INTERNATIONAL CHILD CUSTODY

A COMMON LAW JUDICIAL CONFERENCE

(September 18 – 21, 2000)
Washington DC

Hague Convention
on the Civil Aspects of International Child Abduction
Discussion Topic No 3

Issues Surrounding Safe Return of the Child (and the Custodial Parent) *

by

The Delegation From The Commonwealth of Australia **

***** A revised version of a paper prepared for this Conference. This paper aims to state the law up to 1 September 2000. The authors acknowledge and thank the participants of the Conference for their helpful comments on the original paper. Further comments are welcomed and may be forwarded to Danny.Sandor@familycourt.gov.au.

The Family Court of Australia website includes a page of selected judgments relating to the Convention at http://www.familycourt.gov.au/judge/index/html/child_abduction.html and links to Australian legislation.

****** Mr. Stephen Bourke, Mr. Murray Green, Justice Joseph V. Kay & Mr. Danny Sandor.

INTRODUCTION

Issues surrounding the safe return of the child and abducting parent need to be seen in the changing context of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). Article 1 states that the objects of the Convention are:

> "*(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
> *(b) to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in other contracting States."*

It is clear and beyond argument that the prompt return is to enable the courts of the child's home country to determine the parenting arrangements for the child in accordance with the law of that country. Wrongful removal or retention should not be permitted to deprive the courts of the child's home country from determining such questions.

However, the picture that emerges today is increasingly one of the abducting parent seeking support of family and friends in contrast to a conscious motivation of depriving the court of the opportunity to determine the parenting arrangements for the child. The Family Law Council reported the following data:[1]

Abducting Parent's Motivation	**Percentage**
Seeking support	53%
Preventing Contact	28%
Following new partner	5%
Fleeing violence	6%
Other	8%

[1] Family Law Council, *Parental Child Abduction*, Commonwealth of Australia, January 1998, p.10.

In Australia, the law requires the Commonwealth Central Authority and its State and Territory counterparts to do everything necessary or appropriate to protect the welfare of the child on return.[2] At the 1997 Special Commission meeting at the Hague to discuss the operation of the Convention, the meeting adopted a resolution that Article 7(h) imposed an obligation on Central Authorities to protect the welfare of the returning child (see below). The resolution was adopted subject to certain qualifications relating to the powers of Central Authorities under the legal and welfare systems of each country.

This paper examines the topic of safe return under the following headings:-

A. Undertakings, safe harbour orders, mirror orders;

B. Criminal proceedings against the taking parent;

C. Problems relating to enforcement; and

D. Direct judicial communication.

A, MIRROR ORDERS, SAFE HARBOUR ORDERS & UNDERTAKINGS

Introduction

Kay J's first instance Family Court of Australia decision in *McOwan v McOwan*[3] drew attention to the following key determinant of ongoing judicial support of the Convention:

> *"Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that the contracting States and Courts will become reluctant to order the return of children."* [4]

It is well established under Australian jurisprudence that Convention applications are not decided according to the principle that the subject child's best interests or welfare is the

[2] Regulation 5(1)(c) of the *Family Law (Child Abduction Convention) Regulations*.
[3] (1994) FLC ¶92-451.
[4] (1994) FLC ¶92-451at 80,692.

paramount consideration.[5] In *Murray v Director, Family Services ACT*,[6] the Full Court of the Family Court of Australia[7] said:

> *"… the Hague Convention and the Regulations* [implementing the Convention in Australian law] *contemplate that it is in the best interests of the child for issues such as custody and access to be determined in the courts of the country of the child's habitual residence unless the exceptions referred to in regulation 16 are made out.*
>
> *The issue in a Hague Convention application is purely one of form, subject to those exceptions, and the paramountcy principle is accordingly not relevant."* [8]

That view was reiterated in *McCall and McCall; State Central Authority (Applicant); Attorney-General of the Commonwealth (Intervener)*[9] where it was noted that this stance is in accordance with the point of view of those who drafted the Convention.[10]

Although there would seem some variance in how welfare or best interests considerations come into play once an exception has been made out, it is widely accepted in common law jurisdictions that the paramountcy principle does not govern convention applications.

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[5] An important point raised at the Washington Conference by the delegation from the United Kingdom was that the approach of courts in contracting States to applications for relocation of a child or "leave to remove a child from the jurisdiction" will impact upon the tendency for children to be removed illicitly. The most recent Australian authority in this regard provides guideline guidance to the correct approach to such applications which are determined according to the paramountcy principle: *A and A : Relocation Approach* [2000] FamCA 751 sourced from http://www.familycourt.gov.au/html/2000.html applying the High Court of Australia decision in *AIF v AMS* (1999) FLC ¶92-852.

[6] (1993) FLC ¶92-416.

[7] A significant relevant feature of the Australian court system is that while first instance jurisdiction under the *Family Law Act* 1975 (Cth) is widely dispersed, all appeals from such matters, including appeals from decisions under the *Family Law (Child Abduction Convention) Regulations* are heard by the Full Court of the Family Court of Australia (which typically comprises three judges, at least two of whom are members of the Appeal Division of the Court) thereby assisting in the development of a specialist intermediate level appellate level jurisprudence. At present, there are seven judges of the Appeal Division: Nicholson CJ, Ellis, Lindenmayer, Finn, Kay, Holden and Coleman JJ. Appeals from the Full Court of the Family Court of Australia are by special leave or certificate to the highest court of the land, the High Court of Australia.

[8] (1993) FLC ¶92-416 at 80,258-9.

[9] (1995) FLC ¶92-551.

[10] See para. 19 of the Explanatory Report of the Convention (*Actes et documentes de la Quatorzieme session 6 au 25 Octobre 1980, Tome III*); see also A.E. Anton, (1980) "The Hague Convention on International Child Abduction", Vol 30 *International and Comparative Law Quarterly*, at 542. *McCall's* case also rejected an argument that there was an inconsistency between the Convention and the United Nations Convention on the Rights of the Child, thereby endorsing a view which had expressed in *Murray's* case.

This was held early in the life of the Convention by the English Court of Appeal[11] and followed by the 1992 Scottish Inner House decision of *Whitley, Petitioner*.[12] It is also the position adopted by the United States Sixth Circuit Court of Appeals[13] and the New Zealand approach (illustrated by *Adams and Wigfield*,[14] and subsequently the Court of Appeal's decision in *A v Central Authority for New Zealand*[15]). A similar view was confirmed by the Supreme Court of Ireland in *T.M.M. v M.D*,[16] and the Supreme Court of Canada was unanimous on this issue in *Thomson v Thomson*.[17]

Most recently, in *De L v Director General, NSW Department of Community Services*[18] the High Court of Australia considered the Regulations giving domestic effect to the Convention,[19] it being the case that Australia did not transpose the Hague Convention in a "wholesale" manner when legislating to implement it through the *Family Law (Child Abduction Convention) Regulations* ("the Australian Regulations").[20]

The majority in *De L v Director General, NSW Department of Community Services*[21] said:

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[11] *C v C* (1989) 1 WLR 654 (CA); also indexed as *Re C (A Minor)(Abduction* [1989] 1 FLR 403.

[12] (1998) Fam LR 7 (decision delivered 29 April 1992, Second Division of the Inner House, Court of Session); see *Singh v Singh* (1997) SC 68 concerning welfare considerations once an exception to the policy of return has been made out.

[13] *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996); see also PH Pfund "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners" (1990) XXIV *Family Law Quarterly*, No.1 at p. 39.

[14] [1994] NZFLR 132 per Hammond J.

[15] [1996] 2 NZLR 517; also indexed as *A v A* [1996] NZFLR 529.

[16] [1999] IESC 8 (8th December 1999) at para 31 sourced from http://www.bailii.org/ie/cases/IESC/1999/8.html.

[17] (1994) 6 RFL (4th) 290 at 318. See also *W.(V.) v. S. (D.)*, [1996] 2 S.C.R. 108 at paras 76 and 77 sourced from http://www.canlii.org/ca/cas/scc/1996/1996scc48.html.

[18] (1996) FLC ¶92-706.

[19] *Family Law (Child Abduction Convention) Regulations* made pursuant to s111B of the *Family Law Act* 1975 (Cth) with jurisdiction conferred by s 39(5)(d) of the Act; the constitutional validity of the Regulations as they then stood was confirmed by the Full Court of the Family Court of Australia in *McCall and McCall:State Central Authority (Applicant); Attorney-General (Intervener)* (1995) FLC ¶92-551. The present regulations were held to be valid by the High Court of Australia in *DJL v The Central Authority* (2000) FLC ¶93-015 (*Laing v The Central Authority* (1999) FLC ¶92-849 on appeal).

[20] The Australian approach of drafting Regulations led to a range of interpretative difficulties: see the discussion by the Full Court in *Laing v The Central Authority* (1999) FLC 92-849.

[21] (1996) FLC ¶92-706 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

> *"The Regulations reflect the objects of the Convention to settle issues of jurisdiction between the Contracting States by favouring the forum which has been the habitual residence of the child. The underlying premise is that, once the forum is located in this way, each Contracting state has faith in the domestic law of the other Contracting States to deal in a proper fashion with matters relating to the custody of children under the age of 16. Necessarily, proceedings under the Regulations are to be seen as standing apart from [proceedings relating to the custody, guardianship or welfare of, or access to, a child]. It follows that they are not subject to the paramountcy principle."* [22]

Even so, where an established defence under the Convention enlivens a discretion not to order return,[23] it follows that the more effective the mechanisms for protection of children until and upon return to the other jurisdiction, the more likely that return will nonetheless

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[22] (1996) FLC ¶92-706 at 83,454-5. See also the discussion by Kirby J at 83,468-9.

[23] Articles 12 and 13 of the Convention set out defences to the obligation to order return:

"Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

"Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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 degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

In respect of Article 13b, the "grave risk" defence is usually based on alleged abuse. The High Court of Australia has granted special leave to appeal in a case where a child's disability (autism) is denied by the left-behind parent and said to lead to grave risk of psychological or physical harm or other intolerable situation if the child is returned. Evidence as to whether there is a facility for the treatment of the child would also seem in issue. The Full Court of the Family Court of Australia judgment upholding the trial Judge's decision to order return to Greece is *P v Commonwealth Central Authority* [2000] FamCA 461 sourced from http://www.familycourt.gov.au/judge/2000/html/p_text.html. Special leave to appeal to the High Court of Australia was granted on 24 November 2000 – *D.P. v Commonwealth Central Authority* (D5-00); transcript of the special leave hearing sourced from http://www.hcourt.gov.au.

be ordered. Greater confidence in the efficacy of protection measures can avert having to find, as Ward LJ did in a different Convention dilemma, that:

> *"... the interests of the children in remaining here should not be sacrificed on the altar of comity between nation States."* [24]

Limits to comity were also canvassed by Doogue J writing for the New Zealand Court of Appeal in *A v Central Authority for New Zealand*:[25]

> *"Where the system of law of the country of habitual residence makes the best interests of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Court of that country and not the country to which the child has been abducted to determine the best interests of the child.*
>
> *… There may well be cases, for example where the laws of the home country may emphasise the best interests of the child are paramount but there are no mechanisms by which that might be achieved, or it may be established that the Courts of that country construe such provisions in a limiting way, or even that the laws of that country do not reflect the principle that the best interests of the child are paramount."*[26]

The types of order considered in this section of the paper seek to balance adherence to the policy of the Convention with the prevention of risk of harm to the child to be returned.

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[24] *Re T (Abduction: Children's Objections to Return* [2000] 2 FLR 192 at 220, Sedley and Simon Brown LJJ agreeing.

[25] [1996] 2 NZLR 517; also indexed as *A v A* [1996] NZFLR 529.

[26] [1996] 2 NZLR 517 at 522-3. See also *P.Q. Petitioner* (27 April 2000, Outer House, Court of Session) sourced from http://www.scotcourts.gov.uk/opinions/PAT1004.html. There, Lady Paton at first instance in the Outer House of the Court of Session found a grave risk defence made out. The case involved allegations of physical and sexual abuse of the children by their father, where the mother had, from the start, brought the allegations to the attention of the authorities and the courts in the abducted-from country (c.f., *Starr v. Starr*, 1999 S.L.T. 335). Lady Paton said (at para 65):"*The facts speak for themselves, and in the rather unusual circumstances of this case, I consider that there is indeed reason to assume that the courts in France might not, for whatever reason, be able or willing to provide adequate protection for G and B (cf. Friedrich cit. sup.) ... As was emphasised in Friedrich v Friedrich, cit. sup., the reason for any apparent lack of ability or willingness on the part of a Hague Convention court to provide adequate procedures or remedies is irrelevant. The explanation might be a lacuna in the legal system itself (which is unlikely in view of the highly-developed and sophisticated system existing in France), or it might simply be the personal view or judgement of someone operating within the system, or some other reason. I do not consider that it is necessary for R.S.* [the respondent mother to the application for return] *to establish whether the lack of protection resulted from the court system itself or from the actings or decisions of particular office-bearers within that system or from some other source. Applying the test in Friedrich v Friedrich, ("when the court in the country of habitual residence, for whatever reason, may be incapable or*

That balancing takes place within a legal context where there are limits to the nature, reach and enforceability of orders which may be made by the Court contemplating the child's return.[27] In a related vein, The Chief Justice of the Family Court of Australia said in an *extra curial* address:

> *"There is a presumption that upon return to the jurisdiction, a competent body will resolve the competing claims over the children. The position was explained by the Full Court in Gsponer v Director General CSV:*
>
> > *"There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare."*
> >
> > *Even so, it is no offence to judicial comity to appreciate that Contracting States may have systems which, in practice, differentially facilitate or impede access to such a competent body."*[28]

Central Authorities can play a critical role in facilitating such access with safety and protection. The need for and nature of case-specific orders by courts depends upon what may be routinely expected of Central Authorities. This paper first examines the extent to which there is a common view as to such expectations.

