian of all children within the area of its jurisdiction and the exercise of its discretion in this role was guided by the paramount consideration of the "best interests of the child". The Court considered the role played by the provisions of the Hague Convention in determining the best interests of the minor child *in casu* and referred to section 39(1) of the Constitution of the Republic of South Africa Act 108 of 1996 in examining the weight to be attached to international and foreign law in the present enquiry. The Court concluded that while these were potentially of assistance to South African courts, they were not binding. The foreign case law surrounding the application of the Hague Convention was of relevance to the present enquiry insofar as it dealt with the best interests of the child in conjunction with the Hague Convention and the Court would have regard to such case law while remaining mindful of its responsibility, which was to "decide, *in the circumstances of this individual case*, what order will serve the best interests of the minor child".

The Hague Convention is premised on the assumption that abduction of a child is generally prejudicial to the child's welfare and that the courts of the state of the child's habitual residence are the authorities best placed to decide the merits of a custody dispute. On this basis the Hague Convention ensured the return of the child to the area of jurisdiction of the courts of the state of his habitual residence. The issue before the Court was therefore whether it was in the child's best interests to be returned to South Carolina for this purpose, or to remain in the custody of the instant Court to enable the Court to decide what order should be made for his future care.

The Court was of the opinion that Respondent's abduction of the child constituted what would have been a "wrongful removal" in terms of the Hague Convention were it to have been in force at the time, and that she had not established that the child was now settled in his new environment or that his return to the United States of America would pose a grave risk to his physical or psychological well-being or otherwise place him in an intolerable situation.

The Court then turned to a consideration of what would serve the best interests of the child in the present matter and noted that in this respect South African courts are not bound by orders of foreign courts in determining what is in the best interests of a child but must attach such weight to any such orders as is appropriate in the circumstances of the case. The Court would not be unduly influenced by the Respondent's contempt of the orders made by the York County Family Court, especially as it was of the view that she had acted bona fide in what she believed were the best interests of her child.

The allegations of the Respondent as to Applicant's unsuitability to have custody or unsupervised access to the child were considered, specifically his record of drug abuse and imprisonment for various drug-related offences as well his criminal record and the list of incident reports in respect of the Applicant. Most serious was the allegation that the Applicant had sexually molested the child. The report of a psychologist who was treating the child was taken into account in this respect but the Court noted that the report had been based on interviews with the child and what the Respondent and her attorneys had told the psychologist as well as reports from various persons in South Carolina, which had all been prepared without hearing the Applicant's side of the story. The Court concluded that it would be impossible for it to properly evaluate the evidence in respect of the alleged sexual molestation without the presence of the relevant persons for examination and cross-examination. Furthermore, the allegations were untested and disputed by the Applicant. The York County Family Court was best suited to investigate the merits in the required detail and to determine what orders would best promote the child's welfare.

The York County Family Court was also the *forum conveniens* for determining the matter and would undoubtedly apply the principle that the best interests of the child were paramount.

It was the Court's duty to make appropriate orders to ensure maximum possible safety of the child until the South Carolina Court could resume its role in relation to him and to this end it required certain undertakings from both parties including *inter alia* undertakings by Applicant to provide accommodation for the child and the Respondent, to pay for his educational and medical expenses, to take steps to render the order of the Court enforceable in South Carolina and not to seek to enforce or prosecute contempt of the previous orders of the York County Family Court. Respondent was required *inter alia* to surrender the child's and her own travel documents to the Applicant's attorneys and to keep them informed of her own and the child's whereabouts. These undertakings were to continue until determination of the dispute by the York County Family Court.

As to costs, the Court held that having regard to the fact that both parties had acted bona fide in what they believed to be the best interests of the child, justice and fairness would be best served if no order was made as to costs.

The Court ordered the return of the child to the jurisdiction of the York County Family Court, such order coming into effect once the entire order of the Court became enforceable in that jurisdiction and once the undertakings required had been accepted by both parties.

Notes

For Custody, see *LAWSA* (Vol 16, paragraphs 126-153)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed.)

South Africa

Azanian Peoples Organisation (Azapo) and others v President of the Republic of South Africa and others 1996 (8) BCLR 1015 (CC); 1996 (4) SA 671 (CC)
B v S 1995 (3) SA 571 (A)
Bethell v Bland and others 1996 (2) SA 194 (W)
Bethell v Bland and others 1996 (4) SA 472 (W)
Coetzee v Government of the Republic of South Africa, Matiso and others v Commanding Officer, Port Elizabeth Prison and others 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC)
Di Bona v Di Bona 1993 (2) SA 682 (C)
Dube v Dube 1970 (1) SA 331 (R)
Ex Parte Critchfield [1999] 1 All SA 319 (W)
Ferrers v Ferrers and another 1954 (1) SA 514 (SR)
Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC)
Gumede v Attorney-General, Transvaal 1995 (1) SA 608 (T)
Krasin v Ogle [1997] 1 All SA 557 (W)
Littauer v Littauer 1973 (4) SA 290 (W)
Madiehe (born Ratlhogo) v Madiehe [1997] 2 All SA 153 (B)

Märtens v Märtens 1991 (4) SA 287 (T) – **F**
McCall v McCall 1994 (3) SA 201 (C) – **F**
Park-Ross and another v Director: Office for Serious Economic Offences 1995 (2) BCLR 198 (C); 1995 (2) SA 148 (C)
Qozeleni v Minister of Law and Order and another 1994 (1) BCLR 75 (E); 1994 (3) SA 625 (E)
Riddle v Riddle 1956 (2) SA 739 (C)
S v Makwanyane and another 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) – **F**
T v M 1997 (1) SA 54 (A)
Terblanche v Terblanche 1992 (1) SA 501 (W)
V v H [1996] 3 All SA 579 (SE)
Zorbas v Zorbas 1987 (3) SA 436 (W)

Australia

Murray v Director, Family Services (*Act*) (1993) 116 FLR 321 (Family Court of Australia)
ZP v PS (1994) 181 CLR 639 (High Court of Australia) – **F**

United Kingdom

Re F (Minor: Abduction: Jurisdiction) [1990] 3 All ER 97 (Court of Appeal) – **F**
Re H and another (Minors) (Abduction: Custody Rights), Re S and another (Minors) (Abduction: Custody Rights) [1991] 3 All ER 230 (House of Lords)

Judgment

VAN HEERDEN AJ: The proceedings before me concern a minor child, Zackary Lamar Kirsh, who was born in Mecklenburg County, North Carolina, United States of America, on 26 May 1992 and who is therefore nearly 6 years and 10 months old. The applicant is the boy's father and the respondent his mother. Both parents were born in the United States of America, the applicant in South Carolina on 14 September 1954 and the respondent in Alabama on 2 March 1961, and both are citizens of the United States. They were married to each other on 5 May 1990 in Gaston County, North Carolina.

During October 1994, respondent left the common home in South Carolina, taking Zackary with her. The parties have quite different versions of the reasons for the breakdown of their relationship – according to respondent, she decided to end their marriage because of applicant's abuse of certain drugs, his refusal to obtain assistance for his drug "addictions" and his physical abuse of Zackary on 4 October 1994. While applicant does not deny his past drug abuse, he is emphatic in his denial of respondent's allegations of his abuse of their son. Furthermore, although applicant concedes that his drug problems may well have contributed to the breakdown of his marriage to respondent, he denies that this was the "primary reason" for respondent's departure from the common home. According to applicant, respondent "left our marriage" in order to pursue an adulterous relationship in which she was involved at the time. It appears from the judgment of the Family Court of York County, South Carolina, dated 7 June 1996 (annexed to applicant's founding affidavit as "KK3") that this Court found that the respondent had indeed committed adultery both before and after her separation from applicant.

