生））」にそれぞれ改める。

⑵　同６頁２行目の「同合意書には」を「同合意書（以下「本件合意書」という。）は公証人による宣誓認証書面として作成され」に，同４行目から５行目にかけての「できると記載されている。」を「できる，原審相手方は，本合意に従わなかった場合は，米国及び国際的な政府による救済措置を含む法的措置がとられることを理解する旨記載されている。」に，同７行目から８行目にかけての「出国した。」を「出国し，そのころ日本に入国した。」にそれぞれ改め，同１７行目の「平成２６年７月２９日」の前に「原審相手方と子らは，日本に入国後，原審相手方肩書住所地にある祖父母宅に祖父母とともに居住している。」を加える。

⑶　同７頁１５行目末尾に「子らは，同年９月，同志社インターナショナルスクール京都（ＤＩＳＫ）に入学した。」を加える。

⑷　同８頁２４行目を次のとおり改める。

「ウ　同訴訟（以下「ミネソタ訴訟」という。）における原審申立人の子らの親権及び監護時間に関する申立てにつき，同年１０月１９日，同裁判所は，ミネソタ州は子らの親権及び監護時間に関する管轄を有しないとして，原審申立人の上記申立てを却下する決定（以下「ミネソタ決定」という。）をした。その理由は，ミネソタ州法において，管轄の要件として子らが手続開始直前の６か月間同州に居住していなければならないと定められているところ，手続開始時（原審相手方が申立書の送達を受けた平成２７年４月２７日）において子らは同州に居住しておらず，その不在は上記定めにおいて６か月の期間に含めるとされる「一時的不在」にも当たらないというものであった（乙５４，７０）。」

２　争点及び争点に対する当事者の主張は，当事者の各抗告理由の要旨を次項に付加するほか，原決定の「理由」欄の第２の２及び３（原決定１７頁６行目から２３頁１５行目まで）に記載のとおりであるからこれを引用する。

3　当事者の各抗告理由の要旨は次のとおりである。

(1)　原審申立人の抗告理由

ア　争点５（子の異議）について

(ｱ)　返還拒否事由としてのいわゆる子の異議（法２８条１項５号）を認めるに当たっては，① 単に子が返還に異議を述べているだけでは足りず，異議の内容として，連れ去り親と一緒にいることや，留置先の国にいたいという希望，留置先の国にいる方が好ましいということを超えた強さが必要であり，② 残された親の元へ返還されることではなく，常居所地国へ返還されることについての異議でなければならず，③ 合理的な理由に基づく異議でなければならない。しかるに，原審家庭裁判所調査官による調査（以下「原審調査官調査」という。）は，上記のような子の異議に対する理解と配慮を欠いたまま行われたものである。

したがって，原審調査官調査の結果をそのまま本件の判断の資料にすることはできないし，上記①ないし③の要件を満たすような子の異議が述べられたと認めることもできない。

(ｲ)　原審調査官調査に対する長男及び二男（調査当時１２歳）の陳述は，認知能力及び思考能力が未だ十分に発達しないまま，原審相手方からの不当な影響を受け，又は片親疎外の状況に陥っている状況下でなされたものである。このため，彼らの陳述は，日本での生活（それは，ＤＩＳＫという学校の特別な環境を中心としたものである。）の良い面ばかりを取り上げて美化する一方，米国での生活の悪い面ばかりを取り上げてこれを貶めるものとなっており，また，原審相手方を無条件に賛美する一方，原審申立人に対しては否定的な評価に終始している。

この点からも，長男及び二男の上記陳述をもって，上記①ないし③の要件を満たすような子の異議が述べられたと認めることもできない。

イ　争点６（裁量返還）について

長男及び二男につき返還拒否事由としての子の異議が認められるとしても，① 合理的な理由に基づく客観的，具体的，絶対的な強い異議であるとまではいえないこと，② 米国に戻れば出生以来長年慣れ親しんだ環境のもとでの生活を再開できること，③ 長女及び三男については米国への返還が命じられた以上，原審相手方はこれに同伴して米国に戻るであろうことを考慮すれば，長男及び二男についても裁判所の裁量により返還を命ずるべきである。

(2) 原審相手方の抗告理由

ア 争点１（常居所地国）について

(ｱ) 常居所の認定方法と子らの常居所地国について

a 条約締約国における裁判例及び解釈指針に従えば，両親の合意で，終期を定めずに子が転居した場合，子の常居所は，転居時に，又はその後短期間で転居先となる。

原審相手方及び子らの来日に先立ち作成された本件合意書で，原審申立人と原審相手方との間で，同年８月２９日までに子らを米国に戻す旨合意されているが，これは暫定的な合意にすぎず，子らの日本の滞在について，原審申立人と原審相手方との間で確定的な期限は定められていなかった。むしろ，子らの日本の滞在の期限についての当事者双方及び子らの認識は，原審申立人が就業し，以前のような生活ができるようになるまでという不確定なものであった。しかるに，就業については，原審申立人は，精神障害者のための職業紹介の公的支援を受けている状態であり，ドーナツショップ開業等の計画も具体化していなかった。また，生活については，自宅のローンが支払えず売却を試みている状態であった。このように，来日時において，短期間に日本の滞在を終了できる見込みは全く立っていなかった。

また，原審申立人が，子らの来日前に大阪ＹＭＣＡインターナショ

ナルスクールに子らの入学願書を出し，プロビデンス・アカデミーには長期間の休学について相談していたこと，来日後には子らのＤＩＳＫへの入学手続，学校生活及び習い事（ピアノ）につき協力したことからすれば，原審申立人の意思としても，日本の滞在が短期間に終了することを予定していなかった。来日に際して身の回り品しか持参しなかったのは，荷物が多いと輸送費が高額となること，子らが成長期にあるため衣服等は日本で購入した方が合理的であることによるものであり，日本の滞在が短期間に終了すると予定していたからではない。

このように，子らの転居は終期を定めずになされたものというべきであるから，子らの常居所は，来日時に，又はその後短期間で転居先（肩書住所地）となる。

ｂ　そして，子らの転居先（肩書住所地）が，幼少時から交流のあった祖父母の住居であること，ＤＩＳＫでも通学開始後すぐに多数の友人ができ，ＤＩＳＫを気に入って通学していることからすれば，通学を開始した平成２６年９月には，肩書住所地が子らの常居所となっていた。

(ｲ)　ミネソタ決定との関係について

ミネソタ決定は，国際裁判管轄も視野に入れて，子らの利益の観点から，本件とほぼ同一の証拠に基づいて，子らの不在は「一時的」なものとは認められないと判断し，子らの親権及び監護の問題につき同州の管轄を否定したものであり，本件においても参考とされるべきである。

また，日本の裁判所が子らの親権及び監護に関する国際裁判管轄を有すると解されるのに対し，ミネソタ州裁判所はこれを有しないと既に判断しており，この判断は，同州法の規定上，子らが物理的に同州内に戻っただけで自動的に覆るものではない。この点からしても，子らの常居所が米国にあるとの判断を前提に，子らの米国への返還を命じることは

誤りである。

イ　争点３（留置に関する同意）について

(ｱ)　両親の合意で子を転居させた後，一方が合意を破棄して子の返還を求めたことで，不法な留置となるわけではない。合意を一方的に破棄することを認めるような法理は存在しない。

したがって，本件において，子らの不法な留置があったということはできない。

(ｲ)　原審申立人は，不法な留置の開始時期の特定に困難をきたしている。原審申立人は，就業して以前のように暮らせるようになるまで子らが日本に滞在する旨の合意をしたにもかかわらず，一方的にこの合意を破棄した時点をもって不法な留置の開始日としようとし，いつ合意を破棄したかについて自ら決めかねているために不法な留置の開始日の特定が困難になったと思われる。

原審申立人が一方的に合意を破棄したことによって，原審相手方が子らを日本に滞在させることが不法な留置となるわけではない。

ウ　争点４（重大な危険）について

(ｱ)　長男及び二男につきその異議に基づいて本件申立てが却下され，長女及び三男につき返還が命じられることによって生じるきょうだい分離の状況は，長女及び三男にとって法２８条１項４号にいう「重大な危険」に当たる。このことは，他の締約国の裁判例からも明らかである。

なお，きょうだい分離を避けるために長男及び二男が自発的に米国に行くことになれば，長男及び二男の利益が著しく害される。また，きょうだい分離による不都合は，きょうだい間の交流を密にすることによって回避できるものではない。

(ｲ)　原審申立人が子らに対して暴力的・高圧的な言動をすること，原審申立人が精神的障害を有していることは，原審調査官調査の結果及び多数

の書証によって明らかであり，このことによっても，「重大な危険」があるといえる。

第３　当裁判所の判断

１　子らの常居所地国（争点１）について

⑴　常居所地国とは，連れ去りの時又は留置の開始の直前に子が常居所を有していた国をいい（法２条５項），常居所とは，人が常時居住する場所で，相当長期間にわたって居住する場所をいうと解されるところ，認定事実(2)によれば，子らが平成２６年７月１３日に米国を出国するまでの常居所は米国にある原審申立人肩書住所地（以下「父宅」という。）であったと認められる。

また，留置とは，子が常居所を有する国からの当該子の出国の後において，当該子の当該国への渡航が妨げられていることをいう（法２条４号）ところ，認定事実(4)及び(7)によれば，子らは，平成２６年７月１３日，米国を出国した後，現在まで日本にある原審相手方肩書住所地（以下「祖父母宅」という。）に居住しており，現在，子らの米国への渡航が妨げられて留置の状態にある（これが原審相手方による原審申立人の監護権を侵害する留置に当たるか否かは後に判断する。）ことが認められる。

