



## HIGH COURT OF AUSTRALIA

7 November 2012

RCB AS LITIGATION GUARDIAN OF EKV, CEV, CIV AND LRV v THE HONOURABLE  
JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF  
AUSTRALIA & ORS

[2012] HCA 47

On 7 August 2012 the High Court dismissed a challenge to an order of the Family Court ("the Court") to return four children to the custody of their father in Italy, holding that there had been no denial of procedural fairness. Today the High Court delivered its reasons in this matter.

The order to return the children was made after the mother of the children, divorced from the father and living in Australia, refused to return the children to their father, who was living in Italy. This was contrary to a consensual custody agreement between the parents that the children habitually reside with their father. The order was made under provisions of the *Family Law Act* 1975 (Cth) ("the Act") which give effect to the Convention on the Civil Aspects of International Child Abduction to which Australia is a party. These provisions do not provide for consideration of the merits of the custody arrangements, but simply for an order to be made to return children who have been 'wrongfully' removed from their habitual country of residence. The Court retains a discretion to refuse to make an order in certain circumstances, including where, as the children did in this matter, a child objects to the order. The plaintiff argued that a denial of procedural fairness had occurred where the Court had failed to fully consider those objections and to afford the children an opportunity to intervene as parties or to have independent legal representation.

In the reasons handed down today, the High Court observed that the Court had appointed a Family Consultant to report to the Court and the parties on the nature and strength of the children's objections, and that the Family Consultant, as an officer of the Court and a person skilled in advising the Court on such questions, could be relied on to inform the Court fairly and sufficiently on the relevant issues. A majority of the Court noted that, in addition to the evidence of the Family Consultant, the mother of the children had also had the opportunity to adduce evidence on the children's objections from a psychologist. The High Court rejected the submission that resolution of questions about a child's objections always required separate legal representation for each child, as this incorrectly assumed that a child would always have sufficient maturity to instruct a lawyer, and that only a lawyer could adequately determine the child's views. A majority of the High Court also observed that no practical unfairness had resulted from the children's non-intervention as parties in the proceeding. Accordingly the High Court concluded that there was no procedural unfairness to the children.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*