The Obligations of Central Authorities Towards Returning Children

A proposal on this subject was put forward by Australia with the support of some other contracting States at the March 1997 Special Commission meeting to discuss the operation of the Convention.[29] Some background to impetus for the resolution was

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unwilling to give the child adequate protection"), it is unnecessary in my view to identify or to explain the reason for any apparent incapacity or unwillingness to provide adequate protection.".

[27] One important social context is the frequent claim of child abuse and/or domestic violence by abducting mothers: see Miranda Kaye (1999) "The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned By Coach and Four" Vol 13 *International Journal of Law, Policy and the Family* 191.

[28] The Honourable Alastair Nicholson *Advancing Children's Rights and Interests : The Need for Better Inter-Governmental Collaboration*, the 1996 Sir Ronald Wilson Lecture, Perth Australia, 13 November 1996, sourced from http://www.familycourt.gov.au/papers/html/nicholson2.html.

[29] *Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)* drawn up by the Permanent Bureau, sourced from http://www.hcch.net/e/conventions/reports28e.html.

recently described by the Principal Legal Officer for the Commonwealth Central Authority for Australia. In a 1999 paper, Ms Jennifer Degeling said:

> *"This issue has been of some concern to the Chief Justice of the Family Court since his involvement in a number of cases where an abducting parent has fled a domestic violence situation or has been left destitute on return to the country of habitual residence. In Cooper v Casey (1995) FLC ¶92-575 Nicholson CJ said that the Convention imposes an obligation on Central Authorities to take responsibility for ensuring the protection of children returned under the Convention. Although a similar approach was taken by the NZ Court of Appeal in* [*A v Central Authority for New Zealand*]*, the acceptance of such an obligation had not received much support from other countries who were consulted about this issue prior to the 1997 Special Commission meeting at The Hague."* [30]

It appears there was general acceptance at the 1997 Special Commission meeting that contracting States to the Convention accept that Central Authorities have an obligation under Article 7(h) to protect the welfare of children upon return. How that obligation should translate into practice was, however, the subject of disagreement. Article 7(h) provides:

> *"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.*
>
> *In particular, either directly or through any intermediary, they shall take all appropriate measures—*
> ...
> *(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;"*

The 1997 Special Commission report states:

> *"Following discussion of Australia's proposal, delegations appeared to accept the following proposals:*
>
> *1 It is essential to the integrity of the Convention to ensure the safety of children on their return to their country of habitual residence, in order to alleviate possible concerns and the reluctance of judges to order the return of children where issues of (alleged) abuse or violence arise.*

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[30] Jennifer Degeling, *The Welfare of the Child on Return to their Country of Habitual Residence*, Paper presented at the Biennial Conference for State and Commonwealth Central Authorities, Canberra Australia, 27-28 October 1999.

2 An increase in the number of refusals to return, in cases where such issues arise, would not be desirable. Accordingly, a narrow interpretation of Article 13 b of the Convention should be encouraged by strengthening the role of Central Authorities in co-operating to facilitate awareness of government or public resources available to parents and children. In that context, Central Authorities should be prepared and encouraged by their respective States to adopt a flexible approach to their obligations under Article 7 h of the Convention.

Conclusions

In view of the above proposals, delegations are urged to adopt the following conclusions:

1 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return until the jurisdiction of the appropriate court has been effectively invoked, in certain cases.

2 It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information respecting, legal, financial, protection and other resources in the requesting State, and facilitate contact with these bodies in appropriate cases.

[3 - The measures which may be taken in fulfilment of the obligation under Article 7 h to take or cause to be taken an action to protect the welfare of children may include, for example:
a alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
b advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
[c providing the requested State with a report on the welfare of the child;]
d encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.]" [31]

There then follows a *"Note by the Permanent Bureau"*:

[31] *Report of the third Special Commision meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)* drawn up by the Permanent Bureau, sourced from http://www.hcch.net/e/conventions/reports28e.html at page 22.

"The delegation of Italy agreed with the suggested changes regarding Conclusion 1. The Italian experts did not object to the wording of Conclusions 2 and 3. They suggested, regarding Conclusion 3, that one item be added, to provide that applications for return, should include, whenever possible, a description of the services or measures available in the requesting State for the protection of the child or the returning parent. The delegation of Austria with respect to Conclusion 2, preferred the wording suggested in Working Document No 20 to that suggested by the Canadian experts. In addition, the Austrian experts wished Conclusion 2 to specify that returning parents should be given assistance even when ex parte custody orders have been issued after the abduction and that such orders should not prejudge the final outcome of the proceedings. The experts also wished that Conclusion 3 c), be deleted and that it be clearly stated, under Conclusion 3 b, that information was only required upon request. The delegation of France, with respect to Conclusions 1 and 2, reminded the meeting that the French Central Authority could not ensure that custody proceedings would be instituted upon return, although it could commit to assist the parent in all possible ways, in particular by contacting other authorities or services. The French experts found Conclusion 3 to be too specific and would prefer it more open ended. Regarding Conclusion 3 c), it was pointed out that the French Central Authority could not provide information beyond the measures taken upon the return, for it lacked the resources needed for a long term follow-up. Other experts expressed similar concerns as those mentioned above, including those regarding Conclusions 3 b) and 3 c). Experts also wished that it be made clear that the purpose of the proposal was to protect the child and not to reward the abducting parent.

The square brackets around Conclusion No 3 reflect the doubts of certain experts as to whether this provision should be retained and the internal square brackets around sub-paragraph c reflect particular doubt as to the acceptability of this provision." [32]

Ms Degeling's paper said of the 1997 Special Commission meeting result:

"The acceptance of the resolution was important as abducting parents often raise arguments that they face harm or an intolerable situation (by which they often mean no accommodation, no financial support, no access to legal aid, domestic violence) if they return with children to foreign countries.

At the least, this additional responsibility requires the Central Authority for each country to provide information about services relating to social security, legal aid, emergency accommodation, or domestic violence protection which are

[32] *Report of the third Special Commision meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)* drawn up by the Permanent Bureau, sourced from http://www.hcch.net/e/conventions/reports28e.html at page 23.

available in the city or area to which the abducting parent is asked to return with the children.

In Australia it is accepted that the obligation also involves, where necessary, a Central Authority in commencing proceedings in the courts to ensure the protection of the welfare of children (eg. to enforce an undertaking by the parent who sought the return of the children to provide accommodation or financial support).” [33]

The paper reported on pertinent developments in a number of common law jurisdictions.[34] Within this subset of contracting States, it was apparent that the "welfare on return" principle had been put into operation in a variable manner. Mr. David Harris QC, an English barrister, has suggested that the 1997 Special Commission outcome was insufficient:

"Until the signatories to the Convention are prepared to develop an effective protocol to secure, to the optimum extent practicable, the safety and welfare of returning children, along the lines proposed by the Government of Australia, it is incumbent upon courts hearing Article 13(b) defences to asses the allegations made carefully and fairly, if necessary taking oral evidence to resolve critical factual disputes, and, in accordance with the requirements of Article 13, to refuse to order a return, where the evidence genuinely establishes a sufficient degree of risk." [35]

This viewpoint does not, however, factor-in the scope for a court to consider whether undertakings, mirror orders and safe harbour orders can address the risks it finds in a particular case. The paper now turns to a comparison of common law jurisdictions.

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[33] Jennifer Degeling *The Welfare of the Child on Return to their Country of Habitual Residence*, Paper presented at the Biennial Conference for State and Commonwealth Central Authorities, Canberra Australia, 27-28 October 1999. In this regard, it should be a weight towards confidence in returning children to Australia that most delegate State and Territory Central Authorities of Australia are the heads of the government departments responsible for child protection and a further two are Commissioners of the Police Service of that State. Contracting States can therefore legitimately expect that all delegate State and Territory Central Authorities should have close and efficient operational working arrangements between child protection and police services, especially the units with responsibility for the criminal aspects of family violence allegations. Of course, contracting States with otherwise located Central Authorities may have protocols or other systemic mechanisms which have the same benefits.

[34] Australia, England and Wales, New Zealand, Canada (New Brunswick, Saskatchewan, Quebec) and United States of America.

[35] David Harris QC *Is the Strength of the Hague Convention Being Diluted by the Courts?* Paper presented at the 8th National Family Law Conference, Hobart Australia 24-28 October 1998 at para 5.64.

Undertakings and Conditions in the Jurisdiction Ordering Return

The English Court of Appeal decision in *Re C (A Minor)(Abduction)*[36] approved the use of undertakings and subsequently, in *Re M (Abduction: Undertakings),*[37] Butler-Sloss LJ explained the role of undertakings and conditions as an adjunct to ordering return in the following way:

> *"It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction...*
>
> *This court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations... Undertakings have their place in the arrangements designed to smooth the return of and protect the child for the limited time before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child."* [38]

In *Thomson v Thomson,*[39] La Forest J writing for the majority of the Supreme Court of Canada, said:

> *"Given the preamble's statement that "the interests of children are of paramount importance", courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention: see Re L., supra; C. v. C., supra; P. v. P. (Minors) (Child Abduction), [1992] 1 F.L.R. 155 (Eng. H.C. (Fam. Div.)); and Re A. (A Minor) (Abduction), supra. Through the use of undertakings, the requirement in Article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the*

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[36] [1989] 1 FLR 403.
[37] [1995] 1 FLR 1021.
[38] [1995] 1 FLR 1021 at 1024-5.
[39] (1994) 6 RFL (4th) 290 at 318.

child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated." [40]

The views of Butler-Sloss LJ in *Re C (A Minor)(Abduction)*[41] and also *Re G (A Minor)(Abduction)*[42] were relied upon by the Supreme Court of Ireland in *P v B*[43] wherein the Court endorsed the use and effectiveness of undertakings. Denham J with whom Hamilton CJ and Egan J agreed said:

> *"I am satisfied that undertakings may be given by a party to proceedings under the* [Child Abduction and Enforcement of Custody Orders Act 1991] *and accepted by the court. They are entirely consistent with the 1991 Act and the Hague Convention, they are for the welfare of the child during the transition from one jurisdiction to another. Undertakings may be of particular relevance to very young children.*
>
> *Undertakings in this situation are compatible with the Act and international law which have as their objectives the desire to protect children internationally from the harmful effects of their wrongful removal from the country of their habitual residence and the establishment of procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access.*
>
> *Furthermore, undertakings which are for the welfare of the child are in accord with the constitutional protection of the child and its welfare.*
>
> *Undertakings may also protect a parent in their role and in the exercise of their rights under the Constitution. Consequently I am satisfied that undertakings may be accepted in cases under the 1991 Act."*

As to the breadth of the undertakings accepted in the Court below,[44] it was held:

> *"…the conditions as to accommodation and maintenance as identified by the learned trial judge are reasonable. However, in addressing the long term education, maintenance of the child, and bi-annual visits by the child to Ireland,*

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[40] (1994) 6 RFL (4th) 290 at 318 per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ; the minority of L'Heureux-Dubé J and McLachlin J (as she then was) held that domestic legislation permitting "transitory orders" could also be invoked "*provided, of course, as is the case here, that the purpose of the transitory order not be to hamper the objectives of the Convention and that the return of the child in the proper jurisdiction not be delayed to the point of frustrating the purpose of the Convention*" (emphasis in the original).

[41] [1989] 1 FLR 403.

[42] [1989] 2 FLR 475.

[43] [1995] 1 ILRM 201.

[44] The headnote states: *"Budd J ordered that the child should be returned to Spain on the implementation of certain conditions. The conditions were to the effect that the plaintiff should provide accommodation for the defendant and the child, appropriate maintenance for the child until she was 18, and health insurance for the defendant and child. Furthermore, he should provide for the child's education and supply funds to enable the defendant and the child to travel to Ireland twice a year."*

the learned trial judge considered matters more appropriately determined in the Spanish courts."