⑵　そこで，子らの常居所地国を判断するに当たっては，① 留置開始の直前の時点で子らが常居所を有していた国（常居所地国）が米国又は日本のいずれであるのかを認定する必要があり，その前提として，② 子らの留置の開始時期を認定する必要がある。よって，以下，②，①の順に検討する。

ア　留置の開始時期

本件においては，子らの米国からの出国後に子らを監護している原審相手方が子らを米国に渡航させない意思を示したと客観的に判断できる時点をもって，留置の開始時期と認定すべきである。

前記第２の１の認定事実によれば，原審相手方は原審申立人の同意の下で平成２６年７月１３日に子らを連れて米国を出国し，そのころ，日本に

入国したこと（認定事実１(3)エ），これに先立ち公証人による宣誓認証書面として作成された本件合意書で，子らを同年８月２９日までに米国に戻すこと，双方の合意により戻す日を変更できることが約されたこと（同ウ），同年８月中旬ころ，両当事者は，子らが同月２９日を超えて「しばらく（for a while）」ないし「もう少し（little longer）」日本に滞在することに合意したこと（同(4)エ），原審申立人は，同年９月，原審相手方に対し，子らの返還時期について同年１２月下旬を提案したこと，原審相手方は，これに異議は述べなかったものの，原審相手方としては子らを平成２７年５月か６月ころまで日本の学校に通わせる意向であると伝えたところ，原審申立人は，これには同意しなかったこと（同(7)アないしウ），平成２７年１月以降，原審申立人は原審相手方に対し，積極的に子らの返還までは求めず，子らの同年２月中の日本滞在を容認するような言動をとっていたこと（同エ及びオ），原審申立人は，同年３月１０日，原審相手方に対し，子らを米国に戻す手配をするよう求めたが，原審相手方はこれに応じなかったこと（同カ）が認められる。以上の事実によれば，原審相手方が原審申立人に対し，子らを米国に渡航させない意思を表示したのは平成２７年３月１０日ころであると認められるので，同日をもって留置の開始時期というべきである。

イ　常居所地国について

留置の開始時期は上記アのとおり平成２７年３月１０日であるところ，留置開始の直前の時点で子らが常居所を有していた国が米国又は日本のいずれであるか検討する。

まず，子らが平成２６年７月１３日に米国を出国した時点あるいはその後間もなく，子らの常居所が米国にある父宅から日本（祖父母宅）に変更されたか否か検討する。上記第２の１の認定事実によれば，原審相手方は，子らの米国からの出国に当たり，本件合意書で，子らの日本の滞在期間に

ついて，当事者間の合意により変更可能ではあるものの平成２６年８月２９日までとし，原審相手方は本合意に従わなかった場合は，米国及び国際的な政府による救済措置を含む法的措置がとられることを理解する旨約したこと（認定事実(3)ウ），子らが，米国を出国した際に所持していた荷物は，身の回りの品々に限られていたこと（同エ），当事者双方は子らに対して，日本の滞在は原審申立人が仕事を見つけるまでであると説明しており，二男の認識としても，日本の滞在期間は１か月程度と理解していたこと（同エ）が認められる。以上の事実によれば，子らが平成２６年７月１３日に米国を出国した時点では，子らの日本の滞在は同年８月２９日までであって，その後米国に帰国することが予定されていたのであるから，子らが米国を出国した時点あるいはその後間もなく，子らの常居所が米国にある父宅から日本（祖父母宅）に変更されたとは認められない。

次に，子らが日本に入国後，留置の開始時である平成２７年３月１０日までの間に，常居所が日本にある祖父母宅となったか否か検討する。まず，前記第２の１の認定事実によれば，子らの日本にある祖父母宅での居住期間は，平成２６年７月中旬から留置の開始時期である平成２７年３月１０日までの約８か月間になることが認められる。また，居住目的は，本件合意書による合意により平成２６年８月２９日までの期間が限定された日本の滞在であったこと，同年８月中旬ころ，両当事者は，子らが同月２９日を一定期間超えて日本に滞在することに合意したが，原審申立人は，同年９月中旬，原審相手方に対し，子らを同年１２月のクリスマスの前に米国に帰国させるように求めたこと，これに対し，原審相手方は平成２７年５月か６月ころまで子らを日本の学校に通わせる意向を伝えたが，原審申立人は，これには同意しなかったことが認められることからすると，平成２６年８月２９日の期間経過後，子らの日本の滞在期間は延長されたものの期間を限定された日本の滞在という目的そのものが変更されたとは認めら

れない。以上の事実を総合して検討すると，子らの祖父母宅での居住期間が８か月に及び，その間，子らは日本の学校（ＤＩＳＫ）に入学し，日本での生活になじんではいるものの，居住目的が期間を限定された日本の滞在であり，期間経過後は米国への帰国が予定されたものであり，その合意された滞在期間は同年１２月末ころまでにとどまることからすると，子らの常居所が米国にある父宅から日本にある祖父母宅になったとは認められない。このことは，原審申立人の就職等による米国での家族の生活再建の見込みが立っていないことが窺われること（認定事実(3)エ，(4)エ），子らのＤＩＳＫの入学手続に原審申立人が協力したこと（認定事実(4)エ）を考慮しても，上記判断を左右するに足りない。

よって，留置開始直前の時点で子らが常居所を有していた国は米国であると認められる。

なお，原審相手方は，子らの監護に関する裁判管轄の所在を問題とするが，法にいう常居所とは，裁判管轄の前提となる住所等と異なる概念であるから，ミネソタ決定が判示したように，ミネソタ訴訟における原審申立人の子らの親権及び監護時間に関する申立てにつき，手続開始時（平成２７年４月２７日）において同州の裁判管轄が認められないとしても，常居所地国についての上記判断を左右するものではない。

２　返還事由について

法２７条各号所定の子の返還事由につき，前記認定事実によれば，子らが１６歳に達していないこと（同条１号），子らが日本国内に所在していること（同２号），常居所地国である米国（ミネソタ州）の法令によれば，原審申立人は子らに対する監護の権利を有しており，原審相手方による子らの留置は原審申立人の有する子らについての監護の権利を侵害するものであること（同３号），原審相手方による子らの留置の開始時に米国が条約締約国であったこと（同４号）がそれぞれ認められる。

よって，本件においては，子の返還事由に関する法２７条各号の要件が具備されている。

３　返還拒否事由について

⑴　監護権の不行使（争点２）について

原審申立人が子らに対する監護権の行使をしていなかったとは認められないことは，原決定の「理由」欄の第３の２⑵（原決定２５頁３行目から１３行目まで）に記載のとおりであるから，これを引用する。

⑵　留置に関する同意（争点３）について

原審相手方は，子らが米国を出国する際，子らは相当長期間にわたって日本に滞在することが予定されており，原審申立人は子らの留置に同意した旨主張する。

しかし，本件合意書による合意によれば，子らの日本の滞在は平成２６年８月２９日までの期間を限定されたものであったところ，同年８月中旬ころ，両当事者は，子らが同月２９日を一定期間超えて日本に滞在することに合意したが，原審申立人は，同年９月中旬，原審相手方に対し，子らを同年１２月のクリスマスの前に米国に帰国させるように求めたこと，これに対し，原審相手方の平成２７年５月か６月ころまで子らを日本の学校に通わせる意向を伝えたが，原審申立人は，これには同意しなかったことが認められることは前記認定のとおりである。そうすると，原審申立人は，原審相手方の同年３月１０日の子らの留置に同意していたものとは認められない。

なお，原審申立人は，平成２７年１月に，子らとの面会交流及び同年２月の子らのスキー旅行につき，子らの日本の滞在を前提とした電子メールを送付した（認定事実⑺エ，オ）が，これは，現に子らが日本に滞在している状況下で監護権を行使したものと解することができるので，上記認定を左右するに足りない。

したがって，原審相手方の上記主張は採用することができず，法２８条１

項３号所定の返還拒否事由は認められない。

⑶　重大な危険（争点４）について

ア　法２８条１項４号所定の「重大な危険」とは，子を耐え難い状況に置くことによって生じる危険の内容が重大であることを意味すると解されるところ，子らは，出生以来，米国ミネソタ州で生活しており，その間の子らの生活状況が客観的に子らにとって耐え難いものであったとは認められないこと，原審相手方が子らに同伴して渡米することができない客観的な事情があるとは認められないことからすれば，子らが米国へ帰国した場合，子らに上記重大な危険が生じる客観的なおそれがあるとは考え難い。

イ　原審相手方は，原審申立人が精神的に不安定であり，子らを殺害する危険がある，原審申立人が激昂すると子らに暴力的となって子らが危険である旨主張する。

この点，確かに，子らと原審申立人との同居当時，原審申立人は経済的問題を抱え，不貞行為に及び，精神的に不安定となり，子らに対して攻撃的な態度をとったりしたこと（認定事実⑵ア，イ，エ）は認められるが，原審申立人の精神状況の不安定さが恒常的なものであったとまでは認められない。また，子らの米国を出国する前には共に外出して和やかな時を過ごしたこと（甲４４），来日直後にはフェイスタイムによる交流が円滑に行われていたこと（認定事実⑸ア），平成２６年１０月に日本国内で行われた原審申立人と子らとの面会交流（同イ）の際，原審申立人が子らに対し攻撃的な態度をとったなどの事情は認められないことに照らしても，原審申立人が子らに対し日常的に攻撃的な態度をとっていたとは認められない。他に，原審相手方の主張事実を認めるに足りる的確な資料はない。