As stated above, the parties were eventually divorced from each other on 7 June 1996, the matter having been heard on 18 and 19 March 1996. In terms of the divorce order, custody of Zackary was awarded to respondent, while applicant was granted fairly liberal access (or "visitation", to use the American terminology), including staying access every alternate weekend and over certain holiday periods. These access provisions were spelt out in the divorce order in considerable detail.

As appears clearly from the affidavits filed by both parties, their relationship during their marriage and after their separation was a turbulent one. The divorce proceedings were protracted and acrimonious, the period of separation prior to the granting of the divorce decree (some 20 months) being marked by mutual animosity. On 16 December 1994, the York County Family Court made a mutual restraining order against both parties, prohibiting "any harassment, unwanted contact or interference, each to the other and at any time or in any place or in any manner" (see annexure "MK12" to respondent's opposing affidavit). This mutual restraining order was made final and permanent in terms of the decree of divorce. Notwithstanding this order, applicant was convicted of harassing respondent in December 1995 and ordered to undergo mental health counselling.

At the same time that the mutual restraining order was made (16 December 1994) respondent was given temporary custody of Zackary, applicant to have staying visitation with his son every weekend "without limitation or restriction provided that he conduct himself in a reasonable and sober manner and exercises (*sic*) visitation in a moral environment". It would appear that this proviso was imposed in

response to a request from respondent's legal representative at the hearing that the court impose a limitation on applicant's visitation to the effect that he abstain from the use of drugs, narcotics or mind-altering substances during periods of visitation. Neither applicant or respondent apparently "lived up to the intent" of the temporary orders made by the York County Family Court in December 1994, resulting in further temporary orders being made by the same court on 16 March 1995. As far as Zackary was concerned, the prior temporary custody order in favour of respondent was not altered, but the court ordered that "the party who has actual possession of the child must keep the child in a moral, sober and safe environment". Applicant's entitlement to weekend staying visitation also remained unchanged.

On 30 May 1996, prior to the granting of the final decree of divorce, applicant approached the York County Family Court on an emergency basis in respect of his visitation with Zackary. It appears from the papers before me that respondent had suspended applicant's visitation with his son after Sunday 28 April 1996 and that applicant had not had any contact whatsoever with the child since that time. At the hearing of the matter on 30 May 1996, applicant also produced evidence indicating that respondent had applied for passports for herself and Zackary. Although represented by her attorney, respondent herself failed to attend court for the hearing, having apparently advised her attorney that she had been hospitalised as a result of food poisoning. In fact, as appears from respondent's opposing affidavit, she actually left South Carolina for North Carolina with her son on 30 May 1996 prior to the court hearing.

Respondent alleges in her opposing affidavit that she suspended applicant's visitation when she became aware, on 1 May 1996, that applicant had sexually molested Zackary. While attempting to obtain medical and psychological reports to substantiate "the need for supervised visitation", she went into hiding, allegedly because of her concern that the South Carolina court would "grant unsupervised visitation rights" to applicant. At the court hearing on 30 May 1996, certain documentary evidence was placed before the court in respect of respondent's concerns regarding applicant's alleged molestation of Zackary. It would appear from respondent's opposing affidavit that this documentation included a letter from Zackary's teacher at the child development centre which he had attended from the end of August 1995 (annexure "MK4" to the opposing affidavit), a letter from the Assistant Director of this centre (annexure "MK5"), a letter from a mental health counsellor at a community mental health centre who had assessed Zackary on 6 May 1996 (annexure "MK6"), an evaluation report from a licensed clinical psychological who had conducted an "initial evaluation session" with Zackary on 20 May 1996 (annexure "MK7") and (possibly) also certain records of physical and mental health examinations of Zackary conducted by health care professionals on 16 May 1996 (annexure "MK8"). Although most of this documentation was not in proper affidavit form, the South Carolina court "out of an abundance of caution" did review all the information supplied by respondent (see the court's judgment dated 31 May 1996, annexure "KK4" to applicant's founding affidavit). The court pointed out that, since the commencement of the divorce proceedings, applicant had been reported to the Department of Social Services (presumably by respondent) no fewer than 6 times, including the incident which had given rise to the suspension of applicant's visitation, but that all prior reports had been found to be groundless. Applicant had apparently fully co-operated with the Department of Social Services in an attempt to have the matter resolved. The court further noted that, in her deposition in the divorce proceedings, respondent had admitted that she had "a very substantial relationship with a Blane Ray and that the minor child was left with him on numerous occasions. This was verified by Blane Ray's deposition". Applicant had also included, in his affidavit presented to the court at the hearing on 30 May 1996, information to the effect that respondent was "seeing another man with whom the child is spending substantial time".

The court took rather a dim view of respondent's conduct in this matter, stating that her

> "lack of presence in the courtroom for this hearing, along with her failure to apply to the Court for any protective order for the child, create a true and significant doubt in the Court's mind as to her credibility in this matter and whether she really believes that the husband has anything to do with the alleged molestation. She does not have the ability to unilaterally change a Court Order. If she were truly concerned about her child's welfare she would have taken the proper steps through this Court to suspend visitation and have more fully co-operated with the DSS."

In terms of the court order dated 31 May 1996, respondent was found to be in wilful contempt of court for violation of the prior order dated 16 December 1994 and various sanctions were imposed upon her. The court further ordered that applicant's visitation (in terms of the December 1994 order) was to continue without any modification and that respondent was prohibited, with immediate effect, from removing Zackary from York County, South Carolina, without giving applicant at least 60 days' written notice of any such removal. Although respondent failed to attend the hearing on 30 May 1996, her attorney of record sent her a letter (admittedly addressed to her South Carolina address) setting out in detail the terms of the court order (see annexure "KK5" to applicant's replying affidavit). Moreover, it appears from a further letter (similarly addressed) to respondent from the same attorney dated 13 June

1996 (annexure "KK4" to applicant's replying affidavit) that he had been in telephonic communication with respondent's father and had, *inter alia*, explained the "contents of the contempt order" to him. Respondent's father apparently did not know respondent's whereabouts at that time, but was in communication with her. (I pause at this juncture to point out that these letters might not normally have been admissible in evidence, potentially falling within the scope of the attorney-client privilege: see Hoffmann & Zeffert *The South African Law of Evidence* 4 ed (1988) 247 *et seq*. Respondent's counsel did not, however, pursue this point in argument before me and I would, in any event, have been inclined to allow such evidence, these proceedings being brought before this Court in its capacity as the upper guardian of all minors within its jurisdiction. As pointed out by Van Schalkwyk AJ in *Zorbas v Zorbas* 1987 (3) SA 436 (W) at 438G, "the concept of guardianship involves a responsibility which transcends the strictures of the law of evidence" (see further in this regard, *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C–D and cf. *B v S* 1995 (3) SA 571 (A) at 584J–585D, *V v H* [1996] 3 All SA 579 (SEC) at 589*f–g* and *T v M* 1997 (1) SA 54 (A) at 57–578).