In the Scottish courts, the question of the circumstances in which undertakings would be ordered was raised in *Whitley, Petitioner*.[45] Their Lordships considered that they did not need to decide the issue because, in the result, they concurred with the view of the Lord Ordinary that no grave risk exception had been made out and *"*[n]*o question of offering undertakings was in fact raised before us."*[46] The recent first instance case of *D.I. Petitioner* [47] did not clarify the issue as the left-behind father had "*offered certain undertakings"*. Lord Abernethy said:

> *"... they were not essential for my decision as to whether the terms of Article 13(b) had been met. Nevertheless they were offered and I think it would be appropriate to record them in the Minute of Proceedings in words which appropriately reflect the terms, both express and implied, of what was offered."*[48]

In August 1995 the United States Central Authority (the Department of State) expressed the following opinion:

> *"1. While undertakings are not necessary to operation of the Convention, there are good arguments that their use can be consistent with the Convention. Undertakings are most cleanly consistent with the Convention where they facilitate Article 12's objective of ensuring the return of abducted children "forthwith;" minimize the use of non-return orders based on Article 13; and do not undercut the provisions of Articles 16 and 19, which clearly contemplate that return proceedings under the Convention should be jurisdictional and that substantive issues relating to custody, including maintenance, should be left to the court in the child's place of habitual residence.*
>
> *2. As a corollary to the above, undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that that jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under*

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[45] (1998) Fam LR 7 (decision delivered 29 April 1992) - the Second Division of the Inner House of the Court of Session.

[46] (1998) Fam LR 7 at 11.

[47] [1999] ScotCS 114 (1st June, 1999) sourced from http://www.scotcourts.gov.uk/opinions/P6_4_99.html

[48] [1999] ScotCS 114 (1st June, 1999) at para 12 sourced from http://www.scotcourts.gov.uk/opinions/P6_4_99.html

the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance."[49]

In the same month, judgment was delivered by United States Court of Appeals, Third Circuit in *Feder v. Evans – Feder*.[50] The Court approved the use of undertakings in the following remarks:

> *"We also note that in order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon "undertakings" from the petitioning parent. Thomson v. Thomson, 119 D.L.R.4th 253 (Can.Sup. 1994). The district court, on its own initiative, heard testimony about the undertakings Mr. Feder was willing to make in the event that Evan returned to Australia and was not accompanied by Mrs. Feder. Given its denial of Mr. Feder's petition, however, the court did not assess the need for or the adequacy of those undertakings. If on remand the court decides that Evan's return is in order, but determines that Mrs. Feder has shown that an unqualified return order would be detrimental to Evan, the court should investigate the adequacy of the undertakings from Mr. Feder to ensure that Evan does not suffer shortterm harm. See Re O, 2 FLR 349 (U.K.Fam. 1994) (exacting appropriate undertakings is legitimate in Convention cases)."*

In the decision of *Walsh v. Walsh*[51] delivered on 25 July 2000, the United States Court of Appeals for the First Circuit reversed an order for return of the parties children to Ireland. The United States District Court for the State of Massachusetts had ordered return subject to the father's undertakings. The Court of Appeals held that the father would violate the undertakings he had given and that as a consequence the children would remain at grave risk if returned. The Court reviewed the role and limitations of undertakings as follows:

> *"A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings. Necessarily, the "grave risk" exception considers, inter alia, where and how a child is to be returned. n13 The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction. Given the strong presumption that a child should be returned, many courts, both here and in other countries, have*

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[49] August 10 1995 Correspondence from Department of State "Annex B" to *The Hague Convention and the United States of America: Report on Hague Convention Operations*, Lord Chancellor's Child Abduction Unit Central Authority for England and Wales sourced from http://www.hiltonhouse.com.

[50] (3rd Cir. 1995) 63 Fed.3d 217 sourced from http://www.hiltonhouse.com. Although there was dissent as to other matters, there would seem to have been no conflict of view in respect of undertakings.

[51] Sourced from http://laws.lp.findlaw.com/getcase/1st/case/991747.html.

*determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm. See, e.g., Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999) (Blondin II); Turner v. Frowein, 253 Conn. 312, 752 A.2d 955 (Conn. 2000); Thomson v. Thomson [1994] 3 S.C.R. 551, 599 (Can.); P. v. B. [1994] 3 I.R. 507, 521 [*38] (Ir. S.C.). See generally Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 156-72 (1999).*

*A good example of this approach is the Second Circuit's recent decision in Blondin II. The district court had denied the father's petition to return the children to France because the mother had established that returning the children to their father's custody would pose a grave risk of harm. See Blondin v. Dubois, 19 F. Supp. 2d 123, 127-29 (S.D.N.Y. 1998) (Blondin I). The Court of Appeals vacated the district court's judgment and remanded the case to allow the [*39] district court to consider "remedies that would allow the children's safety to be protected [in France] pending a final adjudication of custody." Blondin II, 189 F.3d at 250.*

Yet, there may be times when there is no way to return a child, even with undertakings, without exposing him or her to grave risk. Thus, on remand in Blondin, the district court found that the "return of [the children] to France, under any arrangement, would present a 'grave risk'" because "removal ... from their presently secure environment would interfere with their recovery from the trauma they suffered in France; ... returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm; and ... [one of the children] objects to being returned to France." Blondin v. Dubois, 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000) (Blondin III), appeal filed, No. 00-6066 (2d Cir. Jan. 20, 2000) (emphasis added)."

In the New Zealand Court of Appeal decision *A v Central Authority for New Zealand*,[52] Doogue J said for the Court:

"Consideration was given in the course of argument as to whether a Court had power to attach conditions to any order made by it. It seems reasonably clear there can be no power to attach conditions to an order under s 12 in the absence of a finding in favour of a defence under s 13. On the other hand, if such a defence has been made out and the Court is concerned solely with the exercise of his discretion under s 13 of the Act, then it may be possible that conditions could be attached, unless the statutory provisions dealing with conditions in the Act, ss 26, 27 and 28 imply no authority for the imposition of other conditions. See H v H (1995) 12 FRNZ 498. Nevertheless, as has already been stressed in this judgment, it is not the role of a New Zealand Court to interfere with the functions and responsibilities of the relevant Central Authorities and the courts of another

[52] [1996] 2 NZLR 517 (CA); also indexed as *A v A* [1996] NZFLR 529.

jurisdiction. It would be an unusual case which might give rise to the consideration of conditions. No finding is made on this issue." [53]

When Kay J decided *McOwan and McOwan* in December 1993,[54] his Honour doubted whether there was any express provision in the Hague Convention which would enable a court to require the provision of an undertaking before ordering the return of a child. An express domestic basis was purportedly provided in 1995 when the Regulations were amended to include reg 15(1)(c). Sub-section (1) now reads:

> *"15 (1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:*
>
> *(a) make an order of a kind mentioned in that regulation; and*
>
> *(b) make any other order that the court considers to be appropriate to give effect to the Convention; and*
>
> *(c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention."* [55]

In *De L v Director General, NSW Department of Community Services*[56] the majority of the High Court of Australia remarked on the amended form of reg 15(1):

> *"… the effect of reg 15(1) is to provide that, in making an order in relation to the return of a child from Australia, the court may include in its order a condition the court considers appropriate to give effect to the Convention.*
>
> *...*
>
> *It is impossible to identify any specific and detailed criteria which govern the exercise of the power whereby the Court may impose such conditions on the removal of the child 'as the Court considers to be appropriate to give effect to the Convention'. Many of the criteria which may be applicable in a particular case are illustrated in the above passages from the Canadian and English decisions. The basic proposition is that, like other discretionary powers given in such terms, the Court has to exercise discretion judicially, having regard to the subject-matter, scope and purpose of the Regulations."*[57]

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[53] [1996] 2 NZLR 517 at 524.

[54] (1994) FLC ¶92-451.

[55] Regulation 14(1) includes *"an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention"*. Regulation 16 sets out how a court must deal with applications under reg 14(1).

[56] (1996) FLC ¶92-706.

[57] (1996) FLC ¶92-706 at 83,456-7.

Prior to *De L v Director General, NSW Department of Community Services,*[58] the Full Court of the Family Court of Australia in *Police Commissioner of South Australia v Temple (No 2)*[59] held that the undertakings to the Court imposed by Murray J on a father seeking the return of a child to England exceeded what was required. There had not been a finding at first instance that the "grave risk" defence was made out.[60] The Full Court ordered the child's return subject to more limited undertakings to be made to an English court. Strauss J (with whom Baker and Butler JJ agreed) held that

> *"... Regulation 15(3) does not enable the Court to place conditions on the return of the child. It merely enables the Court to place conditions on the temporary removal of the child from one place to another before the return of the child is ordered."*[61]

More recently in *Townsend v Director-General, Department of Families, Youth and Community Care*,[62] Warnick J had ordered that two children brought to Australia by their mother be returned to their father in the United States for custody proceedings to take place in that jurisdiction. The mother had failed to make out a grave risk exception to the requirement to order return. On appeal, she contended *inter alia* that the trial Judge erred in requiring the father to make undertakings rather than the Court imposing conditions.[63]

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[58] (1996) FLC ¶92-706.
[59] (1993) FLC ¶92-424.
[60] *Police Commissioner of South Australia v Temple* (1993) FLC ¶92-365.
[61] *Police Commissioner of South Australia v Temple* (1993) FLC ¶92-365 at 80,363.
[62] (1999) FLC ¶92-842.
[63] The undertakings were as follows:
"PROVIDED *the FATHER files an Undertaking in Form 41A in this Court and, in respect of Undertakings in paragraphs (c), (d), (e) and (f) carries them into effect:*
a) that he agrees and will agree to a Stay of the Orders, if any, of the courts in the United States of America, relating to the custody of the children and he will not remove, nor support the removal, of the children from the care and control of the MOTHER until the issue of custody is heard and determined by those Courts;
(b) that he agrees to co-operate with the MOTHER to ensure that the Courts of the United States of America determine the issue of custody of the children without delay;
(c) that he will take all necessary steps to support the MOTHER's applications to Immigration authorities in the United States of America for her and the children to return to and remain in that country as long as necessary to enable the issue of custody of the children to be heard and determined by the Courts of that country.
(d) that he will pay to the Australian Central Authority sufficient moneys to pay for airline tickets from Australia to the United States of America for the MOTHER and the children.
(e) that he will pay to the Australian Central Authority for the payment to the MOTHER the sum of $US5,000 to cover the initial cost of temporary accommodation for the MOTHER and the children.

The Full Court of the Family Court of Australia held that the determination of whether to require undertakings or impose conditions was a matter of discretion. The Court said:

> *"... in our view it was a matter for his Honour to consider which conditions if any he thought it proper to impose, or what undertakings to require, and we are not persuaded that he fell into error. In particular, in the absence of evidence as to United States law and practice on the matter, we see no reason to assume that the undertakings required by his Honour would be less effective in carrying out the intent of the Convention than orders expressed as conditions."*[64]

It thus seems that under Australian and the other common law jurisprudence reviewed above, court-imposed conditions and undertakings must be purposefully related to the Convention's objects of facilitating return of the child. A finding of "grave risk" by the Australian court ordering return is not however necessary, a position that appears to accord with the caselaw in Ireland, Scotland and Canada but not with the more strict approach taken by the New Zealand Court of Appeal; *quaere* the United States.

Orders and Undertakings in the Jurisdiction to which the Child is Returned

In *McOwan and McOwan*,[65] Kay J observed :

> *"If undertakings are to be given it is important to make sure they can be enforced. There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the court of the State in which the child has been returned, can require compliance with an undertaking given to another Court."*[66]

Writing *extra curially*, his Honour suggested:

> *"One way to avoid this difficulty is for undertakings to be lodged in both the Court hearing the Convention application and a proper Court in the jurisdiction to which the child is to be returned in order to overcome enforcement difficulties. …. In* ***Re S (Child Abduction: Acquiescence)*** *[1998] 2 FLR 893, Sir Stephen*

(f) that he will pay to the Australian Central Authority for payment to the MOTHER the sum of $US5,000 to cover the initial cost of living expenses for 14 days for the MOTHER and the children." (1999) FLC ¶92-842 at 85,856-7.

64 (1999) FLC ¶92-842 at 85,858.

65 (1994) FLC ¶92-451.

66 (1994) FLC ¶92-451at 80,691.