したがって，原審相手方の上記主張は採用することができない。

ウ　原審相手方は，原審申立人には資力がないため，父宅もいつ競売等されるかわからない状況にあること，私立校であるプロビデンス・アカデミー

に戻ることはできず公立校に通学せざるを得ないところ，ハーフである子らは公立校ではアジア系住民のグループにも白人住民のグループにも入れてもらえず差別やいじめに遭う危険が高いことも，重大な危険に当たる旨主張する。

しかしながら，原審相手方において子らに同伴して米国に渡航することができない客観的な事情があるとは認められない本件において，子らの米国への返還が当然に原審申立人との同居を意味するものともいえないし，子らが出生以来米国ミネソタ州で成長してくる中で，いじめや差別に起因する具体的な問題が生じたことを示す的確な資料もない。したがって，原審相手方の上記主張は採用することができない。

エ　原審相手方の主張するその余の点（病気治療の便宜など）を考慮しても，米国に子らを返還することによって，子らの心身に害悪を及ぼすなど重大な危険があるとは認められない。

なお，当裁判所は後記のとおり子ら４人全員を米国に返還すべきものと判断するので，きょうだい分離によって生ずる重大な危険についての原審相手方の主張については判断を要しない。

(4)　子の異議（争点５）について

当裁判所は，長男及び二男については法２８条１項５号所定の返還拒否事由が認められ，長女及び三男については同返還拒否事由は認められないと判断する。その理由は，原決定の「理由」欄の第３の２(5)（原決定２７頁１６行目から３０頁１８行目まで）に記載のとおりであるからこれを引用する。

これに対し，原審申立人は，原審調査官調査における子らの意思の調査には不備があると主張するが，本件記録を検討しても，原審調査官調査に原審申立人主張の不備があるとは認められない。また，原審申立人は，長男及び二男による陳述は，認知能力及び思考能力が未だ十分に発達しないまま，原審相手方からの不当な影響の下になされたものである旨主張するが，長男及

び二男は，原審調査官調査当時，１２歳９か月という年齢相応の成熟度に達しており，原審調査官に対し，原審申立人・原審相手方の意向からある程度離れた自己の意見を述べたと認められることからすれば，長男及び二男の陳述内容に原審相手方からの不当な影響があるとも認められない。したがって，原審申立人の上記各主張はいずれも採用することができない。

４　長男及び二男についての裁量返還事由の有無（争点６）について

(1)　前記３(4)認定のとおり，長男及び二男は米国に返還されることを拒んでおり，長男及び二男について法２８条１項５号の返還拒否事由があると認められる。そして，長男及び二男は，既に１年以上日本において生活し，平成２６年９月からＤＩＳＫに通学して新たな友人を作るなど日本の生活に適応していること，長男及び二男が米国に返還されても，従前の学校及び家庭での生活ができるか否か明らかではなく，この限りにおいては，長男及び二男を米国に返還することは長男及び二男の利益に資するとはいえない。しかし，長女及び三男については同号の返還拒否事由が認められず（前記３），当裁判所としては，長女及び三男につき米国への返還を命ずべきであることからすると，長男及び二男につき本件申立てを却下した場合には，必然的にきょうだいが分離される上に，子らの監護を巡る裁判手続が米国（長女及び三男）と日本（長男及び二男）に分かれて係属する状況となる可能性が高いところ，かかる状況を避けるべく長男及び二男についても米国への返還を命ずることが長男及び二男の利益に資するか否かを検討する必要がある。

そこで，まず裁判手続の点についてみると，子ら４人は共に成長してきており，相互間の心理的な絆も強いと認められることからすれば，子らの監護に関する定めについての判断に当たっても，子ら４人に対する調査を同一の裁判手続のもとで行い（ミネソタ決定（乙５４）によれば，同州の裁判手続においては「評価人（evaluator）」による法科学的な評価が行われることが見込まれる。），かかる調査結果を踏まえた判断がなされることは，長男及

び二男の利益に資するということができる。そして，長男及び二男は，英語を母語とし，米国における生活習慣や思考様式にも出生以来慣れ親しんできており，米国の裁判手続においても自らの意見を十分に述べる能力を有すると認められることからすれば，同州の裁判手続において自らの意見を述べるなどして，子ら４人について判断を得ることが，長男及び二男の利益に資するものといえる。

次に，きょうだい分離による影響については，長男及び二男は現在１３歳１か月，長女及び三男は現在７歳１１か月であっていずれも未だ成長期にあることからすれば，この時点できょうだいを分離すると，子らに与える感情的，心理的な悪影響は重大である。また，長女及び三男につき米国への返還を命じたため，原審相手方が長女及び三男とともに米国に戻ることも十分考えられ，その場合に長男及び二男を原審相手方の監護補助者（祖父母ら）の監護に委ねることは必ずしも適切とはいえない。

以上の諸事情を総合すると，長男及び二男につき，法２８条１項本文ただし書により，同項５号に掲げる事由があるとしても常居所地国である米国に長男及び二男を返還することが長男及び二男の利益に資するものというべきである。そこで，法２８条１項ただし書により，長男及び二男につき米国への返還を命ずることとする。

⑵　原審相手方は，きょうだい分離を避けるために，むしろ長女及び三男に係る本件申立てを却下すべきである旨主張するが，法２７条は，子の返還事由が認められる場合には，裁判所は子の返還を命じなければならないと定めており，裁量による返還拒否の余地はないものと解される。したがって，原審相手方の上記主張は採用することができない。

５　結論

以上によれば，原審相手方に対し，子ら全員を米国に返還することを命ずるのが相当である。

よって，原決定のうち，長男及び二男につき原審申立人の返還申立てを却下した部分を原審申立人の抗告に基づき取り消して，原審相手方に対し長男及び二男を米国に返還することを命じ，原審相手方の抗告は理由がないからこれを棄却することとし，主文のとおり決定する。

平成２８年１月２８日

大阪高等裁判所第９民事部

裁判長裁判官　金　子　順　一

裁判官　田　中　義　則

裁判官　上　田　卓　哉

これは正本である。

平成28年1月28日

大阪高等裁判所第9民事部

裁判所書記官　三宅友恵

2015 (Ra) No. 1404 Case of appeal against a decision on a petition for the return of child
(Court of prior instance: Osaka Family Court, 2015 (Ka-Nu) No. 7 to No. 10)

Decision

Nationality United States of America
Address 6264, Merrimac Lane N, Maple Grove, MN
Appellant/respondent (petitioner in the prior instance)
Cook, James Edward, 2nd
(hereinafter referred to as the "Petitioner")
Counsel Ai Kuroda, attorney-at-law
Counsel Masami Kittaka, attorney-at-law
Subagent Yusuke Kono, attorney-at-law

Registered domicile 51, Iai 5-chome, Matsuyama City, Ehime Prefecture
Address 27-5, Shoyodai 2-chome, Nara City
(as indicated in the written petition)
Appellant/respondent (respondent in the prior instance)
Hitomi Arimitsu
(hereinafter referred to as the "Respondent")
Counsel Tomoko Kamikawa, attorney-at-law

Nationality United States of America and Japan
Registered domicile Same as that of the Respondent
Address Same as that of the Respondent
Child Arimitsu
(date of birth: December 5, 2002)
(hereinafter referred to as the "First Son")

Nationality United States of America and Japan
Registered domicile Same as that of the Respondent
Address Same as that of the Respondent
Child Arimitsu
(date of birth: December 5, 2002)
(hereinafter referred to as the "Second Son")

Nationality United States of America and Japan
Registered domicile Same as that of the Respondent
Address Same as that of the Respondent
Child Maya Arimitsu
(date of birth: February 13, 2008)
(hereinafter referred to as the "First Daughter")

Nationality United States of America and Japan
Registered domicile Same as that of the Respondent
Address Same as that of the Respondent

Child Arimitsu
(date of birth: February 13, 2008)
(hereinafter referred to as the "Third Son")

Main text

1. Based on the appeal filed by the Petitioner, the second paragraph of the main text of the decision in prior instance is revoked.
2. The Respondent shall return both the First Son and the Second Son to the United States of America.
3. The appeal filed by the Respondent is dismissed.
4. Both parties shall bear their own costs for the proceedings in the prior instance and the appellate instance.

Reasons

I. Object of Appeal

(Petitioner)

The Petitioner seeks a decision to the same effect as the first and second paragraphs of the main text.

(Respondent)

The Respondent seeks a decision to the effect that:

1. The first paragraph of the main text of the decision in prior instance is revoked.
2. The petition filed by the Petitioner to seek the return of both the First Daughter and the Third Son to the United States of America is dismissed.

II. Outline of the Case

(The abbreviations used in this decision are as defined in the decision in prior instance. With regard to citing evidence, branch numbers of evidence carrying serial numbers followed by branch numbers are omitted.)

In this case, the Petitioner, who is the father of the Children, seeks against the Respondent, who is the mother of the Children, the return of the Children to the United States of America (hereinafter the "United States") under the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter the "Act"), on the grounds that the Respondent has been retaining the Children in Japan. In response, the Respondent contends that the Children's state of habitual residence (Article 2, item (v) of the Act) is not the United States, and refuses to return the Children, on the grounds that: the Petitioner was not actually exercising the rights of custody at the time of commencement of the retention of the Children by the Respondent (Article 28, paragraph (1), item (ii) of the Act); the Petitioner had given consent to or approval for the retention of the Children by the Respondent (item (iii) of said paragraph); the return of the Children could cause a "grave risk" to them (item (iv) of said paragraph); and the Children are refusing to be returned (item (v) of said paragraph).

