INTERNATIONAL APPLICATION AND INTERPRETATION OF *THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION*

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INTRODUCTION

The *Convention on the Civil Aspects of International Child Abduction* ("the Convention") was adopted by several nations at The Hague on 25 October, 1980. As a member of the Hague Conference, Australia ratified the Convention on 29 October, 1986. However, before treaty obligations have effect in Australia the enactment of 'enabling legislation' is necessary. In order to comply with this requirement section 111B was inserted into *The Family Law Act (Cth) 1975* and, since January 1, 1987, regulations have been made pursuant to this section,[1] thus enabling the performance of Australia's obligations under the Convention.[2]

Whilst the Convention has enjoyed steady ratification since its inception by countries from all continents, the most notable absence of support emanates from Asia.[3]

However, notwithstanding the global support that the Convention has attracted over the years, international child abduction seems to remain an imminent problem.

THE OBJECTIVE AND RATIONALE OF THE CONVENTION

In the formal language of the Convention, the overarching policy of the instrument is pronounced:

> **"…**to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[4]

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[1] *The Family Law (Child Abduction Convention) Regulations* S.R. 1986 No 85
[2] Kay J, (1994) *International Abduction of Children: An Australian Perspective* at 4
[3] Lindenmayer J *The Operation, Between Europe and Australia, of the Convention on the Civil Aspects of International Child Abduction The Hague Convention* at 2
[4] second paragraph of the preamble of the *Convention on the Civil Aspects of International Child Abduction*

It can be gleaned from this statement, in conjunction with the approach adopted by numerous Courts around the world, that the purpose of the Convention is to protect children from the harmful consequences of abduction which arise when they are wrongfully removed from their country of habitual residence, or wrongfully retained in a country other than that of their habitual residence, through the establishment of procedures which ensure their expeditious and safe return.[5] The Convention does not facilitate extradition and Article 19 specifically states that the instrument does not seek to adjudicate the merits of any residence dispute that may also be simultaneously occurring. The gravamen of the Convention, in reality, is to deter international abduction whilst preserving the child's rights to regular contact with both parents.[6]

In decisions emanating from the High Court of Australia[7] and the United States Court of Appeal,[8] it was emphasised by the members of each respective bench that, save for the most exceptional cases, the fundamental objective of the Convention is to facilitate the restoration of the pre-abduction status quo. Subsequently, this would have the desired "dual effect" of enabling disputes, with respect to residence and contact, to be resolved in the appropriate jurisdiction, whilst simultaneously depriving the abducting parent of the fruits of their reprehensible conduct.

According to reports regarding the harmful effects suffered by children who have been abducted, commentators have claimed that in **all** cases children are psychologically harmed and, sometimes, physically harmed as well.[9] Contextually, it is understandably frightening and confusing given the trauma that an abducted child experiences. For not only has the child's stable

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[5] *Re H (Abduction: Acquiescence)* [1998] AC 72 at 81 per Lord Browne-Wilkinson.
[6] Lindenmayer J, *op cit*, at 1
[7] *De L v Director General, NSW Department of Community Services* (1996) FLC 92-706 at 83,466
[8] *Lops v Lops*, United States Court of Appeals, Eleventh Circuit (7 May 1998) Friedrich, 78 F.3d at 1064 at para 81
[9] M Freeman, *The Effects and Consequences of International Child Abduction*, 1998. *Passim*

environment dissipated due to the parents' separation, but the child is then forced to leave familiar surroundings and friends, only to become a stranger in a foreign environment. Therefore, against the background of the preamble's conviction that "the interests of children are of paramount importance in matters relating to their custody," [10] the Convention's starting point is to promptly return an abducted child to their country of habitual residence.

It is important to note however, that this statement in the preamble is understood to promote the concept of the "best interests of children generally,"[11] as opposed to the best interests of the particular child, the latter being a concept tantamount to the *paramountcy principle* evident in Australian domestic law. The dichotomy arises because the former concept serves to deter future abductions and therefore promotes the central object of the Convention. This peculiarity, and seemingly unjust notion in the minds of many abducting parents, was eloquently expressed by Waite J in an English decision as follows:

> "It is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases."[12]

An understanding of the contrasting concepts can be gleaned from the High Court of Australia decision *ZP v PS*.[13] This case involved the abduction of a child from Greece to Australia, by the mother, at a time preceding the former country's ratification of the Convention. The mother had been awarded custody of the child pursuant to Greek law, however a Court Order prevented her from removing the child from the country. In violation of this Order, the mother abducted the child to Australia and commenced proceedings for sole custody, as it then was, in the Family Court of Australia.