> *Brown P recorded undertakings given by an American father to the English court to not harass the mother and to agree to a de novo custody hearing in California. He ordered that a copy of his reasons for judgment including those undertakings be provided to the Californian court."*[67]

A "mirror" approach in framing orders for return also finds favour with the English Court of Appeal. In *Re RB (Abduction: Children's Objections),*[68] Thorpe LJ (with whom Butler Sloss LJ agreed) said:

> *"Once the primary jurisdiction is established then mirror orders in the other and the effective use of the Convention gives the opportunity for collaborative judicial function."*[69]

In the Matter of EP (An Infant); P v P,[70] an unreported judgment of McGuinness J in the High Court of Ireland,[71] illustrates the difficulties that can arise with undertakings where a child is returned pursuant to the Convention. In this case, return was to a civil law jurisdiction, Italy, and her Honour noted of the difficulty associated with undertakings in the instant case that "[i]*t may well be that this also applies to many non common law jurisdictions."*

McGuinness J was there determining an application to return a child brought unlawfully by her mother from Italy to Ireland. In circumstances where she was satisfied that the child and mother *"had an extremely close relationship"*, her Honour was most concerned that an interim custody order granted by an Italian court would separate them *"for an indefinite and lengthy period, and without possibility of appeal"*. McGuinness J was advised at the conclusion of the hearing that the Italian court had varied its interim custody order and granted custody to the mother. Her Honour gave judgment on 12 February 1997 and ordered the return of the child subject to undertakings by both parents to the High Court of Ireland.

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[67] The Honourable Joseph Victor Kay *The Hague Convention – Order or Chaos? An update on a paper first delivered to a Family Law Conference in Adelaide in 1994*, paper presented at New York University U.S.A, September 1999, sourced from http://www.familycourt.gov.au/papers/html/kay.html

[68] [1998] 1 FLR 422.

[69] [1998] 1 FLR 422 at 427.

[70] 18 October 1998 sourced from Lexis.

[71] Mrs Justice McGuinness is now a Justice of the Supreme Court of Ireland.

After the child's return, the father failed to abide by his undertakings and further, on 4 March 1997, the Italian court removed the child from the custody of both parents and placed her in an institution, with minimal access to her mother and father. This Order was apparently based on a report from the Social Services.[72] Enquiries from the Irish Central Authority to the Italian Central Authority received in July 1997 and placed before her Honour in further proceedings were said to show that:-

- The Irish High Court Order was brought to the attention of the Italian Court on 23 April, 1997 and the translation of the above Order was forwarded to it on May 5, 1997.
- In order to enforce the obligations of the parties pursuant to the Irish Order, the Italian Court has to recognise the legal enforceability of the Order in Italy. Such recognition (exequatur) must be applied for by legitimately concerned people.
- The Italian procedural law provides for the parties to undertake obligations which are defined in the "Conciliation Report", which is self-executing (Article 185 Code of Civil Procedure).

McGuinness J said of this information:

> *"It is not clear from these replies whether the common law concept that a party may give undertakings to the Court and that the failure to abide by such undertakings constitutes a contempt of Court is a normal part of the Italian legal code. It may well be that this also applies to many other non common law jurisdictions. In the instant case an additional complication is that the content of the Order of this Court made on the 12 February, 1997 was not conveyed to the Italian Court until the 23 April, 1997 and even then not translated until the 5 May, 1997. The child E had already been removed from the custody of her mother on the 5 March, 1997. Clearly this Court cannot know the reasons for the lengthy delay in conveying the content of the Order of 12 February, 1997 to the Italian Court and of having it translated. Nor can it know whether any attempt was made by the legal representatives of the mother to have the Order legally enforced in Italy. The answer given by the Central Authority for Italy does not in*

[72] At a hearing on 10 February 1998 *inter alia* to enforce the father's undertakings, the trial Judge first discovered that on 13 January 1998, the father had been charged in Italy with offences in connection with the sexual abuse of the child.

fact make it clear whether it is the Order itself which may be recognised as enforceable or whether the undertakings as apart from the Order may be recognised as enforceable. Unfortunately it appears to me that the situation is now such that there is no useful further action that this Court can take in the matter." [73]

Her Honour then considered and concurred with the views expressed by Singer J of the Family Division of the High Court of Justice in *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349. Singer J had said *inter alia*:

"In a case where the Court finds, as I have here, that an Article 13(b) grave risk would be established unless alleviated by undertakings offered or required, and honoured or enforced, it is reasonable . . . for this Court to consider whether the undertakings will be adequately enforceable in the requesting State.

The best practice where such issues arise would be for general information concerning its available processes of enforcement of undertakings to be requested from the Central Authority of the home State pursuant to the provisions of Article 7(e), and consistent with the relaxation upon the reception of evidence as the foreign law which Article 14 provides. However if as here, sufficient information cannot be derived from that source then it may well be necessary to direct the parties to file expert evidence in the more conventional manner

If in relation to any particular Contracting State that process revealed the absence of machinery adequate to give backing to undertakings the observance of which the English Court relied upon to relieve the children of risk of an intolerable situation, then it would be relevant to consider whether the parent proffering the undertakings genuinely intended to honour them."

Singer J had suggested:

"… there may be some scope for developing probably on a bi-lateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic Courts take to issues which commonly arise in Convention cases. Such an issue may well be these Courts use of undertakings designed to smooth the speedy passage home and to the door of the proper Court of children who should never have been taken from its jurisdiction. By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country

[73] It is understood that this problem would not arise in the Canadian Province of Quebec under its Civil Code: personal communication with The Honourable Justice Jacques Chamberland.

wishes to cause any offence to the Courts of the other, nor to seek to interfere with or to influence what that Court then does.

Moreover, it may well be that if such opportunity for the exchange of views does assist to promote co-operation, it should be possible in an appropriate case for the Central Authority of the requested State to liaise with its counterpart in the requesting State to put in place measures agreed by the parties or reasonably required as a proper pre-condition of return."

It will be recalled that in *Police Commissioner of South Australia v Temple (No 2)*[74] the Full Court of the Family Court of Australia required undertakings to be lodged only in the jurisdiction to which the child was being returned. The more recent first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and Hobbs*[75] is the only reported illustration of the use of mirror orders by an Australian court in ordering the return of a child under the Convention. The father, who had initiated the Convention proceedings in respect of his daughter, was permitted by his Honour to file an affidavit that contained a range of undertakings as to:-

- The father not instituting or supporting any criminal or civil charges associated with the removal;
- The father withdrawing pending charges;
- The father paying the costs of the child's return airfare;
- The child remaining in the care of the respondent mother, should she accompany the child back to the Republic of South Africa until the High Court of South Africa directs otherwise or alternatively that he would personally accompany the child on the return trip and would care for the child until otherwise directed.
- The father instituting proceedings in respect of the child within 48 hours of return and pending such proceedings, the respective right of the parents to be governed by their prior settlement agreement; and
- The father obtaining and paying for private educational tuition for the child to maintain her current standard.

[74] (1993) FLC ¶92-424.
[75] (2000) FLC ¶93-007.

The father deposed that he consented to those undertakings being incorporated into "mirror orders" to be granted by both the Family Court of Australia and the High Court of South Africa. Lindenmayer J made orders for the return of the child which would become operative *"conditional upon"* the father first filing the undertakings in the South African court and then filing in the Family Court of Australia an affidavit attesting to his having done so.[76] The child was in fact returned, however, as discussed below, such orders did not secure the co-operation of the mother in the process.

The United States Department of State has suggested that:

> *"We also should not lose sight of the fact that there may be other ways to accomplish the objectives of proposed undertakings. For example, it might be possible for the parties to propose a consent order to the appropriate U.S. court prior to entry of the return order in the United Kingdom. In this connection, you may be interested to know that the private bar in the United States occasionally seeks to facilitate the return of children abducted from the United States by having the left-behind parent seek entry, by the appropriate U.S. court, of an order addressing interim issues of custody and support. We understand that private lawyers sometimes recommend use of these orders, which they call "safe-harbor" orders, in cases where the foreign court may be reluctant to return a child to the United States unless such issues are addressed in some fashion. Where a Safe-harbor order has been entered in the United States, there may be no reason for a foreign court even to consider entering undertakings as part of a basic return order."* [77]

Notably, particularly in light of *Director-General Department of Families, Youth and Hobbs,*[78] the Department has expressed the view that it:

> *"does not support conditioning the issuance of a return order on the acquisition of a safeharbor order from a court in the requesting state."* [79]

Anticipatory Mirror Orders

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[76] (2000) FLC ¶93-007 at 87,178.

[77] August 10 1995 Correspondence from Department of State "Annex B" to *The Hague Convention and the United States of America: Report on Hague Convention Operations*, Lord Chancellor's Child Abduction Unit Central Authority for England and Wales sourced from http://www.hiltonhouse.com.

[78] (2000) FLC ¶93-007.

[79] August 10 1995 Correspondence from Department of State "Annex B" to *The Hague Convention and the United States of America: Report on Hague Convention Operations*, Lord Chancellor's Child Abduction Unit Central Authority for England and Wales sourced from http://www.hiltonhouse.com.

In addition to their use as an adjunct to orders for the return of children pursuant to the Convention, mirror orders have featured in reported caselaw as a mechanism for improving the likelihood that children lawfully taken overseas will be returned if there is then a dispute as to return.

In the English Court of Appeal decision of *Re K (Child)*,[80] Thorpe LJ with whom Sir Oliver Poppelwell agreed, referred to their potential utility where the child was taken to a non-Convention location:

> *"Although not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction, Bangladesh of course has a fully-developed legal system. But within that legal system, the interpretation of child welfare will inevitably and properly be reflective of the culture, traditions and institutions of the state. It does not follow that if the issue of J's future were to be determined by a court in that state, following a breach of the contact, that the mother's relationship with J or the importance of his rooting within this society would receive the same evaluation as in this legal system. That is not to criticise the system of law in Bangladesh, but simply to notice its necessary difference.*
>
> *Accordingly, it seems to me that to preclude the possibility of competitive litigation within two systems, reflecting different traditions and cultures, it is desirable to confine the risk of competitive litigation by putting in place, wherever possible, whatever buttresses can be devised for the primary adjudication in this jurisdiction. It seems to me that the appearance within the Family Law Reports of the cases of re T and re A whatever may have provoked that appearance, is useful as offering to practitioners a precedent for the sort of mechanisms appropriate where the friendly foreign jurisdiction roots its family justice system in Islamic law.*
>
> *There is obviously in this case the possibility of notarised agreements. There is the possibility of mirror orders."* [81]

Subsequently in *Re P (A Child : Mirror Orders)*,[82] Singer J in the Family Division of the High Court of Justice dealt with a case where a United States court had refused an

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[80] [1999] EWCA 3184 (15th July, 1999) sourced from http://www.bailii.org/ew/cases/EWCA/1999/3184.html.

[81] The cases cited therein are: *re T (Staying Contact in Non-Convention Country)* [1999] 1 FLR 262; *re A (Security for Return to Jurisdiction (Note)* [1999] 2 FLR 1.

[82] [2000] 1 FLR 435.

application pursuant to the Convention to return a child removed by the mother. The Orange County Family Court made an order regulating rights of contact between the child and the father who was living in England and lacking a right of entry into the United States. The order provided that the mother was to bring the child to England each October for one week, so that the father could have contact with the child for 4 hours a day on 5 consecutive days. Those terms were agreed between the parties and the United States Court expressly stated that it was to be entered as a mirror order in the Family Division. The father's English lawyers were to provide the mother's representatives and the court in the USA with copies of the mirror order made by the English court prior to the arrival of the child in England.

The primary question before Singer J was whether the making of a mirror order was consistent with the Court's powers and jurisdiction given that the child was neither habitually resident in England nor present in England on that date.[83] In the course of finding that he could and should make the order sought, his Honour observed:

> *"As it happens, for some years now, more often of course in unreported but not infrequently in reported cases, Family Division judges and judges of the Court of Appeal have advocated in appropriate cases that the parties before them, where contact or a move to live abroad is in contemplation, should provide precisely that form of cordon sanitaire in that foreign jurisdiction which in this case the parties would seek to create here for their child.*
>
> *Thus, England's judges have invited parties to go off and get mirror orders or their non-common law equivalents in Chile, Canada, Denmark, the Sudan, Bangladesh, Egypt and even in Saudi Arabia."* [84]
>
> *"Then there is the category of case, of which this one is typical, where a foreign court is making provision for contact to take place in another jurisdiction, in this case England. In that category of case it is important that there should be the possibility for orders to be made in advance of and against the arrival of the child so that the parties and the foreign court may have confidence that if either of them seeks to take advantage of the presence of the child in the contact jurisdiction, the court there will not lend itself to any such attempt.*

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[83] In respect of proceedings in Australia see ss69C and 69E *Family Law Act* 1975 (Cth).
[84] [2000] 1 FLR 435 at 439.