The court of prior instance made a decision in which the petition concerning the First Son and the Second Son was found to be groundless and dismissed, whereas the petition concerning the First Daughter and the Third Son was found to be well-grounded and the Respondent was ordered to return them to the United States. Both parties filed appeals against the decision in prior instance.

1. With respect to the findings of fact, we hereby cite what is stated in the decision in prior instance, Section II-1 in the "Reasons" part (from page 3, line 7 to page 17, line 5), making the following corrections (hereinafter referred to with the item number in that section, as "Finding of Fact (1)" or the like).
   (1) Replace the phrase "the Petitioner (US national) and the Respondent (Japanese national)" in page 3, line 10 of the decision in prior instance, with "the Petitioner (US national; born on May 2, 1966) and the Respondent (Japanese national; born on July 16, 1971)," and the phrase "the Children (the First Son, Second Son, First Daughter, and Third Son)" from line 11 to line 12 on the same page, with "the Children (First Son (born on December 5, 2002), Second Son (born on the same day), First Daughter (born on February 13, 2008), and Third Son (born on the same day)."
   (2) Replace the phrase "In said agreement document, it is stated that…" starting on page 6, line 2 of the decision in prior instance and ending on line 5 on the same page, with "Said agreement document (hereinafter referred to as the 'Agreement Document') was prepared as a document under oath certified by a notary, and it is stated therein that the Respondent understands that…, and that if she fails to comply with the Agreement, legal measures including relief measures may be taken by the United States and international governments," and the phrase "departed from the United States" on line 7 to line 8 on the same page, with "departed from the United States and entered Japan around that time"; and before the sentence starting with "On July 29, 2014" on line 17 on the same page, add "After entering Japan, the Respondent and the Children have been living with the grandparents at the grandparents' house located at the Respondent's address indicated herein."
   (3) At the end of page 7, line 15 of the decision in prior instance, add "In September 2014, the Children entered Doshisha International School, Kyoto (DISK)."
   (4) Correct the part on page 8, line 24 of the decision in prior instance as follows:
   "On October 19, 2015, in response to the petition filed by the Petitioner in said suit (hereinafter referred to as the "Minnesota Case") with respect to the parental authority over and the custody time of the Children, said court made a decision to dismiss the Petitioner's petition, holding that a court of the State of Minnesota has no jurisdiction over the petition concerning the parental authority over and the custody time of the Children (hereinafter referred to as the "Minnesota Decision") on the following grounds: under the law of the State of Minnesota, a court of this State would have no jurisdiction unless the Children had been living in this State for six months before the commencement of the proceeding, but at the time of the commencement of the proceeding (on April 27, 2015, when the Respondent received the service of the written petition), the Children were not living in this State, and the period of their absence does not constitute the period of "temporary absence," which is prescribed by law as being counted as part of the six-month period (Exhibits Otsu 54 and 70)."
2. With respect to the issues and the parties' allegations on the issues, we hereby cite what is stated in the decision in prior instance, Sections II-2 and 3 of the "Reasons" part (from page 17, line 6 to page 23, line 15), except for adding the summaries of the reasons for appeal submitted by the parties below.
3. The summaries of the reasons for appeal submitted by the parties are as follows.

(1) Reasons for appeal submitted by the Petitioner

A. Issue 5 (Children's objection)

(a) In order to accept a child's objection to being returned (Article 28, paragraph (1), item (v) of the Act) as the grounds for refusal of the return of the child, (i) it is not sufficient for the child to merely state an objection to being returned: the objection must be stronger than a mere hope for being with his/her parent who has taken him/her or staying in the country where he/she is currently retained, or a preference to the country where he/she is now; (ii) the objection must be to being returned to the state of habitual residence, rather than to being returned to the hands of the left-behind parent; and (iii) it must also be supported by reasonable grounds. However, the investigation by the family court probation officer of the court of prior instance (hereinafter referred to as the "investigation by the probation office of the court of prior instance") was conducted without the understanding of and consideration to the child's objection as explained above.

Consequently, the results of the investigation by the probation officer of the court of prior instance cannot be used as they are as the basis for adjudicating this case, nor can it be found that any such objection that meets the requirements mentioned in (i) to (iii) above has been expressed.

(b) The First Son and the Second Son (aged 12 years at the time of the investigation) made statements to the probation officer of the court of prior instance, without their cognitive capacity and ability to think being fully developed, and while they were under the undue influence of the Respondent or suffering from parental alienation. Therefore, in their statements, they took up only the good things about and romanticized their living in Japan (mainly in the special environment of their school, DISK), while taking up only the bad things and diminishing their living in the United States. Also, they praised the Respondent unconditionally but evaluated the Petitioner negatively from the beginning to the end.

In this respect as well, the First Son and the Second Son's statements cannot be regarded as the evidence of an objection that meets any of the requirements mentioned in (i) to (iii) above having been expressed.

B. Issue 6 (Return by court's discretion)

Even where it is found that the First Son and the Second Son expressed legitimate objections that may be argued as the grounds for refusal of their return, given that (i) it is too much to say that their objections are objective, specific, absolute and strong objections supported by reasonable grounds, (ii) if they return to the United States, they would be able to resume their living in the environment that they have been accustomed to for a long period since they were born, and (iii) since the court has ordered the return of the First Daughter and the Third Son to the United States, the Respondent is expected to go back to the United States accompanying them, therefore the court should exercise its discretion to order that the First Son and the Second Son should also be returned to the United States.

(2) Reasons for appeal submitted by the Respondent

A. Issue 1 (State of habitual residence)

(a) Method of identifying the habitual residence and the Children's state of

habitual residence

a. According to the court decisions made and the interpretation guidelines adopted in the Contracting States, if a child moves from one place to another for a period with no definite end based on an agreement between the parents, the place to which the child has moved becomes the child's habitual residence at the time of the move or shortly after that.

In the Agreement Document prepared before the Respondent and the Children came to Japan, the Petitioner and the Respondent had agreed to return the Children to the United States by August 29, 2014, but this is only a provisional agreement and the parties had not determined any definite end of the Children's stay in Japan. Rather, the parties and the Children had an uncertain forecast regarding the end of the Children's stay in Japan, i.e. until the Petitioner would find a job and would be able to return to his previous living conditions. However, the Petitioner still received public assistance for job placement that was available to persons with mental disabilities, and had not put his plan to open a doughnut shop into effect. As for his living conditions, the Petitioner was trying to sell his house because he was unable to pay its loan. Thus, at the time when the Respondent and the Children came to Japan, there was no prospect that their stay in Japan would end soon.

Also in light of the facts that before the Children came to Japan, the Petitioner had applied for their admission to Osaka YMCA International School and consulted with the Providence Academy regarding their long absence from school, and that after the Children came to Japan, the Petitioner helped the procedure for their admission to DISK as well as their school life and after-school lessons (piano), the Petitioner did not expect that the Children's stay in Japan would end soon. When the Children came to Japan, they brought with them only their personal belongings, because the freight would be costly if they brought more baggage and because it would be rational to buy them new clothes in Japan as they were in the growing stage, and that was not because the Petitioner expected that their stay in Japan would end soon.

Thus, it should be said that the Children moved for a period with no definite end, and hence the place to which they moved (their address indicated herein) became their habitual residence at the time of the move or shortly after that.

b. Given that the place to which the Children moved (their address indicated herein) is the house of their grandparents with whom they have kept in contact since their early years, and that they made many friends soon after starting to go to DISK and they like to go there, their address indicated herein had become their habitual residence by September 2014, when they started to go to DISK.

(b) Relationship with the Minnesota Decision

While bearing in mind the aspect of international jurisdiction and relying on almost the same evidence as that produced in this case, the Minnesota Decision, from the perspective of ensuring the Children's interests, concluded that the Children's absence cannot be regarded as "temporary" and denied the State of Minnesota's jurisdiction over the petition concerning the parental authority over and custody of the Children. Hence, the Minnesota Decision should be taken

into account as a helpful reference in this case.

In addition, while a court of Japan is considered to have international jurisdiction over the petition concerning the parental authority over and custody of the Children, the Minnesota Decision already determined that the court of the State of Minnesota does not have such jurisdiction. Under the law of the State of Minnesota, this determination would not be reversed automatically only because the Children are physically brought back into that State. In this respect as well, it is erroneous to order the return of the Children to the United States on the premise of the determination that their habitual residence is located in the United States.

B. Issue 3 (Consent to retention)

(a) In cases where a child is moved from one place to another based on an agreement between the parents, and either the father or the mother revokes the agreement seeking the return of the child, the retention does not become wrongful from that point on. There is no law that permits such unilateral revocation of an agreement.

Consequently, in this case, the Children cannot be deemed to have been wrongfully retained.

(b) The Petitioner faces difficulty in specifying the point in time when the wrongful retention of the Children commenced. Although the Petitioner agreed to have the Children stay in Japan until he would find a job and would be able to return to his previous living conditions, he attempts to allege that the wrongful retention of the Children commenced at the point in time when he revoked such agreement unilaterally, and while he has been unable to decide for himself when he has revoked the agreement, he seems to have fallen into difficulty in specifying the day on which the wrongful retention commenced.

The Respondent's act of having the Children stay in Japan does not constitute wrongful retention only because of the Petitioner's unilateral revocation of the agreement.

C. Issue 4 (Grave risk)

(a) The Children would be separated if the petition concerning the First Son and the Second Son is dismissed based on their objection and the return of the First Daughter and the Third Son is ordered. Such separation could cause a "grave risk" referred to in Article 28, paragraph (1), item (iv) of the Act, to the First Daughter and the Third Son. This is clear from the court decisions made in other countries.