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[10] Preamble to the *Convention on the Civil Aspects of International Child Abduction*
[11] R. Schuz, *The Hague Child Abduction Convention*, 1995 at 774
[12] *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 220
[13] (1994) 122 ALR 1

When the matter finally came before the High Court, in a joint judgment the Chief Justice and Toohey and McHugh JJ determined that, in the context of abductions occurring with respect to countries outside the ambit of the Convention, the welfare of the **particular** child is the paramount consideration.[14] This approach was in accordance with the domestic law of Australia, as opposed to the "mandatory return" concept as enshrined in the Convention.

In justifying the approach adopted by the Convention, Dorothy Daigle advocates that through abandoning the *paramountcy principle* as the appropriate standard, the Convention endeavours to prevent Central Authorities, in the requested states, from making decisions based upon the cultural principles of the child's origin country.[15] The concept of mandatory or automatic return of the child, in the absence of exceptional circumstances, effectively circumvents such a valuative and deliberative process. Furthermore, the fundamental premise is that the court in the country from which the child was abducted is the best equipped to determine disputes regarding the residence and the welfare of the child.[16]

In 1993, the Full Court of the Family Court categorically stated that the *paramountcy principle* had **no** application in Hague Convention matters,[17] and more recently the majority of the High Court confirmed this approach in *De L v Director General, NSW Department of Community Services*,[18] through stating that the objective of the Convention is:

> "…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 has been located in this way, each Contracting State has faith in the domestic law of the other Contracting

[14] (1994) 122 ALR 1 at 13
[15] D. Daigle, *Due Process, Rights of Parents and Children in International Child Abductions*, 1993 at 869
[16] Lindenmayer J, *op cit*, at 4
[17] *Murray v Director, Family Services, ACT* (1993) FLC 92-416 at 80,258.
[18] (1996) 187 CLR 640

> State to deal in a proper fashion with matters relating to the custody of children under the age of sixteen….It follows that they are not subject to the paramountcy principle."[19]

It is important to note however, that in the interests of judicial comity, in conjunction with the promotion of the international desire to discourage the abduction of children, the Australian Family Court endeavours to determine non-Convention child abduction cases in accordance with policy considerations which are similar to those evident in the instrument. Expressions by the Full Court of such intentions were evident in *Barrios and Sanchez:*[20]

> "…it is appropriate to take (the Convention) into account as an element to be considered, albeit subservient to the principle of the paramountcy of the welfare of the child."[21]

However, the Full Court has stressed that it is inappropriate to effectively apply the principles of the Convention in their entirety to non-Convention cases.[22]

The Convention is framed in such a way that, legally, the abduction of a child is regarded as an international tort, the appropriate remedy for such behaviour being the immediate return of the child.[23] In critiquing and examining the principles upon which the Convention is based, Adair Dyer advocates that this tortious approach is effective when the instrument is applied faithfully, thus making penal proceedings not only unnecessary, but sometimes counterproductive.[24]

In direct contrast however, the position in the United States of America is such that in an attempt to reinforce the Convention, Congress passed the *Federal Kidnapping Crime Act of 1993*, which, as its name suggests, imposes criminal

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[19] *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640 at 658.
[20] (1989) FLC 92-054
[21] *Barrios and Sanchez* (1989) FLC 92-054 at 77,609
[22] *In the Marriage of Van Rensburg* (1993) FLC 92-391 at 80,013.
[23] Article 3 of the *Convention on the Civil Aspects of International Child Abduction*
[24] A Dyer, *Childhood's Rights in Private International Law*, 1991, at 113

punishments on the abducting parent.[25] Through creating this federal felony offence, it was thought to fill the gap which existed by virtue of the fact that many countries refused to sign the Convention.[26] However, the effectiveness of this legislation is questionable given that in the case *United States v Amer*,[27] the Egyptian father, who abducted 2 children from the USA to his homeland, chose to serve the prison sentence as opposed to returning the children in accordance with the Act.

REASONS FOR INCREASE IN ABDUCTIONS

Since 1989, the number of children abducted per year from Australia, the USA and the UK, has steadily increased despite the operation of the Convention. In the first 9 months of the financial year 1998-9, as many as 113 such cases had been reported in Australia alone.[28]

Essentially, two major reasons can be cited as contributing to this continuous increase in international child abductions.

i.) Proliferation of Inter-cultural Marriages:

As a result of contemporary phenomena such as globalisation, in conjunction with advances made in the telecommunications and travel industries (e.g. the internet and concord respectively) the world is becoming an increasingly smaller place. One of the consequences that arises as a result of this change, is an increase in the number of bi-national/multicultural marriages. According to the Australian Bureau of Statistics, 28% of marriages registered in Australia in 1998 consisted of couples from different countries.[29] This is a substantial

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[25] A Sapone, *Children as Pawns in Their Parents' Fight for Control*, 2000, at 129
[26] *United States v. Amer*, 110 F.3d 873, 882 (2d Cir. 1996) *cert. denied*, 118 S. Ct. 258 (1997)
[27] *United States v. Amer*, 110 F.3d 873, 882 (2d Cir. 1996) *cert. denied*, 118 S. Ct. 258 (1997)
[28] Data compiled from various editions of "*International Chid Abduction Newsletters*" available at http://law.gov.au/childabduction/publications.html
[29] Australian Bureau of Statistics, *Marriages and Divorces* 1998 at 22

rise when one considers the minimal percentage associated with the same category 20 years ago, when different nations were not as closely connected given the absence of certain twenty-first century advancements.