> *The classic anxiety is of course that, the child having come for contact with the parent in England for a limited period, the parent in England either attempts to remove the child to a third country and to keep the child there, or refuses at the end of the contact to allow the child to return to his country of residence. Armed with a consent order already made in the English jurisdiction, an English judge would virtually inevitably order return first and investigation of the merits in the residence jurisdiction."* [85]

It is convenient to note here that legislation may provide for the recognition of orders as between certain jurisdictions thereby creating another avenue for mirror orders to be established by registration.[86] In respect of registration in Australia, New Zealand and a number of States in the United States of America is each a *"prescribed overseas jurisdiction"*. No other common law jurisdictions are prescribed. A key limitation with respect to prescribed jurisdictions, however, is that the Australian provisions for registration do not apply to interim or *ex parte* orders.[87]

Where an overseas child order is registered in an Australian court,[88] it is enforceable until registration is cancelled[89] and *"has the same force and effect as if it were an order made by that court under this Part."*.[90] Registration of an overseas order in Australia avoids the need for compliance with ss69C and 69E of the *Family Law Act* (Cth) 1975,[91] but in

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[85] [2000] 1 FLR 435 at 441.

[86] In respect of Australia see Part VII Division 13 Subdivisions C and D *Family Law Act* 1975 (Cth) and Schedule 1A of the *Family Law Regulations* 1984 made pursuant to Reg 14. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children represents a multi-lateral approach. As at 1 August 2000 the Convention was not yet in force and no common law jurisdiction was a signatory: Linda Silberman (2000) "The 1996 Hague Convention on the Protection of Children: Should the United States Join?" Vol 34 *Family Law Quarterly* 239.

[87] Sections 70F and 70L *Family Law Act* 1975 (Cth).

[88] See Regulation 23 *Family Law Regulations* 1984.

[89] Regulation 23(5) *Family Law Regulations* 1984.

[90] Section 70G *Family Law Act* 1975 (Cth).

[91] Section 69C *Family Law Act* 1975 (Cth) provides:

"1) Sections 65C, 66F, 67F, 67K and 67T and subsection 68T(4) are express provisions dealing with who may institute particular kinds of proceedings in relation to children.

(2)Any other kind of proceedings under this Act in relation to a child may, unless a contrary intention appears, be instituted by:

(a)either or both of the child's parents; or

(b)the child; or

(c)a grandparent of the child; or

(d)any other person concerned with the care, welfare or development of the child."

Section 69E Family Law Act 1975 provides.

"1) Proceedings may be instituted under this Act in relation to a child only if:

any event these sections are broadly framed and s69E(1)(e) would appear to avoid the difficulties seen in *Re P (A Child : Mirror Orders).*[92]

Matters for Continuing Attention

A *"cohesive approach by common law jurisdictions"* is seen as desirable in the treatment of Hague Convention matters generally and the enforcement of undertakings in particular.[93] It would seem that among common law jurisdictions, there are differences and points on which there is no express judicial agreement concerning aspects of when and how the discretion available under the Convention is to be exercised in furtherance of achieving the safe return of children. Some of the issues that warrant further consideration are as follows:-

1. How can contracting States to the Convention and common law jurisdictions in particular, best contribute to giving effect to the 1997 resolution? Would fuller, more specific and widely promoted implementation of the 1997 resolution concerning Article 7(h) minimise the need for undertakings, mirror orders or safe harbour orders?

2. Is it sufficient that the 1997 resolution would seem to be accepted as giving rise to a responsibility upon Central Authorities *"to provide information about services relating to social security, legal aid, emergency accommodation, or domestic violence protection"*? Where sworn/affirmed evidence has alleged

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(a) the child is present in Australia on the relevant day (as defined in subsection (2)); or
(b) the child is an Australian citizen, or is ordinarily resident in Australia, on the relevant day; or
(c) a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
(d) a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
(e) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.

(2) In this section:
relevant day, in relation to proceedings, means:
(a) if the application instituting the proceedings is filed in a court—the day on which the application is filed; or
(b) in any other case—the day on which the application instituting the proceedings is made."

92 [2000] 1 FLR 435.

93 Paul Ward (1999) "Common Law Undertakings and the Civil Code - The Irish Experience" *Fam Law* 50.

child or partner abuse as a defence to return, should there not be an automatic obligation upon the Central Authority to where the child is returned to convey that evidence to the appropriate child protection and/or criminal investigation authorities?

3. Difficulties have been observed in seeking to use the mechanisms of undertakings, mirror orders or safe harbour orders in non-common law jurisdictions. How should these be addressed?

4. What approach should be adopted to give effect to Singer J's suggestion in *Re O (Child Abduction: Undertakings)* that *"in the absence of machinery adequate to give backing to undertakings the observance of which the English Court relied upon to relieve the children of risk of an intolerable situation, then it would be relevant to consider whether the parent proffering the undertakings genuinely intended to honour them."*

5. Is it consistent with the Convention for courts to:-

- seek or accept undertakings, mirror orders or safe harbour orders where none of the "grave risk" exceptions are found to be made out; and
- order "conditional return"?

Should different considerations apply where a consent order is proposed?

6. What benefits, if any, are seen in the use of anticipatory mirror orders and reciprocal registration provisions *vis a vis* contracting States to the Convention? To what extent would there be cost savings or expedition of an application to return a child if such an order existed?

B. CRIMINAL PROCEEDINGS AGAINST THE TAKING PARENT

Introduction

The wrongful removal or retention of a child across international boundaries has both civil and criminal consequences. The civil aspects are well documented. The debate in

relation to criminal penalties for parental child abduction is more controversial and in Australia was the subject of a recent report by the Family Law Council.[94]

Under Australian law, parental child abduction is not a criminal offence. However, some activities associated with the wrongful removal or retention may be criminal in nature while other activities may attract a sanction which, while not strictly criminal, may be punitive in nature and can include imprisonment.

A Survey of the Law in Australia

Section 65Y of the *Family Law Act* 1975 (Cth) provides that where a parenting order is current, a party to the proceedings that resulted in the making of that order must not intentionally or recklessly take or send, or attempt to take or send the child from Australia. The section also extends its reach to other persons who may conspire with the parent to take or send the child from Australia.

Section 65Z is a companion provision which enacts a similar prohibition where there are proceedings pending for the making of a parenting order, rather than completed proceedings as is required under s65Y. Both sections carry a maximum penalty of 3 years imprisonment.

In addition to ss65Y and 65Z, there are obligations placed upon owners and operators of aircraft or vessels (train travel out of Australia not being possible!), preventing the departure of the aircraft or vessel where it is believed, evidenced by statutory declaration, that the aircraft or vessel may be used to convey the child wrongfully out of Australia.[95] The penalty attached to both these sections is expressed as a monetary penalty being 60 penalty units.[96]

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[94] Family Law Council, *Parental Child Abduction*, Commonwealth of Australia, January 1998.

[95] Section 65ZA (for completed proceedings and s65ZB (for pending proceedings) of the *Family Law Act* 1975 (Cth).

[96] Section 4AB of the *Crimes Act 1904* (Cth) provides that the monetary value of a penalty unit is $112.

There are 2 exceptions to the prohibition in ss65Y and 65Z as well as the prohibitions placed on owners and operators of aircraft and vessels under ss65ZA and 65ZB. First, where there is consent in writing by the parties to the parenting order that the child may leave Australia, an offence will not be committed. Of course, if the consent was fraudulently obtained, the consent will be void. Secondly, where there is a court order under the *Family Law Act* 1975 (Cth) or under the law of a State or Territory providing that the child may leave Australia, there will be no offence under the relevant section.

Other Relevant Provisions

Section 112AP of the *Family Law Act* 1975 (Cth) gives to courts exercising jurisdiction under the Family Law Act a general power to punish for contempt of court.[97]. The Family Court of Australia has no inherent power to punish for contempt it being a court created by statute.[98] However, the wording of s112AP implies that the general law of contempt applies when courts are exercising jurisdiction under the *Family Law Act* 1975 (Cth).

Where there has been a contravention of a court order, that contravention by itself is not sufficient to ground a successful action for contempt of court. It must be coupled with a finding that the contravention also involved a flagrant challenge to the authority of the court. What constitutes a flagrant challenge to the authority of the court will be determined in the context of the circumstances of the case but it must be a "notorious" or "scandalous" challenge to the court's authority. In general, a breach of a court order in civil proceedings is dealt with under the summary procedures available to the court.[99] The aim of these summary proceedings is to protect and preserve the rights of parties to those proceedings where there has been a failure to observe the terms of a court order. However, where contemptuous behaviour is involved – being the contravention coupled with the a challenge to the authority of the court, the reason for the contempt proceedings

[97] Section 35 of the Family Law Act 1975 (Cth) provides that the Family Court of Australia has the same powers to punish contempts of its power and authority as is possessed by the High Court Australia but section 35 is made subject to s112AP.

[98] *In the Marriage of Vergis* (1977) 3 Fam LR 11,398, FLC ¶90-275.

is to preserve the authority of the court. In its report on contempt, the Australian Law Reform Commission said:

> *"Except in a very few cases, where overt defiance of the court is a pronounced element in the situation, it is not the judge or the court that the law is protecting, but the successful party. Therefore, the Commission recommends that the summary procedure be retained as the normal means of punishing disobedience with an order made in favour of a party to civil proceedings….On the very rare occasions that the conduct of the respondent in contempt proceedings arising out of disobedience amounts to a flagrant challenge to a court's authority it would be appropriate for the relevant court to impose punishment for the disobedience. In such a case the focus of the relevant proceedings shifts from merely upholding the rights of an aggrieved party to upholding the authority of the court."* [100]

Except in a very few cases, where overt defiance of the court is pronounced, the typical procedure for dealing with the contravention of a court order is pursuant to s112AD. It has been held that the proceedings pursuant to this part of the *Family Law Act* 1975 (Cth) is a self contained code under which the court may impose sanctions. The provisions are *"careful to avoid the language of the criminal law, and should not be regarded as part of the criminal law of the Commonwealth"*.[101] Where there has been a contravention, the range of sanctions the Court may impose is as follows:-

- A sentence of imprisonment;
- A fine of not more than $6,000 for a natural person or $30,000 for a corporation;
- A recognisance;
- Sequestration of a person's property;
- Order for delivery of a document; or
- An order to compensate for contact forgone.

The standard of proof for proceedings under this Part is the civil standard, even though it may result in imprisonment. However, the degree of satisfaction that the court may require varies having regard to the gravity of the facts to be proved.[102]

Report by the Family Law Council on Parental Child Abduction

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[99] Section 112AD of the *Family Law Act* 1975 (Cth).
[100] Australian Law Reform Commission, *Contempt,* ALRC 35, 1987.
[101] *In the Marriage of Schwartzkopf* (1992) 15 Fam LR 545, FLC ¶92-303.

The Family Law Council released a comprehensive report on the issue of whether parental child abduction should or should not be a criminal offence. The report canvassed the arguments in favour and against criminalisation of parental child abduction. The arguments in favour of criminalisation were as follows:-

- One of the stated aims of making parental child abduction a criminal offence is its deterrent effect. It is said that the incidence of child abduction by parents would reduce if parents acted to remove a child in the knowledge that they may face criminal proceedings;
- There is a degree of uncertainty in the present law in that parents do not fully understand the exact nature of civil proceedings. The enactment of parental child abduction as a criminal offence – being much easier to understand – would be to reduce the uncertainty;
- It is thought that where the nature of civil proceedings are understood, they are seen as being ineffective in obtaining the return of an abducted child. Criminalisation could facilitate the search process and may, as a consequence, attract the priority in police resources and the advanced procedures (eg telephone interception, listening devices) that apply in the investigation of criminal offences. Internationally the assistance of Interpol and overseas police would become available to locate abducted children. Extradition and mutual assistance procedures would also become available;
- The recovery of abducted children is extremely costly to the taxpayer. Any proposal which has a deterrent effect and which reduces costs deserves close consideration;
- There is a combined deterrent and educative effect of criminalisation. It was suggested that the deterrent effect could be specific, by deterring an offending parent from doing it again, or general, by deterring parents in general from abducting their children; and
- The offence of child abduction is also covered by the general state and territory law on abduction. Criminalisation at the federal level would bring parental child

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[102] *In the Marriage of Lindsay,* (1995) 19 Fam LR 649.

abduction into line with State laws relating to child abduction. However, the fact that a parent is involved and the *Family Law Act* 1975 (Cth) as amended by the *Family Law Reform Act* 1995 (Cth) now enables each parent to exercise powers in relation to his or her child and tends to distinguish parental child abduction from other forms of child abduction.