As respondent had left South Carolina on 30 May 1996, she obviously did not comply with the order granted on 31 May 1996. Respondent therefore once again approached the York County Family Court, on 24 June 1996, for further relief. It appears from the judgment handed down by the court the following day (annexure "KK6" to applicant's founding affidavit) that for various reasons, including the fact that the $ 250 fine (for contempt) imposed on respondent in terms of the court order dated 31 May 1996 had been paid timeously, the court concluded that respondent did in fact have knowledge of that order. Expressing "great concern as to the whereabouts and welfare of the minor child", the court found respondent to be in wilful contempt of its previous order and ordered that she should immediately be apprehended if found by any duly appointed law enforcement officer within South Carolina. It was further ordered that, should Zackary be located by any such officer, he should immediately be taken into emergency protective custody and handed over to applicant or some other member of applicant's family (should applicant not be available). Applicant was granted temporary custody of his son until further order of the York County Family Court. The court order dated 25 June 1996 was subsequently amended on 7 July 1996 to authorise the arrest of respondent outside South Carolina (see annexure "KK7" to applicant's founding affidavit). Thereafter, in terms of a further order of the same court dated 15 November 1996 (annexure "KK8" to applicant's founding affidavit), applicant's temporary custody of Zackary was again confirmed. In August 1998, a warrant was issued for respondent's arrest for her "unlawful flight to avoid prosecution", which warrant was apparently still in force at the time of the hearing before me (see annexure "KK9" to applicant's founding affidavit).

Applicant avers that, from the time that respondent disappeared with Zackary, he made ongoing attempts to locate them, working *inter alia* with the Federal Investigation Bureau and the York County Sheriff's Department in this regard. Eventually, in June 1998, applicant approached the York County Family Court for its assistance and, on 7 July 1998, a Mr Patrick Counahan was appointed as agent of that court to aid the enforcement of the prior court orders, to take possession of Zackary should he locate the child and to return him immediately to the court's jurisdiction (see annexure "KK11" to applicant's founding affidavit). Applicant also applied to the United States Department of State for assistance under the Hague Convention on the Civil Aspects of International Child Abduction (1980) (see annexure "KK10" to applicant's founding affidavit). Mr Counahan established that respondent and Zackary were in Cape Town and travelled to Cape Town to verify this information. At applicant's request, Mr Counahan then instructed applicant's attorneys of record to institute the present proceedings for the return of Zackary. It would appear that applicant first became aware of the fact that respondent was living in Cape Town with the child in about November 1998, but respondent's counsel conceded in argument that applicant only gained knowledge of respondent's correct address and telephone number in Cape Town on about 11 January 1999.

As appears from respondent's opposing affidavit, she stayed in North Carolina for approximately four weeks after her departure from South Carolina with her son on 30 May 1996. As already indicated, the reason for her departure was the alleged molestation of Zackary by applicant.

From North Carolina, respondent travelled with Zackary via New York and Frankfurt (Germany) to Vienna (Austria), where they remained until September 1996. Thereafter applicant and Zackary spent about 18 months in Belgium (Brussels) before relocating to Cape Town, living first somewhere in the Southern Suburbs and moving to her current address in Hout Bay in January 1999. In August 1998, respondent engaged the services of a clinical psychologist, Ms Lindsay Fredman, for Zackary "for assessment and intervention following alleged sexual abuse by his father" (see Ms Fredman's confidential report on Zackary dated December 1998, annexure "MK1" to respondent's opposing affidavit). Ms Fredman has apparently been seeing the child on a weekly basis since 8 August 1998.

On 11 December 1998, applicant applied to this Court on an urgent *ex parte* basis for the return of Zackary to the state of South Carolina and into applicant's care. On the same date, a rule *nisi* was

issued, calling upon respondent to show cause on 14 December 1998 why the following order should not be made final:

"1. That the Respondent be ordered to return the minor child Zackary Lamar Kirsh (also known as Zachary L Kirsh) immediately to the State of South Carolina, United States of America, and into the Applicant's care;

2. That the Applicant or his appointee be granted leave and authorisation insofar as same may be necessary to remove the minor child from the Republic of South Africa and to return him to the State of South Carolina, United States of America;

3. That the Respondent produce and hand to the Sheriff of this Honourable Court the following documents in respect of both herself and the minor child: passports, identification documents, travel documents, social security documents, birth certificates and driver's licence;

4. That the Respondent report to the Claremont Police Station, Lansdowne Road, Claremont, each day at 07h00 and 19h00, together with the minor child;

5. That the Respondent and the minor child may not leave the jurisdiction of the Cape Provincial Division without the leave of this Honourable Court;

6. Directing the Respondent to pay the costs of the application."

The terms of paragraphs 3, 4 and 5 above were made an interim interdict with immediate effect pending the return day. On 13 December 1998, the rule *nisi* was extended to 20 January 1999, as it had not yet been possible to serve the founding papers and the court order on respondent. Service on respondent took place on 12 January 1999, the court order being served on the Claremont Police Station on the same day.

After respondent had filed her Notice of Intention to Oppose the application, this Court granted a further order by agreement between the parties on 20 January 1999, extending the rule *nisi* to 16 February 1999 and providing that, pending the return day:

"1. The Sheriff of this Honourable Court shall retain in his safekeeping such travel documents as were handed to him by Respondent in respect of herself and the minor child concerned;

2. Respondent shall report to the Hout Bay Police Station, Hout Bay, each day by 08h30 together with the minor child; and

3. Respondent and the minor child shall not leave the jurisdiction of the Cape Provincial Division without the leave of this Honourable Court."

Applicant was ordered to file his replying affidavit, if any, by 9 February 1999.

Both parties based their papers, at least in part, on the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (1980) ("the Hague Convention"), incorporated into South African law in terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. Ms *McCurdie*, counsel for applicant, and Mr *Katz*, counsel for respondent, also structured their initial heads of argument on the basis that the Hague Convention was applicable to this matter, although they disagreed as to whether respondent's actions in removing Zackary from South Carolina and ultimately from the United States constituted a breach of applicant's "rights of custody" in respect of Zackary (within the meaning of the Convention) and hence a "wrongful removal" in terms of article 3, or rather a breach of applicant's "rights of access" in respect of his son. Prior to this matter being called, however, I drew the attention of both counsel to the provisions of article 35 of the Hague Convention and requested them to prepare argument on whether the Convention applied to an alleged wrongful removal from one state to another occurring *prior* to the entry into force of the Convention between those states.

Article 35 of the Hague Convention provides that "[t]his Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States". States may, however, agree among themselves to apply the Convention retroactively (see article 36, which provides for the possibility of two or more Contracting States limiting the restrictions to which the return of a child may be subject in terms of the Convention by agreeing among themselves to derogate from the relevant provisions of the Convention). Furthermore, certain states have by their implementing legislation made the principles of the Convention retroactively applicable to their authorities: see Linda Silberman "*Hague Convention on International Child Abduction. A Brief Overview and Case Law Analysis*" (1994) 28 *Family Law Quarterly* 9 at 24. South Africa deposited its instrument of accession to the Hague Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 July 1997 and, in accordance with article 38(3) of the Convention, the Convention entered into force for South

Africa on 1 October 1997. In terms of articles 38(3) and (4), this accession is only effective between South Africa and those Contracting States which declare their acceptance of our accession, the Convention entering into force between South Africa and each such accepting state on the first day of the third calendar month after the deposit of the declaration of acceptance.