Bi-national marriages can be based on different, and often opposing, cultural norms and religions.[30] Consequently, when these type of marriages breakdown there is an increased risk of abduction occurring for two reasons:

1.) one party may abduct the child to their homeland in order to ensure that they are raised in accordance with the religion and/or cultural norms that conform with their own;[31] and
2.) following the failure of the marriage, one party may be left in a foreign environment without any support.[32]

Furthermore given that, frequently, the offspring of bi-national couples have dual citizenship, the children can be taken from one country and gain entry to another quite easily.[33]

The abduction of children to countries where family law is governed by Islamic traditions, which are generally regarded as patriarchal and oppressive when compared with Western practices and beliefs, is illustrative of the problems that may arise by virtue of the chasm potentially generated by multi-cultural marriages. So enormous is the divide that in countries where Islamic law dominates society, the Convention has not been adopted, essentially leaving the deprived parent, which is usually the mother, with no legal recourse.

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[30] A Sapone, *op cit*, at 130
[31] *ibid*
[32] Kay J, *The Hague Convention – Order or Chaos?,* 1999, at 1
[33] A. Sapone, *loc cit.*

Often, for the mother, obtaining custody of the child pursuant to the law of the Islamic country to which the child has been abducted is also virtually impossible given that:

> a.) regardless of the mixed heritage of the child, at law, the child is considered to be a Muslim and a citizen of the father's country; and
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> b.) Muslim fathers always have ultimate custody of the children, whereas the mother's right of custody dissipates when the child reaches the age of independence, which is seven for a son and nine for a daughter.[34]

ii.) Consequence of Domestic Violence:

Studies have indicated that there is a high correlation between incidents of child abduction and marriages plagued with domestic violence.[35]

To many batterers, abducting the child of the marriage is a further way of abusing their spouse, notwithstanding the fact that physical violence may have ceased.[36] In the United States of America as many as 25% of batterers abduct their children.[37]

However, whilst this alternative manifestation of domestic violence contributes to an increase in the occurrences of child abduction, according to English barrister Marilyn Freeman, domestic violence further contributes to the problem in another way. Her studies conclude that more and more frequently it is the battered wife who, in the absence of a supportive environment following separation, abducts the children so that she can escape to a place

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[34]D. Andrews, *Non-Muslim Mothers v Egyptian Fathers*, 2000, at 609
[35]A. Sapone, *op cit*, at 131
[36] *id*, at 394
[37]A. Sapone, *loc cit*

where familial and emotional support is available.[38] Furthermore, Freeman cites the gender-bias evident in the language of the Convention and the principles applied in family law proceedings with respect to both the division of property and battered wife syndrome, as factors which contribute to women needing to seek a more compassionate environment.[39]

THE LAW IN AUSTRALIA

Central Authority

Article 6 provides that all countries or Contracting States that adopt the Convention, must establish a Central Authority to pursue the obligations imposed by the instrument. Delineated in Article 7 are the functions that a Central Authority must perform, the most important of which is the responsibility to locate[40] and secure the voluntary return of the child,[41] or alternatively, institute proceedings if judicial intervention is necessary.[42]

Deprived parents who seek to benefit from the Convention must apply to the Central Authority in the contracting state to which the child has been abducted, or the Central Authority of the child's habitual residence, for assistance in ensuring the return of the child.[43] Interestingly, if a child is abducted **to** Australia only a Central Authority has standing to make an application for an order, under the *Family Law (Child Abduction Convention) Regulations,* for the return of the child and should an order be forthcoming, it will direct the return

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[38] M Freeman, *Gender Bias and the Hague Child Abduction Convention, passim*
[39] *ibid*
[40] Article 7(a) of the Convention, in conjunction with regulation 5 of *Family Law (Child Abduction Convention Regulations*
[41] Article 7(c) of the Convention in conjunction with regulation 5 of *Family Law (Child Abduction Convention Regulations*
[42] Article 7(f) of the Convention in conjunction with regulation 5 of *Family Law (Child Abduction Convention Regulations*
[43] Article 8 of the Convention in conjunction with regulations 11 and 13 of *Family Law (Child Abduction Convention Regulations*

of the child to the country from which he/she was abducted, as opposed to the care of the deprived parent, as one would anticipate.[44]

Legal Elements of the Convention

In order to activate the overall objective of the Convention and secure an order for the mandatory return of an abducted child in accordance with Article 11, the following elements must be established by the deprived parent/Central Authority in Australian courts:

1.) there must be a wrongful removal or retention of a child;[45]

2.) the child is under 16 years of age;[46]

3.) the child was habitually resident in a Contracting state immediately prior to the removal to or retention in another Contracting State.[47]

Wrongful Removal or Retention

In the context of the Convention, the issue of "wrongfulness" is pivotal, with Article 3 specifying that in order to seek relief, the applicant must establish:

(a) the removal or retention of the child occurred in the absence of consent or after consent was withdrawn;

(b) the removal or retention of the child effectively breached the rights to custody possessed by the deprived parent [notwithstanding

[44] *Gsponer v Director-General, Department of Community Services (Vic)* (1989) FLC 92-001
[45] Article 3 of the Convention in conjunction with regulation 16(2)(a) of *Family Law (Child Abduction Convention Regulations*
[46] Article 4 of the Convention in conjunction with regulation 16(2)(c) of *Family Law (Child Abduction Convention Regulations*
[47] Article 4 of the Convention in conjunction with regulation 16(2)(b) of *Family Law (Child Abduction Convention Regulations*

the fact that rights of custody may also be attributed to a public body or local institution]; and

(c) the rights of custody were actually being exercised at the time of removal or retention, or would have ultimately been so exercised but for the removal or retention of the child.[48]

As is eloquently delineated by Lord Prosser in the Scottish decision *Kilgour, MS v Kilgour , J*[49] "wrongful retention" is essentially a single, initial event, as opposed to a continuing event:

> "…the retention in question is an initial act of retention comparable in its effects to the act of removal, and…the Convention is not primarily concerned…with the new state of affairs which will follow on such initial acts and which might also be described as retention."[50]

In this case, the child was removed from Canada to the United Kingdom at a time preceding the implementation of the Convention between the two countries. In interpreting the word "retain" narrowly, the Court refused to recognise that after the Convention was implemented, the child was being wrongfully retained. Such a position is supported by regulation 16(3)(d) of the *Family Law (Child Abduction Convention) Regulations.*

The Australian decision of *Hanbury-Brown and Hanbury-Brown; Director General Community Services*[51] considered the meaning of the words "retention" and "removal" and determined that they needed to be construed in the context of the Convention.[52] It can be gleaned from the judgment that the dichotomy between the words can be explained by regarding the word "removal" as involving the concept of physical relocation from one Contracting

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[48] Lindenmayer J, *op cit.*, p.6
[49] (1987, SLT 568) sourced from http://www.hiltonhouse.com/cases/Kilgour.uk
[50] (1987, SLT 568) sourced from http://www.hiltonhouse.com/cases/Kilgour.uk
[51] (1996) FLC 92-671
[52] (1996) FLC 92-671 at 82,965

State to another, whilst "retention" reflects the notion of keeping a child in one Contracting state as opposed to another.[53]

In this case the mother attempted to argue that the Convention applied to the removal of a child from the custodian, as opposed to the country, and that the instrument mandated the child's return to the deprived parent, as opposed to the Contracting State. The Full Court thwarted the mother's attempts to successfully argue this submission, by concluding that such reasoning would facilitate the application of the Convention in cases of abduction which did not involve an international aspect and may only be intra-state.[54]

It is interesting to note that in *State Central Authority v Sue Bine Ayob,*[55] an Australian Judge, Kay J, ordered the return of a child to the United States of America, despite the fact that the mother had initially taken the child to Malaysia, a country which is not a signatory to the Convention. His Honour found that the child had in fact been wrongfully removed from the USA to Australia, albeit via a third country, and it was ordered that the child be returned to the USA.

Rights of Custody

"Rights of custody" is a term defined in the Convention[56] to include rights relating to the care of a child. Internationally, this has been interpreted widely and a parent is regarded as possessing custodial rights if they have a residence or specific issues order in their favour which grants them responsibility for the child's day to day care. Court decisions emanating from Australia, America, England, France and Israel are illustrative of the breadth of the application and interpretation of this term. Case law from these

[53] (1996) FLC 92-671 at 82,966
[54] (1996) FLC 92-671 at 82,970
[55] (1997) FLC 92-746

jurisdictions confirm that the mere right to consent to the child's removal from the jurisdiction is tantamount to a "right of custody" under the Convention.[57] Therefore, in the context of the Convention, this term encompasses rights afforded through the concept of joint custody and this approach is uniform throughout both common law and continental, civil law countries.[58]

When the Court is requested to determine whether a parent enjoys rights of custody, it is the law of the country in which the child is habitually resident that must be examined. Pursuant to s111B(4) of the *Family Law Act 1975*, in Australia, in the absence of a court order to the contrary, each parent is to be regarded as having custody of a child.