If the First Son and the Second Son voluntarily go to the United States with a view to avoiding the separation of the siblings, this would be considerably detrimental to the interests of the First Son and the Second Son. Furthermore, the inconvenience arising from the separation of the siblings cannot be avoided by encouraging close interactions between them.

(b) The results of the investigation by the probation officer of the court of prior instance as well as many items of documentary evidence clearly show that the Petitioner behaves violently and aggressively against the Children and that the Petitioner has mental disabilities, and this also demonstrates the existence of a "grave risk."

III. Court's Decision

1. Children's state of habitual residence (Issue 1)

(1) The "state of habitual residence" refers to a state where a child held his/her habitual residence at the time of his/her removal or immediately before the commencement of his/her retention (Article 2, item (v) of the Act), and a person's "habitual residence" is interpreted as meaning a place where the person lives habitually or for a considerably long period of time. According to Finding of Fact (2), it is found that the Children's habitual residence had been the Petitioner's address indicated herein (hereinafter referred to as the "Father's house") until they departed from the United States on July 13, 2014.

"Retention" refers to a situation where, after his/her departure from the state where he/she holds his/her habitual residence, a child is prevented from traveling to said state (Article 2, item (iv) of the Act). According to Finding of Fact (4) and (7), it is found that after departing from the United States on July 13, 2014, until today, the Children have been living at the Respondent's address indicated herein (hereinafter referred to as the "Grandparents' house") in Japan, and that the Children are currently prevented from traveling to the United States and thus they are being retained (whether this situation constitutes the retention by the Respondent that violates the Petitioner's rights of custody will be determined later.)

(2) In order to determine the Children's state of habitual residence, (i) it is necessary to identify whether the Children, immediately before the commencement of their retention, held their habitual residence in the United States or in Japan (which of these countries is the Children's state of habitual residence), and as a presupposition of this point, (ii) it is also necessary to identify when the Children's retention commenced. Accordingly, we consider point (ii) first, and then point (i).

A. Time of commencement of the Children's retention

In this case, the Children's retention should be held to have commenced at the point in time when the Respondent, who has been taking custody of the Children since their departure from the United States, can objectively be found to have expressed the intention to prevent the Children from traveling to the United States.

According to the findings of fact mentioned in II-1 above: on July 13, 2014, the Respondent departed from the United States taking the Children with her with the Petitioner's consent, and entered Japan around that time (Finding of Fact 1(3) D); in the Agreement Document prepared before their departure as a document under oath certified by a notary, the parties agreed that the Children would be returned to the United States by August 29, 2014 and that the date of their return may be changed by agreement between the parties (Finding of Fact 1(3) C); around mid-August 2014, the parties agreed to have the Children continue to stay in Japan "for a while" or "little longer" after the pre-agreed time limit (August 29, 2014) (Finding of Fact 1(4) D); in September 2014, the Petitioner made a proposal to the Respondent to have the Children returned to the United States in late December 2014, and in response, the Respondent did not make an objection to this proposal but told the Petitioner that she wished to have the Children go to school in Japan until around May to June 2015, which the Petitioner did not consent to (Finding of Fact 1(7) A to C); since January 2015, the Petitioner had not actively requested the Respondent to return the Children but behaved as if he approved the Children continuing to stay in Japan during February 2015 (Finding of Fact 1(7) D and E);

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on March 10, 2015, the Petitioner requested the Respondent to make arrangements for the Children's return to the United States, but the Respondent refused to do so (Finding of Fact 1(7) F). According to these facts, it is found that the Respondent expressed to the Petitioner the intention to prevent the Children from traveling to the United States around March 10, 2015, and therefore it should be determined that the Children's retention commenced as of that day.

B. State of habitual residence

As mentioned in A. above, the Children's retention commenced on March 10, 2015. Next, we consider whether the Children, immediately before the commencement of their retention, held their habitual residence in the United States or in Japan.

We first consider whether the Children's habitual residence had been changed from the Father's house in the United States to Japan (the Grandparents' house) at time of their departure from the United States on July 13, 2014, or shortly after that. According to the findings of facts mentioned in II-1 above: before the Children's departure from the United States, the Respondent agreed in the Agreement Document to understand that the end of the Children's stay in Japan may be changed by agreement between the parties but no later than August 29, 2014, and that if the Respondent fails to comply with the Agreement, legal measures including relief measures may be taken by the United States and international governments (Finding of Fact (3) C); when the Children departed from the United States, they brought with them only their personal belongings (Finding of Fact (3) D); the parties explained to the Children that they would stay in Japan until the Petitioner had found a job, and the Second Son thought that they would stay in Japan for about one month (Finding of Fact (3) D). According to these facts, when the Children departed from the United States on July 13, 2014, they were expected to stay in Japan until August 29, 2014, and then return to the United States, and hence, it is not found that the Children's habitual residence had been changed from the Father's house in the United States to Japan (the Grandparents' house) at the time of their departure from the United States or shortly after that.

We next consider whether the Children's habitual residence had been changed to the Grandparents' house in Japan during the period from their entry into Japan until the commencement of their retention (March 10, 2015). According to the findings of fact II-1 mentioned above, it is found that the Children stayed at the Grandparents' house in Japan for about eight months, from mid-July 2014, until the date of commencement of their retention (March 10, 2015). Also, the Children lived in Japan for the purpose of staying in Japan for a limited period until August 29, 2014, based on the agreement by the parties in the Agreement Document; around mid-August 2014, the parties agreed to have the Children continue to stay in Japan for a period after August 29, 2014, but then in mid-September 2014, the Petitioner requested the Respondent to return the Children to the United States before the Christmas in 2014; in response, the Respondent expressed the intention to have the Children go to school in Japan until around May to June 2015, which the Petitioner did not consent to. Given these facts, although the period of the Children's stay in Japan had been extended beyond the pre-agreed time limit (August 29, 2014), it is not found that the purpose for which they lived in Japan,

i.e. staying in Japan for a limited period, in itself had been changed. Taking all these facts into consideration, the Children have lived in the Grandparents' house for as long as about eight months, and during this period, they entered school in Japan (DISK) and became accustomed to living in Japan, but they lived in Japan for the purpose of staying in Japan for a limited period and they were expected return to the United States after the end of that period, which was around the end of December 2014 as agreed by the parties, and accordingly, it is not found that the Children's habitual residence had been changed from the Father's house in the United States to the Grandparents' house in Japan. Even taking into account the facts that there seems to be no prospect yet for the Petitioner to find a job and rebuild his family's life in the United States (Finding of Fact (3) D, (4) D), and that the Petitioner helped the procedure for the Children's admission to DISK (Finding of Fact (4) D), such facts do not affect the determination given above.

Thus, it is found that the Children, immediately before the commencement of their retention, held their habitual residence in the United States.

The Respondent raises an issue as to which court has jurisdiction over the custody of the Children. The "habitual residence" referred to in the Act is different from "domicile" or other concepts based on which a court's jurisdiction is determined. Therefore, even though, as ruled in the Minnesota Decision, a court of the State of Minnesota, at the time of the commencement of the proceeding (April 27, 2015), had no jurisdiction over the petition filed in the Minnesota Case concerning the parental authority over and the custody time of the Children, this does not affect the determination on the Children's state of habitual residence given above.

2. Grounds for return

In connection with the grounds for the return of a child prescribed in the items of Article 27 of the Act, according to the findings of fact mentioned above: the Children have not attained the age of 16 (item (i)); the Children are located in Japan (item (ii)); pursuant to the laws or regulations of the state of habitual residence, i.e. the United States (the State of Minnesota), the rights of custody of the Children are attributed to the Petitioner and the retention of the Children by the Respondent breaches the Petitioner's rights of custody of the Children (item (iii)); and at the time of the commencement of the retention of the Children by the Respondent, the state of habitual residence, i.e. the United States, was a Contracting State (item (iv)).

Thus, in this case, the requirements prescribed in the items of Article 27 of the Act as the grounds for the return of a child are met.

3. Grounds for refusal of return

(1) Failure to exercise the rights of custody (Issue 2)

With respect to the fact that the Petitioner is not found to not be exercising the rights of custody over the Children, we hereby cite what is stated in the decision in prior instance, Section III-2(2) of the "Reasons" part (from page 25, line 3 to line 13).

(2) Consent to retention (Issue 3)

The Respondent argues that when the Children departed from the United States, they were expected to stay in Japan for a considerably long period and that the Petitioner consented to their retention by the Respondent.

However, according to the aforementioned findings: based on the agreement by the parties in the Agreement Document, the Children were to stay in Japan for a limited

period until August 29, 2014, but around mid-August 2014, the parties agreed to have the Children continue to stay in Japan for a period after August 29, 2014, and then in mid-September 2014, the Petitioner requested the Respondent to return the Children to the United States before the Christmas in 2014; in response, the Respondent expressed to the Petitioner the intention to have the Children go to school in Japan until around May to June 2015, which the Petitioner did not consent to. Accordingly, it is not found that the Petitioner consented to the retention of the Children by the Respondent that commenced on March 10, 2015.

In January 2015, the Petitioner sent emails to the Respondent to discuss his visitation and contact with the Children and the Children's ski trip in February 2015, on the premise that the Children were staying in Japan (Finding of Fact (7) D and E). However, this can be construed as evidence that the Petitioner exercised the rights of custody over the Children under the circumstances where the Children were actually living in Japan, and it does not affect the findings given above.

Consequently, the Respondent's argument mentioned above cannot be accepted, and the grounds for refusal of return prescribed in Article 28, paragraph (1), item (iii) of the Act are not found in this case.