The enabling South African legislation (Act 72 of 1996) makes it clear that, as far as South Africa is concerned, the Hague Convention applies only from the date of commencement of such legislation (ie 1 October 1997): section 6, read with section 2. The Convention entered into force between the United States of America and South Africa on 1 November 1997 (see 1998 *Netherlands International Law Review* 307) and there is no indication that South Africa agreed with the United States to make the Convention retroactively applicable between them. It is important to note that the United States of America acceded to the Convention as a *single state* (unlike Canada, where the Convention entered into force for different provinces, as different territorial units in terms of article 40, on different dates).

For the purposes of the Convention, a "wrongful removal" (viz a removal in breach of "rights of custody") only occurs when the child in question, who has previously been in the state of his or her habitual residence, is taken across the frontier of that state: "[u]ntil that happens, although the child may already have been wrongfully removed within the borders of the state of its habitual residence, it will not have been wrongfully removed for the purposes of the Convention" (per Lord Brandon in *Re H and another (Minors) (Abduction: Custody Rights), Re S and another (Minors) (Abduction: Custody Rights)* [1991] 3 All ER 230 (House of Lords) at 239*d* and 240*c–d*).

As pointed out above, respondent left South Carolina with Zackary on 30 May 1996, but only removed the child from the United States some four weeks later. By the latter date, the order dated 31 May 1996 (prohibiting respondent from removing Zackary from York County, South Carolina, without at least 60 days' advance notice in writing to applicant) and (probably) also the order dated 25 June 1996 (granting applicant temporary custody of Zackary) had been made by the York County Family Court. I will accept in favour of respondent that she had no knowledge of the latter order at the time of her departure from the United States. "Rights of custody" are, however, defined in the Hague Convention as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (article 5(*a*)). Despite some initial uncertainty (see AE Anton "The Hague Convention on International Child Abduction" (1981) 30 *International and Comparative Law Quarterly* 537 at 546), there is now much authority from a number of Contracting State jurisdictions which establishes that, for the purposes of the Convention, a parent's (or other person's) right to prevent removal of a child from the relevant jurisdiction, or at least to withhold consent to or (it would appear) to be given advance notice of such removal, is a right to determine where the child is to live and hence falls within the ambit of the concept of "rights of custody" in articles 3 and 5 of the Convention: see Rhona Schuz "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 *International and Comparative Law Quarterly* 771 at 781, Silberman *op cit* 17–20, Carol S Bruch "International Child Abduction Cases: Experience under the 1980 Hague Convention" in John Eekelaar & Petar Sarcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993) 353 at 365–6 notes 17–18 and accompanying text, and the case law cited by these authorities. I am satisfied on the papers before me that, by the time respondent left the United States with her son, she was at least aware of the provisions of the court order dated 31 May 1996. In any event, it would appear from the wording of article 3 of the Convention that, even if respondent was *not* in fact aware of the above-mentioned order or orders of the York County Family Court at the time of her removal of Zackary from the United States, this would not remove her conduct from the ambit of article 3, provided that, at such time, applicant was either actually exercising his "custody rights" or would have exercised them but for the removal (article 3(1)(*b*)): see Anton *op cit* 546. Thus, respondent's removal of Zackary from the United States was *prima facie* wrongful for the purposes of the Hague Convention. This "wrongful removal" took place, however, at about the end of June 1996, more than a year prior to the date on which the Convention entered into force between South Africa and the United States. Thus, although this is indeed an international child abduction case, it is not one to which the Hague Convention is *directly* applicable: see *Re H and another, Re S and another* (*supra*) at 241*d*.

As this is what may be called "a non-Convention case", this Court is called upon to exercise its inherent jurisdiction as the upper guardian of all minors within its area of jurisdiction. Under the common law, in exercising its discretion as upper guardian, the court's paramount consideration is always the best interests of the child in question. Both constitutional and international law enshrine "the best interests of the child" standard as "paramount" or "primary" consideration in all matters concerning children in South Africa. So, in terms of section 28(2) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), "[a] child's best interests are of paramount importance in every

matter concerning the child". Article 3(1) of the United Nations Convention on the Rights of the Child (1989) (which convention was ratified by South Africa on 16 June 1995) provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The "best interests of the child" standard has in fact been identified by the Committee on the Rights of the Child, the supervisory body provided for by the Convention on the Rights of the Child for the implementation of its provisions, as one of the four key articles in the Convention, "those articles which in its opinion provide the 'soul' of the Convention ... the value system on which the Convention is based" (Julia Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" (1995) 11 *SAJHR* 401 at 408–411 and Thomas Hammarberg "Children" in Asjborn Eide, Catarina Krause & Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 289 at 291–294.

Ms *McCurdie* referred this Court to the provisions of section 39 of the Constitution (Act 108 of 1996) and argued that, in applying the common law and constitutional "best interests of the child" principle in this case, this Court should do so "against the background" of the principles underpinning the Hague Convention, also bearing in mind the provisions of articles 11 and 35 of the Convention on the Rights of the Child. These last-mentioned articles "clearly contemplate the negative impact on children of their abduction or non-return and the necessity of States concluding or acceding to bilateral and multilateral agreements to prevent such occurrences" (per Nicholson CJ and Fogarty J in *Murray v Director, Family Services* (*Act*) (1993) 116 FLR 321 (Family Court of Australia) at 339.

Section 39(1) of the Constitution provides that a court, when interpreting the Bill of Rights, "(*b*) must consider international law; and (*c*) may consider foreign law." In terms of section 39(2), "[w]hen interpreting any legislation, and when developing the common law or customary law, every court ... must promote the spirit, purport and objects of the Bill of Rights". The role of international law (and, to a certain extent, of comparable foreign case law) in interpreting the provisions of the Bill of Rights has been explored in a number of cases dealing with the interim Constitution (Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993)): see, for example, *Qozeleni v Minister of Law and Order and another*[1] 1994 (3) SA 625 (E) at 633F–G, *Gumede v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 640I–642J, *Park-Ross and another v Director: Office for Serious Economic Offences*[2] 1995 (2) SA 148 (C) at 160E–I, *S v Makwanyane and another*[3] 1995 (3) SA 391 (CC) at paragraph 37 *et seq*, *Coetzee v Government of the Republic of South Africa, Matiso and others v Commanding Officer, Port Elizabeth Prison and others*[4] 1995 (4) SA 631 (CC) at paragraph 57 *et seq*, *Azanian Peoples Organisation (Azapo) and others v President of the Republic of South Africa and others*[5] 1996 (4) SA 671 (CC) at paragraph 26 *et seq*, *Fose v Minister of Safety and Security*[6] 1997 (3) SA 786 (CC) at paragraph 24 *et seq*, and see also John Dugard "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 *SAJHR* 208. As pointed out by Chaskalson P in *S v Makwanyane* (*supra*) at paragraph 39,

> "[i]n dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of a foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."

Insofar as there are a number of foreign cases dealing with the interplay between Hague Convention principles and the "best interests of the child" as paramount consideration (sometimes called the "welfare principle"), I will certainly have regard to such case law, while being fully conscious of my responsibility to decide, *in the circumstances of this individual case*, what order will serve the best interests of the minor child, Zackary.