In England the law stipulates that unmarried fathers do not have parental responsibility of a child, in the absence of a court order directing otherwise, as was evident in the English case *Re W; Re B (Child Abduction: Unmarried Father).*[59] Essentially this was a test case in which two unmarried fathers sought declarations that the removals of their children from England were wrongful. However, the surrounding circumstances of each case differed slightly. The first father had initiated proceedings in an attempt to obtain parental responsibility prior to the children's departure, whereas the latter had not. In focusing on this as a distinguishing factor, Hale J found the removal of the children in the first instance to constitute a "repugnant" attempt to frustrate the court process and in breach of rights of custody and, consequently, "wrongful" under the Convention, whereas the latter removal was not "wrongful" according to law.

Habitual Residence

[56] Article 5 of the Convention in conjunction with regulation 4 of *Family Law (Child Abduction Convention Regulations*
[57] A Dyer, *The Hague Convention: Its Successes and Failures* – Part I, at 18
[58] *Ministere public c MB* (1990) 79 Rev crit de d.i.p. 529
[59] [1998] 2 FLR 146

Whilst article 4 of the Convention refers to the concept of "habitual residence," the term remains without any form of accepted, comprehensive, legal definition. The flexibility afforded to such a concept has distinct advantages and it is only case law which is a source of guidance on this issue. Given the high degree of malleability associated with the term, the Courts are able to focus on the specific facts of each particular case rather than the intent of the parent to reside in a particular location.[60]

The flexibility of this definition was evident in 1991, when the Berlin Supreme Court concluded that children removed from Germany 6 months prior had in fact established a place of habitual residence in England in that limited period of time.[61]

Interpretation of the term internationally however, clearly delineates that the concept of dual habitual residence is just not possible:

> "…the notion of dual habitual residence is simply inconsistent with the wording…[and] the entire spirit and sense of the Convention."[62]

Which is consistent with the sentiments expressed by the United States Court of Appeal:

> "…a person can have only one habitual residence."[63]

When Return of the Child is not Mandatory:

Assuming a deprived parent is successful in establishing a case for the return of the child, notwithstanding the overall policy of the instrument regarding mandatory return, the Convention makes provision for a couple of narrow

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[60] Dyer A., *Recognition and Enforcement – Abroad,* at 11
[61] *AZ 3UF* 5187/91
[62] *Hanbury-Brown and Hanbury-Brown; Director General Community Services* (1996) FLC 92-671 at 82,971

exceptions and situations which, when proven on the evidence, bestow the Court with a discretion as to whether the return of the child should be ordered or not.

The discretion, unfettered by the "mandatory return" principle, seldom arises and is often difficult to invoke. However, the discretion arises if one of the following is established on the evidence:

- one year has elapsed between the date on which the child was removed or retained and the date on which an application was lodged under the Convention;[64]
- the child was removed or retained when custody rights were not actually being exercised; or alternatively the removal or retention was consented to or subsequently acquiesced to by the deprived parent;[65]
- should the child be returned there is a grave risk of exposure to either physical or psychological harm; or the child would otherwise be placed in an intolerable situation;[66]
- the child objects to being returned and has reached an age and possess a degree of maturity which warrants the Court taking into account his/her wishes;[67]
- the return of the child would be abhorrent to the fundamental principles of the Requested State with respect to the protection of human rights and fundamental freedoms.[68]

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[63] *Friedrich v Friedrich* 983 F.2d1369 (6th Cir 1993)
[64] Article 12 in conjunction with regulation 16(1)(a) of *Family Law (Child Abduction Convention) Regulations* - Please note that there is Judicial disagreement as to whether the Convention has **any** application once one year has elapsed and the child has been found to be settled – see commentary below and cf: *State Central Authority v Ayob* (1997) FLC 92-746 and *Re L (Abduction: Pending Criminal Proceedings)* [1997] 1 FLR 4 on this point.
[65] Article 13(a) in conjunction with regulation 16(3)(a)(i) and (ii) of *Family Law (Child Abduction Convention) Regulations*
[66] Article 13(b); in conjunction with regulation 16(3)(b) of *Family Law (Child Abduction Convention) Regulations*
[67] Regulations 16(3) (c) *Family Law(Child Abduction Convention) Regulations*

However, it is important to remember that even if one of the exceptions or defences to the presumption of mandatory return is made out, the Court merely has a **discretion** as to whether to order the return of the child or not.

Time Limitations

Whilst this is an exception to the "mandatory return" policy of the Convention, the onus is on the abducting parent to establish that not only has the time limit of one year expired, but that the child is also settled into his or her new environment.

As was emphasised in the report of the Second Special Commission, which is a meeting specifically convened to review the operation of the Convention, the date on which the child is taken across the international border is irrelevant,[69] but rather time starts to run when the child is wrongfully removed/retained or when the consent of the deprived parent is withdrawn.