Some submissions received by Council strongly supported criminalisation of parental child abduction. The National Children's and Youth Law Centre (NCYLC) said in its submission:

> *"The NCYLC believes that child abduction is a violation of the rights of the child and for this reason alone, abducting a child from Australia, to Australia and within Australia should be criminalised.*
>
> *For the NCYLC the motives behind criminalisation are a mixture of punishment (for a wrong done against a child) and deterrence. In this way it is hoped that the criminalisation of parental child abduction shows parents, and those aiding parents, that they do not have a property right in a child and that taking advantage of a child's vulnerability will not be tolerated..."* [103]

An important point made in the Family Court of Australia's submission was that if it is decided to criminalise parental child abduction it will be necessary to be quite specific about what will constitute a criminal offence. The Court suggested that in Austria, France and Netherlands the offence appears to be limited to the taking of the child by a person who does not have parental responsibility for the child. In New Zealand the offence is limited to the removal of a child from the country. However, the Council noted that in other countries with legal systems comparable to Australia, such as the USA, United Kingdom and Canada, the offence does extends to people with parental responsibility.

There are also arguments against the criminalisation of parental child abduction and the report by the Family Law Council set those arguments out in the following way:-

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[103] National Children and Youth Law Centre, *Submission to the Family Law Council Inquiry into Parental Child Abduction, Commonwealth of Australia*, 1998, p26.

- The existing provisions in the *Family Law Act* 1975 (Cth) are adequate to cope with the problem;
- The effect on the child of a parent being imprisoned is a powerful argument against criminalisation. It was suggested to the Council that jailing of a parent following action by the other parent could destroy the relationship between the child and the parent taking the action which resulted in the jailing. On the other hand, it was also put to the Council that the consequences could also be educative for the child by informing their understanding of right and wrong and of responsible and irresponsible behaviour. It was thought that it would be far more serious for a child to observe patently illegal behaviour of a parent going without penalty. The Council added that if parental child abduction were to be criminalised, penalties other than imprisonment are more likely in most cases and, therefore, this argument may not be as strong as it first appears;
- The abductor, being the child's parent, has a right, or would in any event believe s/he has a right, to the care and/or control of the child and it was argued that stealing your own children is an oxymoron because it is not easy to see how one can you steal your own child;
- The consequences of an offence being "criminal" can be quite severe; for example, apart from the penalties imposed, the person acquires a criminal record and this can also affect his or her employment prospects which may affect future parenting abilities;
- In some circumstances the abductor may consider that s/he is merely correcting a wrong, such as denial of reasonable contact with the child, or is saving the child from a perceived danger, such as child abuse;
- In some cases the parent is fleeing alleged acts or threats of violence, or otherwise escaping an intolerable situation; and
- To make parental child abduction a criminal offence is an undue intrusion by the State into the domain of the family. Council notes, however, that the state has intervened in the family domain in relation to such matters as child abuse and neglect.

In recommending that parental child abduction not be criminalised, the Council was influenced by arguments that parental child abduction is not typically criminal in nature and there was no strong evidence that criminalisation had the deterrent effect it was claimed to have. The Council also felt that alternatives to criminalisation would have a much greater likelihood of deterring abduction by parents without the negative effects associated with criminalsation.[104]

C. PROBLEMS RELATING TO THE ENFORCEMENT OF RETURN ORDERS

Introduction

Problems associated with the actual execution of orders requiring the return of a child to a Convention country largely divide into problems caused by the abducting parent, and those caused by the child. The majority of problems are not surprisingly, associated with the abducting parent. This section of the paper will examine some of the more common problems in physically ensuring the child is put on an aircraft destined for the targeted country. In addition, it considers some of the solutions which have been utilised by the courts of Australia and Central Authorities and legal remedies which are or may be available to ensure the child is returned as ordered.

Legal Framework

Section 111B of the *Family Law Act* 1975 (Cth) empowers the executive government to promulgate regulations necessary to enable the performance of the obligations of Australia or to obtain for Australia, any advantage or benefit, under the Convention. Australia has implemented into domestic law, the relevant provisions of the Convention (although not in identical terms) by the *Family Law (Child Abduction Convention) Regulations.*

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[104] Family Law Council, *Parental Child Abduction,* Commonwealth of Australia, 1998, pp31-32.

The types of orders for which the Central Authority can apply and those which the Court is empowered to make are set out in reg 14(1) and reg 15(1) respectively and provide as follows:

> *"**14(1) [Application where child removed to, or retained in, Australia: Form 2]** In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:*
>
> *(a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or*
>
> *(b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:*
>
> *(i) stop, enter and search any vehicle, vessel or aircraft; or*
>
> *(ii) enter and search premises;*
>
> *if the person reasonably believes that:*
>
> *(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and*
>
> *(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or*
>
> *(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or*
>
> *(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or*
>
> *(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention."*

> ***"15(1) [Orders in relation to reg 14 application]** If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:*
>
> *(a) make an order of a kind mentioned in that regulation; and*
>
> *(b) make any other order that the court considers to be appropriate to give effect to the Convention; and*
>
> *(c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention."*

Regulation 20 deals specifically with the responsibilities of a Central Authority following the making of a return order and provides as follows:

> *"**20(1) [Arrangements by Central Authority]** Where an order is made under regulation 16,*[105] *the responsible Central Authority shall cause such arrangements as are necessary to be made in accordance with the order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention."*
>
> *"**20(2) [No notification that order stayed]** If, within 7 days after the making of an order under regulation 16, the responsible Central Authority has not been notified that the order has been stayed in accordance with subrule 1(10) of Order 32 of the Rules of Court, the child shall be returned to the country in which he or she habitually resided immediately before his or her removal or retention."*

It can be seen that the regulations are framed broadly enough to include the Central Authority seeking, in appropriate cases, the making of *"any other order that the Court considers appropriate to give effect to the Convention"*.[106] Both the Preamble and Article 1 of the Convention emphasise that the purpose and objects of the Convention are to secure the prompt return of children wrongfully removed to or retained in any contracting state.[107] Article 7(h) provides:

> *"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.*
> *In particular, either directly or through any intermediary, they shall take all appropriate measures –*
>
> ….
>
> (h) *to provide such administrative arrangements as may be necessary and appropriate to <u>secure</u> the <u>safe</u> return of the child." (emphasis added)*

<u>Taking the Child from the Abducting Parent</u>

The Full Court of the Family Court of Australia highlighted the importance of making appropriate orders to secure the child following an order for return, in the case of *DM v Director-General, Department of Community Services*.[108] The proceedings involved a

[105] Should be 15. Regulation 16 is really a "sign post" provision setting out when the Court must not and may make orders for return.
[106] Regulation 15(1)(b).
[107] See generally Preamble and Article 1(a).
[108] [1998] FamCA 1557; (1998) FLC ¶92-831.

child of almost 17 months of age who had been brought to Australia by her father on 14 April 1998. Both the mother and father who resided in the Republic of Macedonia had taken steps to immigrate to Australia. However the requesting applicant mother alleged that the parties had separated on 9 March 1998, after which she had the full-time care of the child and the father had access. She alleged that on 12 April 1998 the father told her he was taking the child for a walk but failed to return. The father alleged that he and the mother had not separated when he arrived in Australia with the child.

The father unsuccessfully defended the application at first instance (both initially before a Judicial Registrar, and then on a re-hearing before a Judge of the Family Court of Australia) and lodged an appeal to the Full Court of the Family Court of Australia. At the hearing before the Full Court, the father sought an adjournment based on medical grounds, arguing first he was unwell on the day of the hearing, and secondly that he had had insufficient time to prepare his case. The adjournment was refused and the father announced he felt sick and was unable to present arguments in relation to continuing the appeal.

What then occurred is recorded in the judgment of Nicholson CJ in relation to obtaining a warrant for the placement of the child in the care of the applicant State Central Authority (who in this case was also the organisation charged with the welfare of children within the State of New South Wales):

> *"I have little doubt that what the father was doing, was seeking to avoid the Court dealing with this matter, and putting the matter off as long as possible.When he adopted that course, I asked the responsible authority whether they wished to make an application as to the disposition of the child. Mrs Flohm, for the authority, indicated that, although the authority had hitherto been reluctant to make such an application, she felt that in the circumstances she ought to make it, and the application was made. The basis of the application is undoubtedly a concern that, since the father was, on the departmental case at least, prepared to abduct the child from its mother in the former Yugoslav Republic of Macedonia, that there was a real risk that if he saw these proceedings as running against him, that he may take similar steps in relation to the child in Australia, to either remove the child from its present address and remove it to other parts of Australia, or elsewhere.*

Speaking for myself, I think that there is a significant risk of this happening. I propose, in view of the father's attitude, as I indicated to him, to continue to deal with the appeal today, and if he is unable to advance any further material before the Court we will take into account the arguments that are contained in the appeal book and in the material that he has already advanced, and we will consider the appeal on that basis. In order, however, to protect the child from the possibility of removal from its present address, it seems to me that the only appropriate and proper course that this court should take is to order that, until further order, an order be made in terms of paragraph two of the application of the Central Authority."

Kay J, agreeing with the Chief Justice's reasoning, also added:

"The only thing I add is that in the father's own material he indicates:

> *"I was waiting for 37 years of my life for this baby to be born, and I was not going to give up on her at any cost."*

I perceive there to be a real risk that any order that we make, if the appeal is dismissed, could be defeated by the actions of the father."

The case illustrates the necessity for both the Central Authority and the Court to be vigilant in ensuring that if there is a significant risk, based upon the past conduct of the abducting parent, he/she will attempt to hide the child from the Central Authority to defeat the return order, the Court will make orders which will place the child in the care of the Central Authority, or perhaps in appropriate cases a neutral third party to care for the child pending his/her return to the contracting State. It is significant to note that the Full Court was not deterred in this course by the very young age of the child and that the child had not been placed in the care of the Applicant State Central Authority upon the original filing of the application and the father had not attempted to go into hiding immediately upon becoming aware of the application, but had sought to oppose it in the Courts. Whilst not common, there are examples where a parent having lost an appeal against a return order has gone into hiding.[109]

[109] See *DJL v The Central Authority* (2000) FLC ¶93-015 (*Laing v The Central Authority* (1999) FLC ¶92-849 on appeal to the High Court of Australia).

The above case illustrates what might be regarded as the strongest of enforcement options available to the Central Authority and the Court in ensuring that the child is returned as ordered.

Orders such as that made in *DM v Director-General, Department of Community Services*[110] are comparatively rare. In the majority of cases, injunctions are placed upon the Respondent confining where the Respondent and the child are to reside pending the return of the child; with the Central Authority to put in place appropriate monitoring to ensure the parent and child remain at that location. A position halfway between these two options, although seldom used if at all, would be to require the abducting person and the child to reside with a neutral third party until the child is returned.

Lack of Co-operation by the Abducting Parent

Most of the problems encountered in enforcing the order for return are related to the abducting parent failing to co-operate with the Central Authority in making arrangements for the safe return of the child, perhaps in the vain hope that the Central Authority's resolve will be weakened toward pursuing a return, or to gain a minor victory by stretching out the period before which the child has to be returned as long as possible. The following may be regarding as typical examples of this kind of problem; where the abducting parent:-

(i) refuses to hand over documentation necessary to ensure the child can leave Australia and safely re-enter the other contracting State or to sign fresh documentation which may be required for that purpose;

(ii) refuses to share information about arrangements which he/she is making for the return of the child to the contracting State, often wrongly believing that this is not anybody's business but his/hers;

[110] [1998] FamCA 1557; (1998) FLC ¶92-831.

(iii) insists upon a date for a return some distance from the order for return date relying upon varying reasons normally associated with the convenience of the abducting parent and/or the welfare of the child;

(iv) disagrees with every conceivable aspect of the mechanics of the return proposed by the Central Authority i.e. matters such as who will pay for the airline tickets and make the bookings, choice of airline, route to be taken by the airline, etc.

Some Solutions

Obviously every case is unique, however the following represent examples of ways in which the Central Authorities of Australia have sought to overcome difficulties in enforcement resulting from a lack of co-operation.

(i) Seeking a Detailed Order for Return

By the time the application has been made and determined, the Central Authority is usually in a good position to assess the likely level of co-operation which will be received from the abducting parent in the event of a return order. Where it can reasonably be expected that the Central Authority will receive no assistance in arranging the return of the child, an order for return can provide a series of subsidiary orders to give effect to the order for return. Such subsidiary orders could include:-

(i) an order that the passports, which routinely are surrendered to the Court pending determination of the application,[111] be collected by the Central Authority, rather than the abducting parent, who will hold the child's passport until the child arrives at the airport to board the necessary flight;

(ii) an order directing that the abducting parent sign specified, or all necessary, documentation to allow the child to safely and lawfully leave the

[111] As part of the obligations of the Central Authority to secure the whereabouts of the child and take provisional measures (Article 7(b) of the Convention).