As this is not a case to which the Hague Convention is *directly* applicable, it is not necessary for me to deal with Mr *Katz*'s argument that, to the extent that there is a conflict between the application of the Hague Convention and the best interests of the *individual* child concerned in proceedings before a South African court, section 28(2) of the Constitution would have to prevail and the court would be constitutionally bound *not* to apply the Hague Convention. Mr *Katz* relied in this regard on the

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[1] Also reported at 1994 (1) BCLR 75 (E) – Ed.
[2] Also reported at 1995 (2) BCLR 198 (C) – Ed.
[3] Also reported at 1995 (6) BCLR 665 (CC) – Ed.
[4] Also reported at 1995 (10) BCLR 1382 (CC) – Ed.
[5] Also reported at 1996 (8) BCLR 1015 (CC) – Ed.
[6] Also reported at 1997 (7) BCLR 851 (CC) – Ed.

following comments of Hlophe J (as he then was) in an article entitled "The Judicial Approach to 'Summary Applications for the Child's Return': A Move away from 'Best Interests' Principles?" (1998) 115 *SALJ* 439 at 445–446:

> "It is not impossible to imagine cases where, on the evidence before a court, it would not be in the best interests of the child to return to his or her habitual residence. The court, however, has no discretion except in terms of art 13. It seems, therefore, that in cases not involving art 13 defences one can certainly argue that the mandatory-return procedure may not accord with the best interests of the child."

As Professor William Duncan, the First Secretary to the Hague Conference on Private International Law, has pointed out, the argument would seem to be that

> "the Convention system, by denying the judge addressed the opportunity to examine the merits of custody, prevents the application by the judge of the best interests principle. While the Convention assumes that the interests of children generally are advanced by a peremptory return system, it does not permit the issue to be explored in an individual case, unless it can be established that one of the exceptional situations exists under Article 13 or 20" ("Fundamental Principles of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction", unpublished paper delivered at the REUNITE Seminar on the Hague Child Abduction Convention, Cape Town, January 1998, at 7).

It is interesting to note that similar arguments have been advanced in courts in other jurisdictions, largely without success. So, for example, in the above-mentioned case of *Murray v Director, Family Services (Act)*, it was argued that the Hague Convention was inconsistent with and should be read subject to article 3 of the Convention on the Rights of the Child. Nicholson CJ and Fogarty J dismissed this argument as follows (at 339):

> "First, we do not think that the Hague Convention is inconsistent with the UN Convention. The preamble to the Hague Convention is as follows:
>
> > 'The States signatory 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 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, –'
>
> It is thus apparent that the Hague Convention is predicated upon the paramountcy of the rights of the child. It proceeds upon the basis that those rights are best protected by having issues as to custody and access determined by the courts of the country of the child's habitual residence, subject to the exceptions contained in art 13.
>
> The fact that issues relating to the welfare of the child are not relevant to a Hague Convention application is because such an application is concerned with where and in what court issues in relation to the welfare of the child are to be determined ...
>
> In addition, the UN Convention, by arts 11 and 35, clearly contemplates the negative impact on children of their abduction or non-return and the necessity of States concluding or acceding to bilateral and multilateral agreements to prevent such occurrences ..."

In response to the further argument in the *Murray* case that the Hague Convention was inconsistent with the principle that the best interests of a child are the paramount consideration (then contained in section 64(1)(*a*) of the Australian Family Law Act 1975), Nicholson CJ and Fogarty J expressed the view that "we do not think that there is any inconsistency between the Convention .... and the paramountcy principle" (at 340).

Similarly, in the non-Convention case of *Re F (Minor: Abduction: Jurisdiction)* [1990] 3 All ER 97 (Court of Appeal), Lord Donaldson MR stated the following (at 99*j*):

> "I agree with Balcombe LJ's view expressed in *Giraudo v Giraudo* [1989] CA Transcript 527 that, in enacting the 1985 Act [viz the Child Abduction and Custody Act 1985, by which the Hague

Convention was incorporated into English law], Parliament was not departing from the fundamental principle that the welfare of the child is paramount. Rather it was giving effect to a belief –

> 'that in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been normally resident.' "

In the same case, Neill LJ stated that

> "[t]he general principle is that, in the ordinary way, any decision relating to the custody of children is best decided in the jurisdiction in which they have normally been resident. This general principle is an application of the wider and basic principle that the child's welfare is the first and paramount consideration. This principle is subject to exceptions and these exceptions will no doubt be worked out in future cases" (at 101*b*).

See also the following statement (per Balcombe LJ) at 101*h*:

> "... as a general principle, courts should act in comity to discourage the abduction of children across national borders. The forum which has the pre-eminent claim to jurisdiction is the place where the child habitually resided immediately prior to the time when it was removed or retained without the consent of the other parent."

Thus, as concluded by Duncan *op cit* 9,

> "the courts in several countries have accepted, not only that wrongful abductions/retentions are contrary to the interests of children generally, but that the Convention contains sufficient flexibility to ensure that the fundamental rights of any individual child are protected."

It should be clear from the above that the Hague Convention is premised on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of his or her habitual residence. The idea is therefore that the authorities best placed to resolve the merits of a custody dispute are the courts of the state of the child's habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained: see Hlophe *op cit* 444 and 446, Anton *op cit* 543–554, Silberman *op cit* 11, Bruch *op cit* 364 n 13, Jude Reddaway & Heather Keating "Child Abduction : Would Protecting Vulnerable Children Drive a Coach and Four through the Principles of the Hague Convention?" (1997) 5 *International Journal of Children's Rights* 77 at 78–79 and 86–87. As the last-mentioned writers point out (at 94), the reason why courts are prepared to order the return of children in the vast majority of cases

> "is not because they are willing to sacrifice the interests of individual children, but rather because they believe that the overall scheme of the Hague Convention protects the interests of all children who are returned to the jurisdiction of the requesting state. This is because they assume that courts in the requesting state will apply the Welfare Principle in all proceedings concerning custody and access."

The difficult question which this Court has to decide is whether it is in the best interests of Zackary to be returned to South Carolina, so that the South Carolina Court can fully investigate the merits of this matter and make the appropriate decisions with regard to the future custody of and access to Zackary, or whether the best interests of the child require that he remain within the jurisdiction of this Court in order to enable this Court ultimately to decide what orders should be made with regard to his future care. As stated by Lord Donaldson MR in *Re F (Minor : Abduction : Jurisdiction)* (*supra*) at 100*f–g*:

> "The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made" (cf. also in this regard, the dictum of Lord Donaldson MR in *Re A and another (Minors)(Abduction : Acquiescence)* [1992] 1 All ER 929 (Court of Appeal) at 942*b–j*).

If this had been a Hague Convention case, I would in all probability have been constrained, in terms of article 12 of the Convention, to order the return of Zackary to the United States of America without further delay. As I have already indicated, respondent's action in removing Zackary from the United States of America appears to have been a "wrongful removal" within the meaning of the Convention, having been undertaken in breach of applicant's "rights of custody" under the law of the state in which Zackary was habitually resident immediately prior to the removal. Without going into any detail, it does not appear on the papers before me that respondent would have been able to establish any of the

Convention exceptions to a mandatory return of the child. So, although these proceedings were commenced after the expiry of the period of one year from the date of the wrongful removal, I am not satisfied that respondent has demonstrated that the child is now settled in his new environment (see article 12(2) of the Convention). Furthermore, it is my view that respondent has not satisfactorily shown that there is "a grave risk" that Zackary's return to the United States of America "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (see article 13(1)(*b*) of the Convention), bearing in mind the restrictive interpretation of the wording of this article which has been applied by the courts of other Contracting States (see in this regard Reddaway & Keating *op cit* 87–91 and the cases there cited). The exceptions contained in articles 13(1)(*a*), 13(2) and 20 of the Convention are also not applicable to this case. As this is not a Convention case, however, in deciding what is in the best interests of Zackary, the question arises as to the extent to which Convention principles are applicable.