In determining whether the child is settled in the new environment, the Australian approach has fluctuated significantly over the past decade. Initially the Full Court in *Graziano v Daniels* [70] adopted a more restrictive approach, consistent with that followed in the United Kingdom,[71] which required the child to be integrated into the outside environment and community, rather than just being happy and integrated into the new family.

A differently constituted Full Court in *Director-General, Department of Community Services v M &C*[72] overruled *Graziano* as placing an improper

[68] Article 20; in conjunction with regulation 16(3)(d) of *Family Law (Child Abduction Convention) Regulations*
[69] Report of the Second Special Commission, 18-21 January, 1993 – response to question 18 sourced at http://www.hiltonhouse.com/articles/Official.rpt
[70] (1991) FLC 92-212 at 78, 436
[71] *Re N (Minors: Abduction)* [1991] 1FLR 413
[72] (1998) FLC 92-829

gloss on the wording of the Convention, rather than interpreting it in accordance with its ordinary meaning, as is required.[73]

Therefore, an accurate statement of the contemporary liberal approach provides that "the only test to be applied is whether the children have settled in their new environment,"[74] as was confirmed by the Full Court in *Townsend v Director-General, Department of Families, Youth and Community Care*.[75] This liberal approach is consistent with that adopted in Germany, as was delineated in *Rodriguez v Buchholzer*.[76]

However, when an application is made after one year and a finding that the child is settled in their new environment is forthcoming, the approach to be adopted by the Court is in dispute. *In State Central Authority v Ayob,*[77] Kay J held that where one year had elapsed, even if the child was regarded as settled, the Convention had no further application and that any discretion which may exist in these circumstances only did so pursuant to common law, as opposed to the Convention.[78] In support of this approach Perez-Vera maintains that:

> [I]t is clear that after a child has become settled. . . its return should take place only after an examination of the merits. . . which is outside the scope of the Convention...[79]

In conjunction with:

> [The] obligation [to order return] disappears whenever it can be shown that "the child is now settled in its new environment."[80]

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[73] *De L v Director General, New South Wales Department of Community Services* (1996) 187 CLR 640
[74] (1998) FLC 92-829
[75] (1999) FLC 92-842
[76] 7 Ob 573/1990
[77] (1997) FLC 92-746
[78] (1997) FLC 92-746 at 84,072
[79] E Perez-Vera, *Actes et documents de la Quartorzieme session*, Vol 3, 1980, p426, para 107.
[80] Ibid at para 109.

However, in *obiter dicta* the Full Court recently commented that they were not necessarily persuaded by the view that judicial discretion did not exist following the expiration of one year when a child is regarded as settled.[81] In England, Wilson J preferred the notion that judicial discretion remains where a child is regarded as settled after one year.[82]

Acquiescence

If the abducting parent successfully establishes acquiescence with respect to the relationship between the aggrieved party and the child, in the context of the latter's removal from the former, the protection afforded by the Convention is not enlivened. However, exactly what the abductor must positively prove to effectively derive the benefit of this defence differs from country to country.

The Australian approach is narrow and strict and requires acquiescence to "be clear and unqualified,"[83] after the deprived parent is aware of the fact that the child has been removed/retained. In the same judgment Murray J further stipulated that the deprived parent must also be conscious of their rights against the abducting parent, although the Judge stipulated that they need not necessarily be aware of their specific rights under the Convention.

The United States has a similar approach:

> "Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time."[84]

Grave Risk

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[81] *Director-General, Department of Community Services v M & C* (1998) FLC 92-829
[82] *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433
[83] *Police Commissioner of South Australia v Temple* (No. 1) (1993) FLC 92-365 at 79, 828 per Murray J
[84] *Friedrich* (6th Cir 1996, 78 F 3d 1060)

Once again given that this excuse potentially relieves the Court of the "mandatory return" obligation that they are otherwise bound to observe, Courts in Australia, England,[85] and Canada[86] have applied this principle both narrowly and sparingly.

The Australian case *Gsponer v Director-General, Department of Community Services (Vic)*[87] annunciates that the return of the child to a harmful or intolerable situation is determined in the context of their return to a **place,** rather than the care of the deprived parent. That is, the risk of domestic violence being perpetrated against the child by the deprived parent is not sufficient to enliven the jurisdiction of the Convention because it is the responsibility of the Courts in the country of the child's place of habitual residence to afford this type of protection.

The Full Court summarised this position in *Murray and Director General of Family Services,*[88] when they ordered children to go home to New Zealand despite the high risk that they may have suffered the effects of domestic violence at the hand of their father upon returning:

> " …it would be presumptuous in the extreme, for a court in this country to conclude that the wife and children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts."[89]

Wishes of the Child

Justice Kay has delineated that the accurate approach to adopt when considering this exception involves the application of a two-fold test which proposes the following questions:[90]

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[85] *Re E (A Minor) (Abduction)* [1989] 1 FLR 135 per Balcolmbe J
[86] *Thomson v Thomson* (1994) 6RFL (4th) 290
[87] (1989) FLC 92-001
[88] (1993) FLC 92-416
[89] (1993) FLC 92-416 at 80,259
[90] Kay J, *op cit*, at 27

1.) Does the child object to being returned to his or her place of habitual residence ?; and

2.) Is the child at an age and does he or she possess such a degree of maturity that it is appropriate to take his or her wishes into account?