(3) Grave risk (Issue 4)

A. The "grave risk" referred to in Article 28, paragraph (1), item (iv) of the Act is interpreted as meaning that the nature of the risk that may be caused by placing a child into an unbearable situation is grave. In this case, given that the Children had lived in the State of Minnesota, the United States, since they were born, and their living conditions during this period do not seem to have been unbearable to them when viewed objectively, and that no circumstances preventing the Respondent from traveling to the United States accompanying the Children can objectively be found, it is difficult to presume that there is an objective likelihood that such grave risk would be caused to the Children if they return to the United States.

B. The Respondent argues that the Petitioner is mentally unstable and that there is a danger of him killing the Children and that when the Petitioner gets excited, he becomes violent to the Children, posing a danger to them.

In this respect, it is found that when living with the Children, the Petitioner had economic problems, committed adultery, became mentally unstable and took a violent attitude toward the Children (Finding of Fact (2) A, B, and D), but it is going too far to say that the Petitioner was suffering constant mental instability. Also in light of the facts that before the Children departed from the United States, the Petitioner had gone out and spent a peaceful time with them (Exhibit Ko No. 44), that immediately after the Children's arrival in Japan, the Petitioner kept in contact with them on FaceTime without problems (Finding of Fact (5) A), and that there is no evidence to support that when the Petitioner met with the Children in Japan in October 2014 (Finding of Fact (5) B), he took an aggressive attitude toward them, the Petitioner is not found to have had an aggressive attitude toward them on a daily basis. Apart from this, there is no appropriate evidence to find the facts argued by the Respondent.

Consequently, the Respondent's argument mentioned above cannot be accepted.

C. The Respondent further argues that the following circumstances also constitute

grave risk to the Children: for lack of money on the part of the Petitioner, the Father's house might be put up for an auction and sold off at any moment; the Children are no longer able to go back to the Providence Academy, which is a private school, and because they would have to go to a public school, where they might not be included in neither a group of Asian residents nor a group of white residents for being half Japanese and half American, they would be at high risk of suffering discrimination or bullying.

However, as long as no such circumstances that prevent the Respondent from traveling to the United States accompanying the Children can objectively be found in this case, the return of the Children to the United States does not necessarily means that they would be living with the Petitioner. Also, there is no appropriate evidence demonstrating that the Children faced any specific problem arising from bullying or discrimination while growing up in the State of Minnesota, the United States, since they were born. Consequently, the Respondent's argument mentioned above cannot be accepted.

D. Even taking into consideration other arguments made by the Respondent (e.g. convenience for receiving therapy), it is not found that the return of the Children to the United States would harm the Children physically or mentally or cause a grave risk to them.

As explained later, this court determines that all of the four Children should be returned to the United States, and hence it is not necessary to make any determination as to the Respondent's argument regarding a grave risk that may be caused by the separation of them.

(4) Children's objection (Issue 5)

This court determines that the grounds for refusal of return prescribed in Article 28, paragraph (1), item (v) of the Act exist with regard to the First Son and the Second Son, while said grounds do not exist with regard to the First Daughter and the Third Son. As for the reasons for this determination, we hereby cite what is stated in the decision in prior instance, Section II-2(5) of the "Reasons" part (from page 27, line 16 to page 30, line 18).

Against this, the Petitioner argues that the investigation of the Children's intention conducted by the probation officer of the court of prior instance was defective. However, the examination of the case records does not suggest any such defects as argued by the Petitioner on the part of the probation officer. The Petitioner also argues that the statements of the First Son and the Second Son to the probation officer were made without their cognitive capacity and ability to think being fully developed, and while they were under the undue influence of the Respondent. However, at the time of responding to the investigation by the probation officer, the First Son and Second Son were matured enough for their age (12 years and 9 months), and it is found that they stated their own opinions to the probation officer, keeping a certain distance from both the Petitioner's and the Respondent's ideas. Given this, what the First Son and the Second Son stated do not seem to have been under the undue influence of the Respondent. Consequently, neither of the Petitioner's arguments can be accepted.

4. Whether any grounds for refusal of return exist with regard to the First Son and the Second Son (Issue 6)

(1) As mentioned in 3(4) above, it is found that the First Son and the Second Son refused to be returned to the United States, and thus the grounds for refusal of

return prescribed in Article 28, paragraph (1), item (v) of the Act exist with regard to them. The First Son and the Second Son have already lived in Japan for more than one year and have accustomed to living in Japan while going to DISK (since September 2014) and making new friends, and it is uncertain whether, after being returned to the United States, they would be able to restore their school life and family life as they had had before. Insofar as these matters are concerned, it is not deemed to serve the interests of the First Son and the Second Son to have them returned to the United States. However, since the grounds for refusal of return prescribed in said item do not exist with regard to the First Daughter and the Third Son (as mentioned in 3 above) and this court therefore needs to order their return to the United States, if this court dismisses the petition concerning the First Son and the Second Son, this would necessarily separate the Children and it is highly likely to result in the situation where judicial proceedings relating to the custody of the Children are pending separately in the United States (for the First Daughter and the Third Son) and in Japan (for the First Son and the Second Son). Therefore, it is necessary to consider whether it serves the interests of the First Son and the Second Son for this court to order their return to the United States with a view to avoiding such situation.

First, focusing on the judicial proceedings, since the four Children have grown together and seem to be bound with one another by strong psychological ties, it would serve the interests of the First Son and the Second Son if an investigation is conducted for all of the four Children during the same judicial proceedings (according to the Minnesota Decision (Exhibit Otsu No. 54), an "evaluator" is expected to make an evaluation from the perspective of forensic science during the proceedings before a court of said State) and determination on the terms of the custody of the Children is made based on the results of such investigation. Given that the First Son and the Second Son use English as their mother tongue, are accustomed to the American lifestyle and way of thinking since they were born, and that they are capable enough to state their own opinions during the judicial proceedings in the United States, it seems to serve the interests of the First Son and the Second Son to state their own opinions during the judicial proceedings before a court of the State of Minnesota and thereby receive a court decision concerning the four Children.

Next, as for the impact of the separation of the Children, since the First Son and the Second Son are 13 years and 1 month old and the First Daughter and the Third Son are 7 years and 11 months old and thus they are all still in the growing stage, if they are separated now, it would have serious adverse emotional and psychological effects on them. Furthermore, as this court orders the return of the First Daughter and the Third Son to the United States, it is sufficiently likely that the Respondent will also return to the United States accompanying them, and in that case, it is not necessarily appropriate to leave the First Son and the Second Son in the hands of the persons assisting the Respondent's with their care (the Children's grandparents).

Taking all these circumstances into consideration, it should be determined that, as provided in the proviso to Article 28, paragraph (1) of the Act, even where the grounds prescribed in item (v) of said paragraph exist with regard to the First Son and the Second Son, it serves the interests of the First Son and the Second Son to have them returned to the United States, their state of habitual residence.

Accordingly, pursuant to the proviso to Article 28, paragraph (1) of the Act, this court orders the return of the First Son and the Second Son to the United States.

(2) The Respondent argues that in order to avoid the separation of the Children, the court should rather dismiss the petition concerning the First Daughter and the Third Son. However, Article 27 of the Act provides that the court shall order the return of a child if it finds any grounds for the return of the child, which is interpreted as allowing no room for the court's discretion to refuse the return of the child. Consequently, the Respondent's argument mentioned above cannot be accepted.

5. Conclusion

For the reasons given above, it is appropriate to order the Respondent to return all of the Children to the United States.

Therefore, based on the Petitioner's appeal, we revoke the decision in prior instance with respect to the part that dismissed the petition concerning the First Son and the Second Son, and order the Respondent to return the First Son and the Second Son to the United States, while dismissing the Respondent's appeal due to lack of grounds, and thereby render the decision as indicated in the main text.

January 28, 2016

Osaka High Court, 9th Civil Division

Presiding Judge	Junichi Kaneda
Judge	Yoshinori Tanaka
Judge	Takuya Ueda

This is an authenticated copy.

January 28, 2016

Osaka District Court, 9th Civil Division

Court Clerk Tomoe Miyake

July 28, 2016

翻訳証明

Certification of Translation

平成２７年（ラ）第１４０４号　子の返還申立てについてした決定に対する抗告事件の翻訳（英語）は、原本（日本語）の内容と相違ないものであることを証明します。

We hereby certify that, to the best of our knowledge, the translation of the "2015 (Ra) No. 1404 Case of appeal against a decision on a petition for the return of child" (English version) is identical to the original copy (Japanese version).

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

In re the Marriage of: File No. 27 FA-15-499

James Edward Cook II,

Petitioner,

and ORDER

Hitomi Arimitsu,

Respondent.

The above-entitled matter came on before me on or about October 9, 2015. Nancy Zalusky Berg, Esq. appeared on behalf of Petitioner and Drake D. Metzger, Esq. appeared on behalf of Respondent. Both parties briefed the issue of subject matter jurisdiction and filed factual affidavits. Based on the submissions, the specific portions of the record discussed herein, and the Memorandum attached hereto I issue my order as follows:

1. Minnesota is not the children's home state and Minnesota does not have subject matter jurisdiction to address custody and parenting time regarding the parties' children. The custody and parenting time prayers for relief in the parties' pleadings are stricken.

_____

Judge of the District Court

File #27-FA-15-499

MEMORANDUM

The question before me today is whether Minnesota has subject matter jurisdiction to determine custody and parenting time regarding the parties' minor children. Respondent was served with the Summons and Petition to dissolve the parties' marriage when her attorney accepted service on her behalf on April 27, 2015. The Petition alleged that Petitioner had resided in Minnesota for the requisite 180 days but did not allege that the children had resided in Minnesota for 180 days immediately preceding the commencement of the action or that Minnesota was the proper jurisdiction to issue an initial custody/parenting time order under Minnesota Statutes chapter 518D.