This question has not always been consistently answered by the courts of other Contracting States. Many of the important decisions are discussed by David McClean & Kisch Beevers in an illuminating article entitled "International Child Abduction – Back to Common Law Principles" (1995) 7 *Child and Family Law Quarterly* 128. See also Kisch Beevers "Child Abduction – Welfare or Comity?" [1996] 26 *Family Law* 365, the judgment of Cazalet J in *Re A and others* (*Minors*) *(Abduction: Habitual Residence)* [1996] 1 All ER 24 (Family Division) at 33–36 and the judgment of Ward LJ in *Re P (A Minor) (Child Abduction: Non-Convention Country)* [1997] Fam 45 (Court of Appeal) at 51B–56D. The most recent cases demonstrate, however, that, in non-Convention cases of international child abduction, the best interests of the child concerned remain the paramount consideration, and "the principles of the Convention are applicable only to the extent that they indicate what is normally in the interests of" such child (per Balcombe LJ in *D v D (Child Abduction: Non-Convention Country)* [1994] 1 FLR 137 at 144). See also *Re A and others (Minors) (Abduction: Habitual Residence)* (*supra*) at 35, *Re P (A Minor) (Child Abduction: Non-Convention Country)* (*supra*) at 54F–G, *Re JA (Child Abduction: Non-Convention Country)* [1997] 27 *Family Law* 718 (Court of Appeal) and the decision of the High Court of Australia in *ZP v PS* (1994) 181 CLR 639, especially at 663–666. As pointed out by Brennan & Dawson JJ in the last-mentioned case:

> "When a child is abducted from one country and brought to Australia and the abduction is not covered by the Convention, the abduction is relevant only by reason of the effect it has on the child's welfare
>
> ...
>
> And it may be entirely appropriate to order the speedy return of the child to the country from which he or she has been abducted without making as full an enquiry as the court would ordinarily make in determining an application for permanent custody ... If the Family Court properly makes an order for the speedy return of a child abducted from another country, the Court is not declining to exercise its jurisdiction; it is exercising its jurisdiction by making an order dictated by the welfare of that child ...
>
> But the Court must not make its determination by presuming that any child's welfare is better served by leaving the child in Australia or, conversely, by ordering the return of the child to his or her previous or usual country of residence. Nor can the Family Court abdicate its own duty to determine the proceedings in accordance with s 64(1)(*a*) [*viz* the best interests of the child as paramount consideration] by deferring to the judgment of the Court of another country unless the particular circumstances of the case show that that course is in itself in the best interests of the child" (at 663–5) (cf. also the judgment of Lord Simonds in the Privy Council Case of *McKee v McKee* [1951] 1 All ER 942 at 948B).

In my view, the approach of the foreign courts outlined above is in accordance with our common law, as also with section 28(2) of the Constitution and article 3(1) of the Convention on the Rights of the Child. According to our common law, the South African Court, when faced with a custody or other order made by a foreign court in respect of a child now falling under the jurisdiction of the South African Court, is not "bound" by such foreign order. The function of the South African Court is to establish what is in the best interests of the child in question. In so doing it has to form an independent judgment on the evidence before it and must give only such weight to the foreign court order as the circumstances may justify: see, for example, *Märtens v Märtens* 1991 (4) SA 287 (T) at 292E–G and *Di Bona v Di Bona* 1993 (2) SA 682 (C) at 695D–H. See further on the recognition and enforcement by South African Courts of foreign custody orders generally, Caroline Nicholson "The Recognition and Enforcement of Foreign Custody Orders and the Problem of International Child Abduction" (1993) 34(2) *Codicillus* 4, especially at 7–12. In its capacity as upper guardian of all minor children within its

jurisdiction, this Court clearly has jurisdiction, in an non-Convention case, to make an order for the return of a child abducted to South Africa from another country: see, for example, *Riddle v Riddle* 1956 (2) SA 739 (C), *Ferrers v Ferrers and another* 1954 (1) SA 514 (SR), *Dube v Dube* 1970 (1) SA 331 (R) and cf. *Littauer v Littauer* 1973 (4) SA 290 (W). The Court will not, however, make such an order unless it is satisfied that this is in the best interests of the individual child in question.

What then is in the best interests of Zackary in the present case? In answering this question, I must, of course, give the appropriate weight to the various orders made by the York County Family Court and to the fact that respondent has acted in wilful contempt of several of such orders. As stated by Van Zyl J in the *Märtens* case (*supra*) at 293D, however, while this Court frowns upon any form of contempt of a court order, it must not allow itself to be unduly influenced by its annoyance at such contempt. This is particularly so in view of the fact that, in my view, respondent acted at all times bona fide in what she believed to be in the best interests of her son, misguided though her conduct may have been.

Unlike legislatures in certain other legal systems, the South African legislature has not yet attempted to formulate a detailed statutory checklist to assist courts in applying the best interests standard in legal proceedings relating to children. However, in the case of *McCall v McCall* 1994 (3) SA 201 (C), King J (as he then was) formulated the following list of criteria according to which the courts should determine, on the facts of each individual case, what arrangement or order will best serve the interests of the child or children concerned:

> "In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:
>
> (*a*) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
>
> (*b*) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
>
> (*c*) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
>
> (*d*) the capacity and disposition of the parent to give the child the guidance which he requires;
>
> (*e*) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
>
> (*f*) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
>
> (*g*) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
>
> (*h*) the mental and physical health and moral fitness of the parent;
>
> (*i*) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
>
> (*j*) the desirability or otherwise of keeping siblings together;
>
> (*k*) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
>
> (*l*) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 ... should be placed in the custody of his father; and
>
> (*m*) any other factor which is relevant to the particular case with which the Court is concerned" (at 204J–205F).

This list of criteria has been accepted by South African courts in several subsequent cases as "an instructive and valuable guide" to the application of the best interests standards: see *Bethell v Bland and others* 1996 (2) SA 194 (W) at 208F–209F, *Krasin v Ogle* [1997] 1 All SA 557 (W) at 567*s*–569*c*, *Madiehe (born Ratlhogo) v Madiehe* [1997] 2 All SA 153 (B) at 157*g*–158*c*, *Fitschen v Fitschen* (C) case 9564/95 (unreported) at 6–7, *Ex Parte Critchfield* [1999] 1 All SA 319 (W) at 329*b*–*e*.

In this case, respondent's opposing affidavit contains very serious allegations regarding the suitability of applicant to have custody of, or even unsupervised access to, his son Zackary. It would

appear that applicant has a long history of drug abuse and has in the past served time in prison for drug-related offences, including possession of and dealing in narcotics. Applicant has also in the past being convicted of other non-drug-related offences, including receiving stolen goods. Moreover, from 1978 to 1995, numerous incident reports were made in respect of applicant, such reports relating to a wide variety of offences, including assault and battery, breaking and entering, pointing a firearm, forgery, theft, grand larceny, harassment and domestic violence (see annexure "MK10" to respondent's opposing affidavit). Although applicant made no mention whatsoever in his founding affidavit of either his past drug abuse or his criminal record, his replying affidavit contains admissions both of his previous "drug problems and convictions", as also of the fact that he does have a criminal record and that the various incident reports referred to above were in fact made. The most serious allegations made by respondent concern, however, the alleged sexual molestation of Zackary by applicant. According to the Confidential Report on Zackary prepared by Ms Fredman (annexure "MK1" to respondent's opposing affidavit)

> "there is strong evidence that his father sexually abused Zackary (Alex) and this was comprehensively documented by all the reports from the USA in 1996 and has been further substantiated by this current assessment."