Contrasting positions have been espoused by different Courts around the globe with respect to, firstly, the interpretation of the word "objects" and, secondly, the age at which a child is regarded as being sufficiently mature for their views to be considered.

In the Australian decision *De L v Director General, NSW Department of Community Services,*[91] the High Court concluded that the word "objects" needs to be construed according to its ordinary meaning. In citing the English position with approval, their Honours noted the following passage from the judgment *Urness v Minto*:[92]

> "…the expression ['the child objects to being returned'] is to be applied in its ordinary literal sense. The child must object to returning to the country from which it was wrongfully removed."

Therefore, if a child's objection to returning to their place of habitual residence is motivated by a desire to avoid being placed in the care/custody of a particular parent, the exception will not be made out. *Commissioner, Western Australia Police v Dormann*[93] is illustrative of this point. In this case Holden J concluded that the exception was not enlivened because the thirteen year old child objected to being returned to his father, rather than the UK.

Whilst it can be gleaned from Australian case law that, as a general rule of thumb, a child aged twelve possess the appropriate degree of maturity to warrant the Court considering their wishes, there is no authoritative, binding

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[91] (1996) 187 CLR 640

[92] [1994 SLT 988 at 998 as per Lord Penrose

principle to this effect. However, the Courts in both Australia[94] and England[95] have refused to return a younger sibling, whose objections would not otherwise have been a relevant consideration, if the objections of an older sibling enliven the jurisdiction of the exception. The Australian Court specifically stated that to order the return of a six year old child, when his/her thirteen year old sibling was permitted to remain in Australia in accordance with their wishes, would be intolerable.[96]

It is interesting to note that in Germany it was held that a child aged seven was mature enough for the jurisdiction to be enlivened,[97] however this approach has been criticised by academics worldwide. However, each decision must be based on the particular child, for even in Australia the views of children aged nine have been considered in some cases,[98] yet ignored in others.[99] Pursuant to the *Swedish Code on Parents and Children*, the age of twelve is specifically stipulated as the appropriate age at which a child's opinion will become relevant.[100]

Protection of Fundamental Freedoms

Evocation of this defence would be extremely difficult and, primarily, it was inserted to ensure global support for the Convention. In one of the few Australian cases that has considered the operation of this regulation, the Full Court in *McCall and McCall; State Central Authority; Attorney-General of the Commonwealth*,[101] commented that a refusal based on this regulation would require evidence which established that the fundamental principles of the requested State did not permit the return, rather than merely the presence of a

[93] (1997) FLC 92-766
[94] *In the Marriage of Bassi* (1994) FLC 92-465
[95] *Re M (Abduction: Psychological Harm)* [1997] 2 FLR 690
[96] *In the Marriage of Bassi* (1994) FLC 92-465
[97] *AZ* 1F 124/91
[98] *Director-General, Department of Families, Youth abd Community Care v Thorpe* (1997) FLC 92-785
[99] *Police Commissioner v Temple (No. 1)* (1993) FLC 92-365
[100] *Shamsi v Heijkenskjold* (10 April, O 278-89)
[101] (1995) FLC 92-551 at 81,509

manifest incompatibility with those principles should the child be returned. Their Honours further noted that it would be difficult to imagine a situation in which this defence would be necessary given the existence of regulation 16(3)(b).[102]

Reforms

The most significant, contemporary reform that the Convention endured in Australia, arose as a result of the Family Law Amendment Act 2000 ("the Act"). The Act, which was assented to on 29 November, 2000, commenced, for the most part, on 27 December, 2000.[103]

In Explanatory Memorandum which provided the reasoning behind the amendment, it was explained that in accordance with the central objective of the Convention, the pre-abduction status quo should be expeditiously restored in the absence of any consideration of the best interests of the child in the particular case. Accordingly, parliament explained that the separate representation of children who objected to being returned should only be confined to exceptional cases which warranted such representation, with such circumstances to be specified by the Judge when such an order was made.[104]

The effect of the amendment is to overturn the current position in Australia, which can be gleaned from a High Court decision, to the effect that where a child expresses an objection to return under the Convention, that child should ordinarily be separately represented in the proceedings.[105]

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[102] (1995) FLC 92-551 at 81,509 at 81,519 and Report of the Second Special Commission, 18-21 January, 1993 – response to question 30 sourced at http://www.hiltonhouse.com/articles/Official.rpt
[103] Section 2 of the Family Law Amendment Act 2000
[104] Explanatory Memorandum re: Clause 68L(2A) of Family Law Amendment Bill 2000, when the Bill was read for the first time on 22 September, 1999.
[105] *De L v Director General, New South Wales Department of Community Services* (1996) FLC 92-706