Respondent interposed an Answer and Counterpetition that did not challenge Minnesota's jurisdiction to issue an initial custody/parenting time order and instead prayed for an award of sole physical custody and joint legal custody.

I read the parties' pleadings in preparation of the impending Initial Case Management Conference (ICMC) and noticed Respondent's allegation that the children had been living in Japan since the summer of 2014 "per the agreement of both parties." This allegation suggested to me that Minnesota might not be the children's home state for UCJEA purposes. I raised my concerns regarding subject matter jurisdiction during the ICMC and asked whether the parties wished to brief the issue. I did so because lack of subject matter jurisdiction is not waived if left out of an answer or motion. Rule 12.08(c) states that, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is generally recognized that keeping children in the middle of a long custody battle is inconsistent

with their best interests and I was concerned that deferring the subject matter jurisdiction issue until later could extend the custody dispute. That is why I raised the issue.

Susan M. Gallagher, Esq. represented Petitioner at the ICMC, but Petitioner chose to switch counsel thereafter and Nancy Zalusky Berg, Esq. was substituted as Petitioner's counsel on August 10, 2015. Ms. Berg wrote to me on August 20, 2015, indicating that she wished to brief the subject matter jurisdiction issue and then my clerk arranged a briefing schedule. Both parties submitted briefs and affidavits and thus the issue was joined.

Petitioner does not deny that the children had been living with Petitioner in Japan since the summer of 2014, which means that sans some nuance that had not yet presented itself, Minnesota would not qualify as the children's home state for purposes of Minnesota Statutes sections 518D.102(h) and 518D.201(a)(1).

Petitioner argues that Minnesota is the children's home state because the period during which they were living in Japan (summer 2014 through April 2015) qualifies as a "temporary absence" for section 518D.102(h) purposes. I have presided over numerous cases in which children lived in Minnesota when a dissolution/custody action was commenced, had not lived here for the entire six month period immediately preceding the actions, had been living somewhere else for a few days or weeks during that six month period, but returned before the custody action began. It is easy to comprehend how a few days or weeks or even a couple months away from Minnesota during the six months immediately preceding a custody action might qualify as a "temporary absence." The fact that the children involved in such cases lived in Minnesota prior to leaving and returned

to Minnesota before the subject actions commenced made their absences consistent with the operative adjective "temporary."

The circumstances of this case do not easily match up with the phrase "temporary absence." The children left for Japan in summer 2014, enrolled in a Japanese school with Petitioner's approval, and remained in Japan attending their Japanese school until almost the entire 2014/2015 school year had run its course before Petitioner commenced this action in late April 2015. These facts do not suggest to a reasonable observer that the children living in Japan for almost a year before this action commenced represented a temporary hiatus.

I will address the legal arguments advanced by the parties in support of their competing positions, but before doing so I should remind counsel that "The court's 'paramount consideration' in all matters involving court established relationships of a child is the best interests of the child. *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995)." *LaChapelle v. Mitten*, 607 N.W.2d 151, 158 (Minn. App. 2000). If this "temporary absence" issue allows for more than one legitimate answer, it would not be inconsistent for this court to consider the manner in which two competing, legitimate answers might have a negative impact on the children.

Petitioner adduces the parties' July 8, 2014 Agreement in support of his contention that the children's living arrangements in Japan were "temporary." The Agreement states that Respondent would be bringing the children to Japan for vacation but would be returning them to Minnesota no later than August 29, 2014. This language certainly suggests that the parties initially intended the children's Japan adventure to be a vacation, which would make the summer 2014 hiatus from Minnesota qualify as a

"temporary absence." However, Petitioner argues in his Memorandum that my focus should not be on the parents' intent because "the parties' intent is not relevant to the children's home state analysis." (Petitioner's Memorandum p. 3). I do not agree with this contention that the parties' intent is not relevant to the analysis and simply adduced this portion of Petitioner's Memorandum to point out his inconsistent positions regarding the role of the parties' intent (see his intent arguments discussed later herein).

Respondent attacks the binding nature of the July 2014 Agreement by arguing that she was coerced into signing the document – a contention strongly denied by Petitioner. Whether Respondent was coerced into signing the Agreement represents the type of factual issue that cannot be resolved by affidavit analysis alone, but I can resolve the jurisdiction without delving into the merits of Respondent's coercion claim. The reasons why I need not resolve the coercion claim all involve undisputed facts.

I will start by assuming that both parties intended the children's Japan adventure to be a vacation, but this assumption necessarily requires me to assume as well that both parties anticipated the children would return to Minnesota by August 29, 2014. When the children did not return as anticipated but remained in Japan past the due date, it becomes legitimate for me to examine the circumstances surrounding the children's extended stay in Japan. My examination into such circumstances should help me determine whether the children's absence from Minnesota changed character from "temporary" to something else. With that context in mind, a few facts jump out at me as key.

First, Petitioner's and Respondent's actions after August 29th suggest that they agreed to modify the terms of the Agreement or ignore it all together. Petitioner admits as much when he avers that, "In mid-August I agreed that the children could stay in Japan

with Hitomi for a while longer, but I never agreed for the children to stay indefinitely." (Affidavit ¶ 14). The key point is not the duration of the agreed upon additional stay in Japan but rather Petitioner's agreement that Respondent was no longer bound by her agreement to return the children to Minnesota by August 29, 2015. Petitioner's agreement not to abide by the August 29th deadline renders less germane Respondent's assertion that she had been coerced into accepting that August 29th return date.

Second, Petitioner's agreement to allow the children to stay in Japan a "little while longer" than the original August 29th return had practical ramifications. It necessarily meant that the children would be enrolling in school in Japan or, at the very least, returning to Minnesota at an indefinite time in the future and starting school late in Minnesota. Since it is logical to assume/infer that Petitioner would not want the children to return to Minnesota too late to start school on a timely basis merely to extend a vacation that had already lasted almost two months, it is also logical to assume/infer that Petitioner was receptive to the children's Japan adventure morphing from a vacation to one that would last at least as long as the 2014/2015 school term in Japan. Consistent with my assumption/inference here, Petitioner signed a document approving the children's enrollment in a Japanese school. He tries to put a positive spin on that approval by noting that he signed the document allowing them to enroll in a Japanese school before the July 2014 Agreement, thus making the terms of the Agreement representative of his intent. However, the children were later reenrolled in a different Japanese school when the first one failed to meet the parties' expectations and this new enrollment occurred not only after the July 2014 Agreement but after Petitioner's "while longer" extension had run its course.

Third, I will assume for purposes of analysis that Petitioner's agreement to allow the children to remain in Japan for a "while longer" was limited to a few days or a couple weeks at most, but if that were the case, I would have expected Petitioner to seek court help in securing the children's return to Minnesota when they did not return a "while" after August 29th. He did no such thing and his failure to take remedial action in late September/early October suggests that a "while longer" had morphed into many months longer. This nuance is one in which consideration of the children's best interests comes into play. The longer Petitioner sat on the side lines and did nothing to compel the children's return to Minnesota, the more time he afforded them to develop friendships in Japan, grow accustomed to their new school, and become integrated in their new community. Court action to compel the children's return to Minnesota in late September/early October 2014 would have been far less disruptive and potentially traumatic to the children than his spring 2015 resort to court action.[1] Even more revealing, instead of taking court action to secure the children's return during late September/early October, Petitioner traveled to Japan to visit the children in October, including a trip to Disneyland in Tokyo.

Fourth, Respondent avers that the parties began talking about her moving to Japan in spring 2014. Petitioner does not dispute this averment but takes issue with Respondent's version of the reasons that prompted the spring discussion. I need not determine whether the reasons listed by Respondent were in fact the reasons. Rather, what is important to my analysis is the fact that the parties began filling out school applications for Japan in June. Indeed school applications for the YMCA school in Japan were signed and dated on June 25, 2014, two weeks before the Agreement. Also helpful

[1] Such prompt remedial action also would have made the two month hiatus appear temporary in nature.

is Respondent's unchallenged averment that Petitioner purchased an iPad for the children so he could Facetime with them after they moved to Japan. Such action is inconsistent with Petitioner's assertion that he only agreed to have the children go to Japan for a summer vacation.

Fifth, the parties listed their Minnesota home for sale in May 2014. To a reasonable observer this action certainly suggests at the very least that the parties no longer intended to keep continuity in the children's Minnesota home and surroundings. Petitioner places a spin on this listing by arguing that it was done purely to "cash out" equity. Petitioner conveniently resorts to his subjective intent regarding the listing agreement, but also argues in his Memorandum that either party's subjective intent is not germane to the inquiry. He cannot have it both ways. If objective intent should be my charge then I should be consistent and I agree with Respondent that Petitioner's actions in listing the house for sale were consistent with the Respondent's view that the status quo was changing. I also agree that Petitioner's actions after the Agreement was signed are consistent with Respondent's view that Petitioner agreed to have the children remain in Japan far longer than a "while" after August 29, 2015. Indeed, Petitioner's objective manifestation of assent to having the children start school in Japan and remain there until they were integrated into their new school, home, and community and made new friends looks to me like the children's "absence" from Minnesota ceased to be a temporary absence even if it could have been labeled as temporary in the beginning.