It must, however, be emphasised that Ms Fredman prepared this report without interviewing applicant or hearing "his side of the story" in any way. Moreover, apart from her weekly sessions with Zackary himself, she based the report on information gleaned from respondent, respondent's attorney and the above-mentioned letters and reports emanating from various persons (including mental and health care professionals) in South Carolina during May 1996 (see annexures "MK4" to "MK8" to respondent's opposing affidavit). All these letters and reports were also prepared without any contact with applicant himself. It is also highly relevant, in my view, that most (if not all) of this South Carolina documentary evidence in respect of applicant's alleged molestation of Zackary was placed before the York County Family Court at the above-mentioned court hearing on 30 May 1996. As I have already indicated, the South Carolina Court reviewed all the information supplied by respondent and pointed out that, since the commencement of the divorce proceedings, applicant had been reported to the Department of Social Services (presumably by respondent) no fewer than six times. However, all such reports had been found to be without substance. It is perhaps also important to reiterate that, on the papers before me, it appears that, after her separation from applicant, respondent was "involved" with at least one other man, with whom Zackary was left on numerous occasions. Applicant emphatically denies that he has ever physically or sexually abused his son. Apart from Ms Fredman, all the other expert and other witnesses upon whose evidence respondent relies in respect of applicant's alleged sexual molestation of Zackary are located in the State of South Carolina. And it would be impossible for this Court properly to evaluate this evidence in the absence of the relevant persons for examination and cross-examination.

It is clear from the above that the "evidence" given by respondent in support of the applicant's alleged abuse of his son is untested and hotly disputed by applicant. The allegations of abuse are all in respect of incidents said to have occurred within the state of South Carolina. These allegations are, therefore, not matters which could realistically be dealt with by this Court.

Furthermore, both parties have lived for most of their lives in the United States of America. Both applicant's family and respondent's family are in the United States, while detailed records and the various collaterals in respect of the allegations made by respondent concerning applicant's "dark past" are (it would appear) also to be found in the United States. In my view, therefore, it is the York County Family Court which is best suited to investigate the merits of this case in the detail required and to determine what orders in respect of Zackary's future care will best "promote and ensure his physical, moral, emotional and spiritual welfare" (see *McCall v McCall* (*supra*) at 204J and see also the judgment of Van Schalkwyk AJ in *Zorbas v Zorbas* (*supra*), especially at 439C–E). Applying the best interests of Zackary as the paramount consideration, I am satisfied that Zackary's best interests require that his future should be adjudicated upon in the South Carolina Court, rather than "that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here", if indeed this would be possible at all (see the judgment of Buckley LJ in *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 All ER 913 (Court of Appeal) at 925–926. In so far as the doctrine of *forum (non) conveniens* is applicable to the proceedings before me (see CF Forsyth *Private International Law* 3 ed (1996) at 162–165, McClean & Beevers *op cit* 132–135 and the above-mentioned decision of the High Court of Australia in *ZT v PS*. (*supra*), especially at 647–651), the York County Family Court is in my view the *forum conveniens*. I have no doubt that that Court will, in hearing and determining the matters of the future custody and care of and access to Zackary, apply the principle that the best interests of the child are its paramount consideration.

I do, however, regard it as the duty of this Court to make appropriate orders so as to ensure that Zackary has the maximum possible protection until the South Carolina Court can resume its normal role in relation to him. In this regard, although in his Notice of Motion the applicant sought an order that his son be placed in his care, he indicated in his replying affidavit that he "would be prepared to consent to an order" that Zackary remain in respondent's care pending the determination of the issues of custody and care of and access to Zackary by the South Carolina Court. He further indicated that he was "prepared to consent to an order" that he exercise access to his son in the presence of the third party, pending the outcome of the hearing in the South Carolina Court. From applicant's replying affidavit, it appears that he gave these undertakings on the recommendation of his attorney and

> "on the understanding that this would protect me from any further allegations in respect of alleged abuse.
>
> It would furthermore facilitate my relationship with Zackary with whom, due to the Respondent's behaviour, I have not had contact for some two and a half years."

Courts in other jurisdictions have sometimes ordered the return of an abducted child to the country from which he or she was abducted, subject to the giving of undertakings by the applicant parent or by both parents in relation to a variety of matters, including: undertakings to provide the child and the abducting parent with financial support and/or accommodation, to refrain from abusing the child and/or the abducting parent, not to institute or continue criminal proceedings against the abducting parent on his or her return, not to remove the child from the care of the abducting parent, to exercise access to the child subject to specified conditions and so on (see, for example, *C v C (Minor: Abduction : Rights of Custody Abroad)* [1989] 2 All ER 465 at 470*a–f* and *P v B* (*Child Abduction : Undertakings)* [1994] 3 The Irish Reports 507 (Supreme Court) at 520–523; see further Reddaway & Keating *op cit* 94–95 and Bruch *op cit* 358 and cases there cited). As pointed out by Butler-Sloss LJ in *C v C*,

> "these undertakings are crucial to the welfare of the child, who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home ... The father [in that case the applicant parent] should not be instrumental in putting obstacles in the way of that easy return, or make difficulties once the child is back. It is essential that the judge hearing the future issues of custody and access ... should have the opportunity to consider the welfare of the child as paramount without emergency applications relating to the manner of the return of the child" (at 469*h–j*).

Similarly, Duncan *op cit* 38 refers to the development (in Hague Convention cases) in the United States of America of so-called "safe-harbour orders", being orders made by a judge, on the application of the "left-behind parent" in the state of the child's habitual residence, which provide assurances in relation to "any matters of finance, accommodation or protection which may face the child and the custodial parent on return". With this in mind, I requested Ms *McCurdie* to ascertain from applicant, *inter alia*, what further undertakings applicant was willing to make in respect of Zackary's well-being on an interim basis, pending the decision of the South Carolina Court in respect of the custody of and access to Zackary, should this Court grant a return order. Similarly, I requested Mr *Katz* to ascertain from respondent, *inter alia*, what she regarded as the necessary safeguards and undertakings that should be given by applicant to ensure Zackary's well-being, pending the decision of the South Carolina Court, should I order that Zackary be returned to South Carolina. Both parties filed further affidavits in this regard. I have carefully considered these affidavits and have come to the conclusion that undertakings should be required of both parties, as a prerequisite to the return of the child, as follows:

As regards applicant, the following undertakings are required –

That, pending the full adjudication and determination by the York County Family Court, South Carolina, of the issues of the custody and care of and access to Zackary:

1. He will not seek to enforce against respondent the orders of the York County Family Court dated 25 June 1996 and 15 November 1996, granting applicant temporary custody of Zackary, and will not seek to remove Zackary from the day to day care of respondent save for the purpose of such access as is referred to in the undertaking numbered 3. below.
2. He will not institute or support any proceedings, whether criminal or civil, for the punishment of the respondent or any member of her family, whether by imprisonment or otherwise, for any matter arising out of the removal by respondent of Zackary from South Carolina on 30 May 1996 and from the United States of America approximately four weeks later. In particular, he will not proceed with any charges against respondent in respect of her contempt of previous orders of the York County Family Court and will take all steps possible to ensure the withdrawal of any criminal charges pending against her in this regard.