Despite vehement opposition to this proposed amendment, which was voiced by various members of the Family Law Profession, including Justices of the Court, at the Senate Legal and Constitutional Legislation Committee meeting in November, 1999,[106] Item 68 of Schedule 3 of the Act has amended sub-section 68L(2) of the *Family Law Act 1975*, in order to reflect the wishes of Parliament and overturn the position delineated by the High Court on this point.[107]

One must critically evaluate the soundness of such a reform, particularly given that when a defence or exception is raised under Article 13 of the Convention, the Court requires evidence to assess whether the requisite elements are established. These assessments are most effectively made by a separate, independent representative who is focused on the interests of the child.

However, some of the recommendations offered at the meeting with respect to the proposed amendments regarding the Convention were incorporated into the Act, including Justice Kay's suggestion that the Act should not specify that the child should be returned to their 'country of habitual residence,' but rather that it should be silent on the point and, consequently, be consistent with the Convention. The Judge explained that such an approach was necessary to cover the situation where a court has permitted the child to reside in a country other than that of their habitual residence, for a specific period of time, and they are then abducted. To include the phrase as the Bill initially proposed, would mean that the child would have to be returned to their place of habitual residence, notwithstanding the fact that the deprived parent had permission to reside in another country, with the child, for a specified period of time.[108]

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[106] Senate Legal and Constitutional Legislation Hansard held on 9 and 15 November, 1999 as per Nicholson CJ, Kay J, Meredith from Law Society NSW and Ryan from Legal Aid Commission NSW and National Legal Aid sourced from http://www.aph.gov.au/hansard/senate/commttee/comsen.htm. *passim*
[107] Item 68 of Schedule 3 of the Family Law Amendment Act 2000.
[108] Senate Legal and Constitutional Legislation Hansard held on 9 November, 1999 as per Kay J, L&C 16 sourced from http://www.aph.gov.au/hansard/senate/commttee/comsen.htm

A further amendment to the application of the Convention, as a result of the Act, makes provision for a costs order to be made against the party who wrongfully removed the child, or prevented the exercise of rights of access to the child, for the necessary expenses incurred by the deprived parent as a result.[109] Although pursuant to regulation 30 of the *Family Law (Child Abduction Convention) Regulations*, the Court already had the power to do this when orders were made pursuant to certain regulations.

Undertakings

Whilst English and US jurisdictions have been willing to accept undertakings from the abducting parent which govern the return of the child, Australian courts have been critical of their effectiveness given that there is no mechanism to ensure that such an undertaking is complied with.[110]

Despite Chief Justice Nicholson's efforts to expand the Convention to include the enforcement of undertakings generally,[111] the effect of Item 87 of Schedule 3 of the Act is that the Australian Central Authority is not bound to make decisions, pending court proceedings, in accordance with any undertakings that may have been given in another jurisdiction.[112] Arguably, such an approach fails to embrace or promote an atmosphere of co-operation with respect to this issue.

Conclusion

Whilst the Convention may not provide a solution for abductions to or from non-signatory countries, the rate of expeditious returns ordered by the

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[109] Item 98, Schedule 3 of *Family Law Amendment Act 2000*
[110] *McOwan v McOwan* (1994) FLC 92-451 at 80, 691 per Kay J
[111] Nicholson CJ, *Australian Judicial Attitudes to the Hague Convention on the Civil Aspects of International Child Abduction* and M. Banotti and A. Hennon, *Problems in the operation of the Hague Convention on International Chid Abduction* at 3.
[112] *id*

Australian Courts, in accordance with the objective of the Convention, remains high.[113] With respect to the countries which are signatories to the Convention, centralised court systems have been recommended to ensure a more consistent and uniform application of the Convention on an international level.[114]

However, given Australia's rich and diverse multi-cultural society, appropriate remedies for abductions to countries with dissimilar religious and societal practices to mainstream Anglo-Saxon traditions, should be pursued in order to facilitate peaceful resolutions to international child abductions. International mediation is a widely supported concept, which is similar to the role currently fulfilled by the European Parliament Mediator, which endeavours to encourage solutions through co-operation between the parties involved, their lawyers, the Central Authorities and any other relevant bodies.

With the spotlight currently on international child abduction given the imminent amendments to the application of the Convention in Australia, through the dissemination of information, education and the encouragement of co-operation with respect to this issue by members of the family law profession, surely this will assist in navigating a peaceful passage through these tumultuous waters.

[113] Data compiled from various editions of "*International Chid Abduction Newsletters*" available at http://law.gov.au/childabduction/publications.html
[114] M. Banotti and A. Hennon, *loc cit*

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