Commonwealth of Australia and re-enter the other contracting State, together with a default provision that in the event the applicant fails or refuses to sign such documentation, the Registrar is appointed to sign that documentation in place of the abducting parent;

(iii) a mandatory injunction requiring the abducting parent to contact the Central Authority on a regular basis pending return i.e. a reporting condition;

(iv) a specific time by which the child must be returned to the contracting country;

(v) a specific liberty to the Central Authority to return to Court to obtain further subsidiary orders in order to assist the Central Authority carry out its obligation to effect the return of the child pursuant to the Convention Regulations, in order to avoid any argument that there is no such power to do so upon the basis that the Court's power is spent and be prepared to return to Court where necessary;

(vi) an order requiring the abducting parent to enter into a form of recognisance or bond, forfeitable in the event that the child is not returned to the contracting State in accordance with the order.

(ii) Utilising Sanctions for Breach of Orders

The Family Court of Australia, has, by statute, the same power to punish for contempts of its power and authority, as is possessed by the High Court of Australia in respect of contempts of the High Court.[112] There is a further statutory provision empowering Courts exercising jurisdiction under the *Family Law Act* 1975 (Cth)[113] to punish for contempt where it constitutes a contravention of an order made under the *Family Law Act* 1975 (Cth) and involves a flagrant challenge to the authority of the Court (commonly

[112] Section 35 *Family Law Act* 1975 (Cth).
[113] Family Court of Australia, Family Court of Western Australia, Federal Magistrates Service.

referred to as criminal contempt) or does not constitute a contravention of an order under the *Family Law Act* 1975 (Cth).[114]

In addition, there is a statutory power to impose sanctions where a Court is satisfied a person has, without reasonable excuse, contravened an order made under the *Family Law Act* 1975 (Cth) (commonly referred to as civil contempt).[115] As mentioned earlier in this paper, orders for return in Hague cases are made pursuant to powers to order a return contained in the *Family Law (Child Abduction Convention) Regulations* rather than the *Family Law Act* 1975 (Cth). The term "order under this Act" includes "an order (however described) made by the Court under this Act".[116] In turn, the words "this Act" are defined in the Act[117] to include "the Regulations". Accordingly, it appears that the section is applicable to orders made under the *Family Law (Child Abduction Convention) Regulations*. The Court must be satisfied that the person breaching the order did so without reasonable excuse. When a breach is established, the Court is specifically empowered to make *"such orders or other orders as the Court considers necessary to ensure compliance with the order that was contravened"*.[118]

Where the only order which the Court makes is an order requiring that the child be returned to a contracting state, it may be open to argument whether it could be said that the actions of the abducting parent had "contravened" the order. It would depend upon the nature of the action by the parent and how direct such action is in preventing the child from being returned. In the case of taking the child into hiding, it may be arguable that the direct effect is to stop compliance with the order. It may be open to greater debate if the actions of the abducting parent have the practicable effect of frustrating the order rather than directly contravening it. However, where the subsidiary order supporting the return order specifically requires the abducting parent to do or refrain from doing things necessary to effect the return of the child, then a case of contravention is more easily made out.

[114] Section 112AP *Family Law Act* 1975 (Cth).
[115] Section 112AD *Family Law Act* 1975 (Cth).
[116] Section 112AA *Family Law Act* 1975 (Cth)
[117] Section 4 *Family Law Act* 1975 (Cth).

(iii) Negotiations/Counselling

In Australia, many of the designated State Central Authorities are also the agencies charged with administering the child welfare legislation in force within the various States and Territories which comprise the Commonwealth of Australia. Within those agencies, there resides significant expertise in the areas of child welfare, counselling and working with what could generally be termed, difficult parents. Often, parents who are initially difficult can be persuaded to accept the Court's decision and not work actively to frustrate it after counselling sessions with a social worker and/or a psychologist. Such an approach is often resource intensive. Further, as the agency is the "opposing party", its officers are often not accepted by the abducting parent as an organisation genuinely motivated to assist him/her and the child. The approach can also have its limits from the perspective of the agency, in that officers of the agency can leave themselves open to allegations of having unduly influenced the abducting parent to take or not take critical decisions, such as whether to appeal the decision at first instance.

Problems of Enforcement Arising from the Actions of the Child

The most common case is where a child has objected to returning, but the Court has ordered the child's return in any event. On some occasions, the Central Authority will receive some warning that there may be difficulties. The warning will come from statements made by the child, relayed through the abducting parent, or made during direct discussions between the Central Authority and the child. In such cases there is an opportunity to utilise counselling and other forms of persuasion to assist the child in accepting the reality of the situation. In the cases of *Director-General, Department of Families Youth and Community Care v. N*[119] and *Director-General Department of Families Youth and Community Care v. McC*[120] (respondents' names abbreviated), Barry J ordered as part of the return order, that the child attend a counselling session with a

[118] Section 112AD(4) *Family Law Act* 1975 (Cth).
[119] (unreported), Family Court of Australia, 5 December 1997.
[120] (unreported), Family Court of Australia, 8 June 1999.

Family Court of Australia Counsellor so that the child may have explained to her the decision which his Honour had made. The effectiveness of counselling is obviously reduced where the abducting parent remains hostile following the decision.

In cases where the child is hostile to a return, consideration is given to requesting that the requesting applicant travel to Australia for the purpose of reuniting with the child and having that person accompany the child back to the contracting State. Consideration must be given to who will pay the cost of this travel and an appropriate order sought as part of the subsidiary orders at the time the return order is made.

The circumstance which poses the greater difficulty is where, at the very last minute, usually at the airport, the child refuses to board the aeroplane either by standing his or her ground or running away from the airport. The second of these circumstances occurred in the case of *Director-General, Department of Families, Youth and Community Care v. O* (respondent's name abbreviated).[121] That application involved the return of a 13 year old child who had come to Australia for a one month holiday staying with her father and did not return as arranged. Bell J found that the child did not object for the purposes of the Convention. Whilst upset at the outcome, the child was briefly counselled by an officer of the State Central Authority after the decision was handed down. The mother travelled to Australia to accompany the child to the United Kingdom after the decision was handed down. At the airport, the child asked to go to the toilet before entering the customs area to board the return flight and disappeared from the airport and could not be located. The mother, who was travelling with limited funds, reluctantly boarded the return flight alone.

The father brought an application to re-open the Hague Convention proceedings relying upon the child's reaction at the airport as new evidence of her objection to returning. The application was dismissed. The State Central Authority applied for orders that the respondent pay the necessary costs of an officer of the State Central Authority to accompany the child to the United Kingdom, but ultimately accepted the father's decision

[121] (unreported) Family Court of Australia, Bell J 24 March 1999.

that he would return with the child and the entry by him into a $2,000.00 recognisance, forfeitable in the event the child was not successfully returned to the United Kingdom.

A difficulty of another kind arises where the actions of the child in refusing to return, come to the attention of the airline and the airline, in the interests of passenger safety or for some other reason, refuses to accept the child on the aircraft. This occurred in an English case of *Re: HB (Abduction: Child Objections).*[122] The response of the United Kingdom Central Authority was to request the applicant mother to travel to England to accompany the child, which she did not do. The child sought leave to be joined in the proceedings and to personally appeal the decision of the judge at first instance. Ultimately, the appeal was allowed and a finding that the child objected was made with the application remitted to the trial judge to consider whether the residual discretion to order the child's return in any event should be exercised. At the remitted hearing Hale J[123] dismissed the application noting that one of the primary goals of the Convention, being a prompt return, was no longer possible. Noting the strength of the child's objections and in the mother's failure to readily offer assistance in the form of responding to correspondence sent to her by the United Kingdom Central Authority seeking her assistance in resolving the impasse; Her Honour dismissed the application.

In circumstances where the attendance of the requesting applicant parent is insufficient to persuade the child to behave appropriately for a return journey, it is difficult to envisage what practical options are open to a Central Authority to enforce the order. Generally speaking, it is expected that the presence of the requesting applicant parent could sufficiently quell the child's apprehension so as to ensure incidents which may cause the airline to refuse to carry the child, will not occur. Where the child's behaviour can be linked to the influence of the abducting parent, consideration could be given to seeking an order that the requesting applicant's costs while staying in the requested country be paid by the abducting parent.

[122] [1998] 1 FLR 422.
[123] Reported as Re: *HB (Abduction: Child Objections) (No. 2)* [1998] 1 FLR 564.

Australian State Courts acting in the *parens patriae* jurisdiction have held that the Court has extremely coercive powers in order to act in the best interests of the child, even if the "target" of the Court's orders is the child him or herself. *In the case of Director-General, New South Wales Department of Community Services v Y,*[124] Austin J of the Supreme Court of New South Wales, on the application of the Director-General, ordered that a child, who had previously been made a ward of Court, with an a-typical eating disorder which appeared to be an extreme form of anorexia, be returned to her treating hospital (from which the child had previously escaped) and detained there, by force if necessary, for treatment for her condition in her best interests, against the very strong wishes of the child and her parents. His Honour took into account what he found to be strong and uniform evidence of the medical experts that without the treatment, the child would die. In a later decision,[125] Austin J ordered the parents of a child, not yet born, not to breast feed the child and that the child have special treatment, as the mother was HIV positive.

Commentators on these decisions have remarked that the coercive powers available in the *parens patriae* jurisdiction are far wider than anything under relevant State legislation involving children in the care of the State.[126] The High Court of Australia has held that the Family Court of Australia has a statutory jurisdiction similar to the *parens patriae* jurisdiction.[127] It is now the subject of express legislative enactment.[128] Whilst it is arguable that the Family Court of Australia would share similarly coercive powers in its "welfare jurisdiction" such coercive powers in both the *parens patriae* and statutory welfare jurisdiction are governed by the best interests of the child as the paramount consideration.

Whether a Court would be prepared to make similar coercive orders against the child, usually the subject of the application and not a party to it, upon the foundation that such

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[124] [1999] NSWSC 644 sourced from http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1999/644.html.
[125] *Re: Baby A* [1999] NSWSC 787 sourced from http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1999/787.html.
[126] See article by John Eades, *Law Society Journal* (February 2000) p. 52.
[127] *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case)* (1992) 175 CLR 218.
[128] Section 67ZC *Family Law Act* 1975 (Cth).

orders are necessary and appropriate to give effect to the Convention, has yet to be determined and hopefully, never will need to be.

D. DIRECT JUDICIAL COMMUNICATIONS - THEIR FEASIBILITY AND LIMITS

Introduction

> *"The judge, when the case is already pending elsewhere, is required to communicate with his or her counterpart in the other state. However, the judicial communication is a wild card in this otherwise orderly business. Anything might happen, and it is a process usually not controlled or even witnessed by counsel."*[129]

The United States Experience

American statutes and canons are replete with provisions promoting direct judicial communications.

The US *Uniform Child Custody Jurisdiction Acts* (UCCJA) envisaged and made provision for judges of different jurisdictions communicating with each other in respect of a matter which may be pending in both jurisdictions or which may need to be transferred from one jurisdiction to another. For example, the relevant Illinios State No. 750 ILCS 35 provided as follows:

> *"Sec. 7.* ***Simultaneous Proceedings in Other States****.*
>
> *(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.*

[129] Richard Crouch, Attorney, discussing the US *Parental Kidnapping Prevention Act* (The PKPA) http://patriot.net/~crouch/flnc/abd.html.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Section 10 and shall consult the child custody registry established under Section 17 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 20 through 23 of this Act. If a court of this State has made a custody judgment before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the most appropriate forum.

Sec. 8. ***Inconvenient Forum.***

(a) A court which has jurisdiction under this Act to make an initial or modification judgment may decline to exercise its jurisdiction any time before making a judgment if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

…

(d) ***Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court*** *with a view to assuring that jurisdiction will be exercised by the most appropriate court and that a forum will be available to the parties.*

Sec. 24. ***International Application.***

The general policies of this Act extend to the international area. …"

The successor to the UCCJA, the *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA) makes more extensive provisions for judicial communication. Following

are some relevant extracts from the draft Bill, and prefatory notes and comments by the National Conference of Commissioners on Uniform State Laws

> *"**SECTION 110. COMMUNICATION BETWEEN COURTS.***
>
> *(a) A court of this State may communicate with a court in another State concerning a proceeding arising under this [Act].*
>
> *(b) Communications between courts that affect the substantive rights of a party must be made in a manner that allows the parties to participate, or allows the parties to present jurisdictional facts and legal arguments to the courts, before a final determination is made as to which forum is appropriate. A record must be made of those communications between courts. The record may consist of notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum of other electronic communications between the courts, or a memorandum made by one or more courts after the communication.*
>
> *(c) Communications between courts on schedules, calendars, court records, and other matters that do not affect the substantive rights of the parties may occur without informing the parties. A record need not be made of those communications.*
>
> *Comment*
> *This section emphasizes the role of judicial communications under the Act. It contains the authorization for a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.*
>
> *Language has been added to emphasize the role of the parties in the communication process. If the communication between the courts involves relatively inconsequential concerns such as scheduling, calendars or consultation on other minor matters, the communication can occur without the parties being informed or participating. Included within this type of communication would be matters of cooperation between courts under Section 112.*
>
> *However, on all matters which could affect the parties' substantive rights, a court must communicate with another court in a manner which allows the parties to participate or to present jurisdictional facts and arguments. In particular this includes communications that are required under Section 204 (Emergency Jurisdiction), Section 206 (Simultaneous Proceedings), Section 207 (Forum Non Conveniens), and Section 305 (Simultaneous Proceedings). In any event, a record*

of the communication must be made. No particular form of communication is required to inform the parties that a communication between courts is scheduled. An informal communication is sufficient.