3. He will exercise access ("visitation") to Zackary in the presence of a third party at times and places to be arranged by the Department of Social Services, South Carolina. Such third party shall be a person agreed upon between the parties or, failing such agreement, nominated by the Department of Social Services, South Carolina.
4. He will provide separate accommodation for respondent and Zackary in South Carolina, close to an appropriate school for Zackary. Such accommodation shall consist of at least two bedrooms, lounge, bathroom and kitchen, with appropriate furnishings for Zackary and respondent.
5. He will pay maintenance ("child support") for Zackary from the date of Zackary's arrival in South Carolina until adjudication of the matter by the South Carolina Court, at the rate of $450 per month or such other amount as may hereafter be determined by the Department of Social Services, South Carolina, pursuant to the Department of Social Services' guidelines in this regard.

   The first such amount shall be payable on the day of Zackary's arrival in South Carolina and, thereafter, monthly in advance on the first day of every month.
6. He will bear the costs of schooling for Zackary, as also the costs of all Zackary's reasonable educational and extra-mural requirements.
7. He will provide for the use of the respondent a roadworthy motor vehicle at his expense from the date of respondent's arrival in South Carolina for two months or until the adjudication and determination by the York County Family Court of the above-mentioned issues relating to Zackary, whichever may be the later.
8. He will pay for any medical expenses reasonably incurred by respondent in respect of Zackary in the United States of America. Should it be recommended by the Department of Social Services, South Carolina, that Zackary continue with therapy, he will bear the costs of such therapy. In this regard, he will continue to pay the monthly health insurance premiums for Zackary as set out in the divorce decree dated 7 June 1996.
9. He will co-operate fully with the Department of Social Services, South Carolina, and with any professionals who conduct an assessment in order to determine what future custody, care and access arrangements will be in Zackary's best interests. This will include applicant's undergoing (at his expense) a full psychiatric assessment in respect of his suitability to have custody of or access to Zackary.
10. He will provide air tickets and, if necessary, also rail and coach tickets and book seats for respondent's and Zackary's return from Cape Town to York County, South Carolina, to depart from Cape Town on a day not before 19 April 1999. The details of such travel arrangements shall be specified to respondent's attorneys no later than three working days before the date of the departure of the flight upon which respondent and Zackary are to depart from Cape Town.
11. He will, forthwith upon receipt of this Court Order, at his own cost take all steps necessary to cause this order to be made an order of the York County Family Court, South Carolina and/or such other steps as may be necessary so as to ensure that this Order is enforceable in the United States of America, and to provide proof to respondent's attorneys and to this Court as soon as such order of the said Family Court has been granted and/or such other necessary steps have been taken.

As regards respondent, the following undertakings are required –

That, pending the full adjudication and determination by the York County Family Court, South Carolina, of the issues of custody and care of and access to Zackary:

1. She will not, until the return provided for hereunder, remove Zackary from Cape Town.
2. She will, until the return provided for hereunder, keep applicant's attorneys fully advised of her address and telephone number in Cape Town.
3. She will return with Zackary to York County, South Carolina, on the tickets provided and the flight(s) and other means of transport specified, pursuant to the undertaking of applicant numbered 10 above.
4. She will, immediately upon her arrival with Zackary in York County, South Carolina, hand to applicant's legal representative in South Carolina for safekeeping the following documents in respect of both herself and Zackary: passports, travel documents and birth certificates.

I turn now to consider the question of costs. Each party requested a cost order against the other party and both Ms *McCurdie* and Mr *Katz* made oral and written submissions in support of such requests.

Both counsel referred this Court to the judgment of Wunsh J in the case of *Bethell v Bland and others* 1996 (4) SA 472 (W). In this case, in discussing whether there is a general "rule" that, in custody and access cases, no order as to costs should be made, the learned Judge stated the following:

> "There is no such 'rule' according to the enquiries I have made from many of my Colleagues. The position is rather that in custody and access disputes it is frequently, by reason of the circumstances of the case, appropriate not to make an order for costs ...
>
> One should not elevate instances where Courts have not made orders as to costs to 'rules'. At most, they can be guidelines to the exercise of a judicial discretion. In each case the facts are crucial ..." (at 474A–D and H–I).

In this case, respondent acted in wilful contempt of at least one South Carolina court order of which she was aware in removing Zackary from the United States of America and in going "into hiding" with the child for approximately two and a half years. It is also true that, in his attempts to enforce the South Carolina Court Orders referred to above, applicant appears to have been put to considerable expense, both in locating respondent and Zackary and then in being compelled to litigate in a foreign court. However, I am satisfied that respondent's conduct, including her opposition to this application, was governed at all times by what she genuinely and in good faith believed to be in the best interests of her child. As regards applicant, it must be pointed out that he was not, in his founding affidavit, open with this Court as regards his history of drug abuse and his criminal record, although these were certainly material facts that should have been placed before the court, particularly in the original *ex parte* application (see, for eg *Hall and another v Heyns and others* 1991 (1) SA 381 (C) at 397B–C and further Erasmus, Breitenbach & Van Loggerenberg *Superior Court Practice* (1997 with loose leaf updates) at B1–42). Despite applicant's lack of candour in this regard, I am satisfied that applicant also acted at all times in what he genuinely and in good faith believed to be in the best interests of his son, motivated by his natural desire to find the boy and re-establish his paternal relationship with him. The undertakings offered by applicant, first in his replying affidavit and thereafter in his further affidavit filed with this Court, show the good intent which he has for the welfare of his child. In the words of King J (as he then was) in the *McCall* case (*supra*) at 209B–C,

> "both parents have, in contesting this case, acted in what they believed to be the best interests of their child. There is no winner and no loser. There are two concerned parents."

This being so, justice and fairness will, in my view, best be served in this case if no order is made as to costs. The effect of this is that each party will bear his or her own costs.

I therefore make the following order:

a. That respondent return the minor child, Zackary Lamar Kirsch, to the jurisdiction of the York County Family Court, South Carolina, United States of America, in accordance with her undertaking numbered 3. above.

b. That paragraph a. of this order will only become effective once both parties have given to this Court, in affidavit form, the undertakings required of them by this Court, as set out above, and once applicant has furnished proof to this Court that this Order has been made an order of the York County Family Court, South Carolina and/or that he has taken such other steps as may be necessary so as to ensure that this Order is enforceable in the United States of America. Should the assistance of the Registrar of this Honourable Court be required in order to enable applicant to comply with his undertaking numbered 11. above, the Registrar is requested to furnish such assistance to the applicant or his legal representatives immediately upon being requested to do so by applicant or his legal representatives.

c. That the travel documents presently held by the Sheriff of this Honourable Court, in accordance with the order granted by this Court on 20 January 1999, be handed over to applicant's attorneys forthwith. These travel documents shall be handed to respondent by applicant's attorneys at the airport of departure and shortly before the time of departure of the flight specified by applicant pursuant to his undertaking numbered 10. above.

d. That respondent will, immediately upon her arrival in South Carolina, hand to applicant's legal representative for safekeeping the following documents in respect of both herself and Zackary: passports, travel documents and birth certificates, in accordance with her undertaking numbered 4 above.

e. That there be leave for a copy of this Order, and for the papers herein to be disclosed in any proceedings in respect of the said minor, Zackary Lamar Kirsch, in the United States of America.

f. That each party will bear his or her own costs of these proceedings.

Van Heerden AJ

For the applicant:
JL McCurdie instructed by *Cliffe Dekker Fuller Moore Incorporated*, Cape Town

For the respondent:
A Katz instructed by *Craig Schneider Associates*, Cape Town