The purpose of this section is to regularize the communication process between courts. It preserves the flexibility necessary to accommodate busy judicial schedules while including protection for the parties against unauthorized ex parte communications. A full discussion of the problem can be found in State ex rel. Grape v. Zach, 524 N.W.2d 788 (Neb. 1994).

SECTION 204. TEMPORARY EMERGENCY JURISDICTION.

(a) A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

…

(d) A court of this State that has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced, or a child-custody determination has been made, by a court of a State having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this State that is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed that a child-custody proceeding has been commenced, or a child-custody determination has been made by a court of another State under a statute similar to this section shall immediately communicate with the court of that State. The purpose of the communication is to resolve the emergency and protect the safety of the parties and the child.

Comment

…

The communication between courts is to be accomplished in accordance with Section 110. The communication under this section affects the substantive rights of the parties and therefore the provisions of that section on participation of parties and making of the record are applicable.

SECTION 206. SIMULTANEOUS PROCEEDINGS.

(a) Except as otherwise provided in Section 204, a court of this State may not exercise its jurisdiction under this [article] if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another State having jurisdiction substantially in conformity with this [Act], unless the proceeding is stayed by the court of the other State because a court of this State is a more convenient forum under Section 207.

(b) Except as otherwise provided in Section 204, a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding was previously commenced in a court in another State having jurisdiction substantially in accordance with this [Act], the court of this State shall stay its proceeding and communicate with the court of the other State. If the court of the State having jurisdiction substantially in accordance with this [Act] does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.
(3) proceed with the modification under conditions it considers appropriate.
…
Comment
…

Under this Act, the simultaneous proceedings problem will arise only when there is no home State and more than one significant connection State. For those cases this section retains the "first in time" rule of the UCCJA. Subsection (b) retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another State. The communication is governed by Section 110. It is a communication that affects the substantive rights of the parties.

SECTION 306. SIMULTANEOUS PROCEEDINGS. *If a proceeding for enforcement under this [article] has been or is commenced in this State and a court of this State determines that a proceeding to modify the determination has been commenced in another State having jurisdiction to modify the determination under [Article] 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding."*

The promotion of judicial communication has not been confined to the family law area. In his paper *Global Economy Demands Judicial Cooperation and Communication,*[130] Sid Brooks discusses its application in the field of cross border bankruptcies.

"Pending U.S. Legislation in Cross-Border Cases

The first initiative involves legislation passed in 1998 in both the U.S. House of Representatives and the U.S. Senate. That legislation promoted—indeed mandated—that United States courts cooperate and communicate with courts of other countries involved in transnational insolvency cases. Also included in the legislation, however, were controversial "consumer" bankruptcy provisions that,

[130] *The Colorado Lawyer* March 1999 Vol. 28, No. 3 http://www.cobar.org/tcl/1999/march/judges.htm.

coupled with the threat of a presidential veto, doomed passage of the entire bill in conference committee. Nonetheless, the sections involving international judicial cooperation and communication in transnational insolvency cases were approved without dissent.

The successor to the 1998 legislation, H.R. 3150, a nascent "Chapter 15" for the U.S. Bankruptcy Code, creates the architecture for administration of United States cross-border insolvency cases. Patterned after the United Nations Committee on International Trade Law's Model Law on Cross-Border Insolvency, which was developed over five years and involved forty-five countries, H.R. 3150 establishes a comprehensive mechanism for courts dealing with cross-border insolvency cases.
Central to the legislation are two principles:

1. United States courts are directed to "cooperate to the maximum extent possible with foreign courts or foreign representatives."

2. United States courts are authorized to communicate with foreign courts and foreign representatives, either directly or indirectly.

The mandate to cooperate is subject to and limited by the enacting country's "public policy," and the court's discretion, but it is mandatory nonetheless. This mandate assures that, to the extent possible, collaborative and accommodating strategies must be used by judges in transnational insolvency cases. In the context of the entire structure of the new Chapter 15, that means United States judges may, under certain circumstances, defer to or harmonize their procedures and orders with judges of foreign courts."

Many US State codes of judicial conduct, of which the Michigan Code is a good example,[131] make specific provision for the manner in which a Judge should approach this area.

*"**CANON 3:***

A Judge Should Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities:

[131] Adopted by the Michigan Supreme Court effective October 1, 1974, incorporating amendments effective through January 18, 1994 http://www.michbar.org/directory/code.html.

4. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

a. A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:

- *the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and*

- *the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.*

b. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

c. A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

d. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

e. A judge may initiate or consider any ex parte communications when expressly authorized by law to do so."

How Would an Australian Court React?

The difficulty with the operation of "judicial communication provisions" is that the common law, absent clear statutory authority, would seem to prohibit such behaviour.

In *Re JRL; Ex parte CJL*,[132] the High Court of Australia dealt with an application for a writ of prohibition against a judge hearing a custody case. The child, the subject matter of the proceedings, was living with the father. There had been extensive counselling and

[132] (1986) 10 Fam LR 917.

a counsellor had prepared a report. The counsellor was strongly of the view the child should live with the mother. The father sought an adjournment of the proceedings, and when the counsellor learnt there was a prospect of an adjournment being granted, she sought and was granted an audience in private with the judge, who was apparently very concerned that the child had an anxiety neurosis which would deteriorate if she was allowed to stay with the father. The judge, after speaking with the counsellor, immediately called counsel into her chambers and discussed the counsellor's evidence with them.

The High Court by a majority of 3 to 2 granted the writ of prohibition. The minority stressed the peculiar statutory role of the counsellor and the remedial action taken by the trial Judge to invite the parties' representatives in as soon as it occurred to the Judge that the private conversations should not be allowed to continue. The majority, however, said that there had been a clear breach of the fundamental principle *"that a judge must not hear evidence or receive representations from one side behind the back of the other"*. Gibbs CJ said:

> *"the principle which forbids a judge to receive representations in private, is not confined to representations made by a party or the legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views of opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court."*

Mason J in his judgment made it clear that parliament could override the principle that

> *"a judge is to try a case on the evidence and arguments presented in open court by the parties or their legal representatives by reference to those matters alone."*

Brennan J said:

> *"it would require at least statutory authority to permit a judge to discuss with a counsellor out of court any question of substance relating to an issue in proceedings for custody pending before that judge."*

His Honour went further, however, by saying:

> *"that jurisdiction to determine [proceedings for custody] is a matter vested in the Family Court, and it cannot be exercised in the privacy of a judge's chambers. This is incompatible with the intention of the parliament"*

In *McOwan*,[133] the wife took the children to England for a holiday. Within a week of arrival she decided not to return to Australia. The following week the husband commenced proceedings in the Family Court of Australia for sole custody and sought an order for return of the children. The wife's response was to commence some proceedings in England seeking ex parte orders prohibiting the removal of the children from England. The husband then responded with an application in England under the Hague Convention and the wife was ordered to return the children to Australia, which she did on 25 August 1993. Two days after her arrival, the husband filed a Notice of Discontinuance in the Australian proceedings. The wife then applied for legal aid, trying to seek orders to enable her to return to England, but aid was refused.

Apparently at the behest of the maternal grandparents, Johnson J wrote from the Royal Courts of Justice to the Chief Justice of the Family Court of Australia a letter in the following terms:

> *“I have now had a rather sad letter from the maternal grandmother and I enclose a copy of her two letters, and my brief acknowledgment, together with copy of my order.*
>
> *I wonder if you could pass this on to someone who might be able to give the matter some attention. These Hague Convention cases do sometimes seem to produce harsh results, but the policy is clear.*

[133] (1993) 17 Fam LR 377; (1994) FLC ¶92-451.

> *Obviously I am not suggesting there is anything amiss in the way the matter is being handled in Australia; my intervention is simply as a matter of humanity, and to show that we do care."*

The Chief Justice then summoned the parties and the State Central Authority to court *"for the purpose of enquiring whether proper arrangements have been made for the welfare of the children".*

When the matter came on for hearing the parties sought an adjournment to enable them to further explore the possibility of a reconciliation. The Attorney-General for the Commonwealth of Australia and the State Central Authority were invited to make submissions relating to the procedure that had been adopted to bring the parties to the Court in the absence of an *inter partes* application.

Eventually Kay J was not required to rule upon the submissions as the parties advised the Court they had reconciled. He did, however, publish a judgment setting out the submissions and identifying the issues raised by them. Accordingly to the submissions, as soon as the child was back in Australia the child abduction convention had served its purpose. His Honour concluded that:

> *"the provisions of the Hague Convention appear however to limit the role of the Central Authority to securing the safe return of the child, and for making arrangements for organising and securing the effective exercise of rights of access (see Article 7).*
>
> *It would also seem appropriate that the Central Authority should be required to enquiry whether appropriate arrangements are made for the welfare of the child once the child is returned in accordance with the Hague Convention order. Unless contracting states can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that contracting States and courts will become reluctant to order the return of children."*

An English Approach

The high water mark of international judicial collaboration in Hague cases might well be the judgment of Singer J in *Re M and J (Abduction International Judicial*

Collaboration),[134] a judgment delivered in Family Division of the High Court of Justice on 16 August 1999. The case was unusual in that the children were in England with both of their parents and it was the maternal great grandmother who was claiming rights of custody under American law and seeking the return of the children.

Both parents had been involved with drug offences. The father had been deported from the United States, the mother had been in prison in the United States, and the children had been placed in the care of their great-grandmother. After the mother's release from prison, she took the children to England without the grandmother's consent. The case raised significant issues as to what would happen to the mother in the event that she tried to go back to California if the children were sent back there. The mother had been in breach of probation in leaving California. The great grandmother was prepared to leave the children in the mother's care upon her return to California. The trial Judge was concerned of the effect upon the children if the mother was arrested at the airport. That led the trial Judge, with the permission of the parties, to communicating with a Californian judge. The Californian judge, Ferrari J, advised Singer J that with the assent of the District Attorney he was able there and then to recall and quash the warrant for the mother's arrest and reinstate the mother's probation and to take no further action until issues relating to the children had been resolved. The next day Ferrari J made an order and faxed a copy of it to Singer J.

Singer J then had a telephone conversation with the mother's counsel and counsel for the great-grandmother. It was agreed he should then speak to Gutman J, the supervising judge of the Family Law Department of Los Angeles Superior Court to arrange the swift listing of a hearing to determine what orders might be made in advance of a return so as to regulate the position of the children pending such a hearing. The discussions between Gutman J and Singer J are set out in length in the reported judgment in this case. There then followed an adjourned hearing for ongoing email and fax contact between various judges. Glitches were overcome with continued trans-Atlantic telephone conversations . All in all, Singer J thought it was a very worthwhile exercise.

[134] [2000] 1 FLR 803.

In his commentary on the case, William M Hilton said:

> *"The views of Justice Singer, a well respected judge of the English High Court and a judge well versed in The Convention, as to judicial collaboration exemplifies the highest standards of the reach of The Convention.*
>
> *This is the second known case under The Convention where judicial collaboration has been used, the first being Diab vs Benoit (Canada 1996) Prov. of Quebec, Dist. of Terrebonne No 700-04-001386-967, available on Hilton House Web Site as: http://www.hiltonhouse.com/cases/Diab_cdn.txt*
>
> *The concept of judicial collaboration should be used whenever there is any concern about the logistics of returning a child to his/her habitual residence.*
>
> *Judicial collaboration can and should be used when ever there needs to be a seamless movement of children from one contracting state to another.*
>
> *The High Court's use of E-Mail, telephone contact and FAX are in harmony with Art. 7(h) of The Convention:*
>
> > *". . . to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child."*
>
> *The proper and effective use of judicial collaboration may also seen by the recent United States Court of Appeals Case Blondin v Dubois (2nd Cir 1999) --- Fed.App.3d ---; No.98-2834; 17 Aug 1999, available on Hilton House Web Site."*

Concluding Thoughts on Judicial Communication

It seems that the key to legitimacy of judicial cooperation, absent clear statutory authority, has to be the consent of the parties had and obtained. It would therefore be wise for judicial decision-makers to create a record of all the communications and to keep the parties informed of the nature of those communications. It would also be prudent to have the outcome of the communications confirmed in writing, either via fax or email, and copies provided to all parties affected by them.

In short, providing justice can be seen to be done, judicial cooperation in Hague cases is to be encouraged.

* * *