I should return to the children's best interests at this juncture in the analysis. If I determine that Minnesota is the children's home state despite the fact that they remained in Japan for the entire 2014/2015 school year and have commenced the 2015/2016 school

year in Japan it would mean that Minnesota would retain jurisdiction over the children until they emancipate (or until Minnesota later defers to another jurisdiction based on facts that occur in the future). I have deep concerns regarding how I would acquire the forensic help necessary to determine custody/parenting time today and in the future. Hennepin County Family Court Services will not perform a custody/parenting time evaluation with the children living in Japan. I've been presiding over Family Court cases since 1997 and I am unaware of an evaluator that would travel back and forth to Japan to perform a private analysis or how the parties would be able to pay for it if such a person existed and able to perform the task. Assuming that a Minnesota court could overcome such practical obstacles, I have serious concerns regarding how a Minnesota court would be able to address post-decree motions to modify custody and/or parenting time if the children remained in Japan.

I understand that a parent should not be able to resort to self-help, flee to a foreign country, and use the practical problems created by that flight to gain the upper hand in a custody/parenting time dispute. However, neither should a parent remaining in Minnesota be able to sit on his/her hands and do nothing until the duration of the children's hiatus from Minnesota either creates or contributes to such practical problems. Had Petitioner taken action a "little while" after the original August 29, 2014 return date, the forensic problems to which I have alluded would not be so great. The distance required for either party to travel to Japan or Minnesota for court would have remained the same, but many of the difficulties with a custody/parenting time evaluation would have been reduced. If Petitioner had sought court help a "little while" after August 29, 2014, the children would not yet have been integrated into their Japanese school and

community, the children would not have made new friends, and the children's bonds with their Japanese relatives would not have grown commensurate with their stay in Japan. In fact, had Petitioner insisted on the August 29, 2014 return date and not agreed to have the children stay a "while longer" and/or enroll in a Japanese school, the chances would have been good if not great that he could have procured injunctive relief based on the July 2014 Agreement alone (but would have brought Respondent's coercion claim into play). Equity aids the vigilant and Petitioner was anything but vigilant in seeking to enforce the 2014 Agreement. Although these observations should not be the be all and end all of the discussion here, they add to the analysis by suggesting a practical best interest reason not to unduly extend the "temporary absence" caveat of sections 518D.102(h) and 518D.201(a)(1) to the situation at hand.

Based on the foregoing analysis of undisputed facts, I cannot find that the children's absence from Minnesota from July 2014 through the April 2015 commencement of this custody case qualifies as a "temporary absence" for chapter 518D purposes.

JTS

STATE OF MINNESOTA

IN SUPREME COURT

A19-1235

In re the Marriage of:

James Edward Cook, II, petitioner,

Respondent,

vs.

Hitomi Arimitsu,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Hitomi Arimitsu for further review be, and the same is, denied.

Dated: July 21, 2020

BY THE COURT:

G. Barry Anderson
Associate Justice

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CASE

Download full text EN

Case Name

De directie Preventie, optredend voor zichzelf en namens Y (the father) against X (the mother) (7 February 2001, ELRO nr.AA9851 Zaaknr:813-H-00)

INCADAT reference

HC/E/NL 314

Court

Country	NETHERLANDS - KINGDOM IN EUROPE
Name	Gerechtshof 's-Gravenhage
Level	Appellate Court
Judge(s)	Van den Wildenberg, De Bruijn-Luckers, Labohm

States involved

Requesting State	CANADA
Requested State	NETHERLANDS - KINGDOM IN EUROPE

Decision

Date	7 February 2001
Status	Final
Grounds	Rights of Custody - Art. 3 | Grave Risk - Art. 13(1)(b) | Objections of the Child to a Return - Art. 13(2)
Order	Appeal dismissed, return refused
HC article(s) Considered	3 13(1)(b) 13(2)
HC article(s) Relied Upon	13(2)
Other provisions	-
Authorities | Cases referred to	-
Published in	http://www.hcch.net/incadat/fullcase/0314.ht

INCADAT comment **Article 12 Return Mechanism**

EXHIBIT
tabbies 3

Rights of Custody	What is a Right of Custody for Convention Purposes? Autonomous Interpretation of 'Rights of Custody' And 'Wrongfulness'
Exceptions to Return	
Grave Risk of Harm	Primary Carer Abductions Economic Factors
Child's Objection	Nature and Strength of Objection Exercise of Discretion

SUMMARY

Summary available in EN | FR | ES

Facts

The child, a boy, was 9 1/2 at the date of the alleged wrongful removal. He had lived in Canada all his life. The parents separated in 1994. Subsequently, the mother was awarded custody and the father access.

On 19 October 1999 the mother petitioned a Quebec court for a change in the access regime. On 1 June 2000 she signed an agreement not to leave Canada before a decision was made. On 5 June 2000 the mother took the boy to Holland.

On 20 October 2000 the *Rechtbank 's-Gravenhage* (juvenile judge) refused to order the return of the boy. The Central Authority and the father appealed.

Ruling

Appeal dismissed and return refused; the removal was wrongful but the standard required under Article 13(2) had been met to show that the child objected to a return.

Grounds

Rights of Custody - Art. 3

The mother argued that since she had been awarded custody of the child she had the right to determine his place of residence. The court rejected this argument given that proceedings were underway in Quebec to consider the issues of custody and access and that the mother had signed an agreement not to leave the country before a final decision was made. By leaving Canada she had moreover violated art 4 of the Canadian Enforcement Act on International Child Abduction by which it is prohibited to remove a child during a procedure in which the question of custody is posed and is not yet decided. The court found the removal to be wrongful

Grave Risk - Art. 13(1)(b)

Notwithstanding the finding on the child's objections the court also found that there was a grave risk the return of the boy would expose him to physical or psychological harm or otherwise place him in an intolerable situation. This was because the mother would not

be able to return to Canada since she had no means of support there. Consequently the boy would have to return alone and the separation from his mother would cause him a grave risk of harm.

Objections of the Child to a Return - Art. 13(2)

The child was heard by the court in a private hearing. He was judged to be very capable of expressing his opinion. He clearly stated that he wanted to stay with his mother in Holland and strongly opposed returning to Canada. On the strength of his objections the court exercised its discretion under Article 13(2) not to order his return.

INCADAT comment

In the Australian case, *State Central Authority of Victoria v. Ardito*, 29 October 1997, Family Court of Australia (Melbourne) [Reference INCADAT: HC/E/AU 283] the Article 13(1)(b) exception was made out on the basis that the mother could not return to the United States with her child. However, in that case the mother was able to adduce evidence that the United States consulate in Melbourne had refused all her applications for a visa to re-enter the United States.

- **What is a Right of Custody for Convention Purposes?**
- **Autonomous Interpretation of 'Rights of Custody' And 'Wrongfulness'**
- **Primary Carer Abductions**
- **Economic Factors**
- **Nature and Strength of Objection**
- **Exercise of Discretion**

Case Law Search New search

CASE No full text available

Case Name **C. v. C. 2003 S.L.T. 793**

INCADAT reference HC/E/UKs 998

Court

Country	UNITED KINGDOM - SCOTLAND
Name	Outer House, Court of Session
Level	First Instance
Judge(s)	Lord Macfadyen

States involved

Requesting State	UNITED STATES OF AMERICA
Requested State	UNITED KINGDOM - SCOTLAND

Decision

Date	8 May 2003
Status	Final
Grounds	Removal and Retention - Arts 3 and 12 | Consent - Art. 13(1)(a) | Grave Risk - Art. 13(1)(b)
Order	Return refused
HC article(s) Considered	13(1)(a) 13(1)(b)
HC article(s) Relied Upon	13(1)(a) 13(1)(b)
Other provisions	-
Authorities | Cases referred to	Re H. (Minors)(Abduction: Acquiescence) [1998] AC 72; P. v. P. (Abduction: Acquiescence) [1998] 2 FLR 835.
Published in	-

INCADAT comment

Exceptions to Return

Grave Risk of Harm Economic Factors

EXHIBIT tabbies 4

Consent	Establishing Consent
General Issues	Limited Nature of the Exceptions

SUMMARY

Summary available in EN

Facts

The application related to a child born in March 2002. The child lived with his married parents in the United States until September 2002 whereupon the mother took her to Scotland. Mother and child took up residence with the maternal grandparents. The father petitioned for the return of the child.

Ruling

Removal wrongful but return refused; a return would expose the child to a grave risk of an intolerable situation.

Grounds

Removal and Retention - Arts 3 and 12

-

Consent - Art. 13(1)(a)

The mother submitted that the father had consented to the removal and in this relied upon a note he had written on 8 July 2008 which affirmed that he assigned all rights to the child to the mother and allowed her to relocate to the United Kingdom. The trial judge questioned whether consent should be interpreted in the same way as acquiescence, as this might lead to over-complications. He noted that a case for consent had to be clearly established.

The judge found that at the time the note was written there was consent on the part of the father. However, he held that consent, once given, was not irrevocable. In mid September, in a phone conversation between the parents, it was accepted by the Court that the father said something to the effect that the mother should go and support herself and the child.

The trial judge held that had the phone conversation been the only additional evidence he would have been inclined to regard this as a reaffirmation of the father's earlier consent. However, other evidence, including from testimony given by the mother showed that by mid-September the July consent was not on balance still in force. The exception was therefore not made out.

Grave Risk - Art. 13(1)(b)

The trial judge accepted that in principle it would, prima facie, place the child in an intolerable situation were she to be returned in circumstances in which it was impossible or impracticable for the mother to return with her. In this arguments based on the financing of travel were rejected since public funds could be made available. Furthermore, special arrangements existed for granting temporary leave to enter the United States.

The primary issue related to the mother's ability to support herself and her daughter whilst in the United States. The mother would not be able to work there or receive benefits, whilst custody proceedings would not necessarily be concluded in weeks or a few months. Consequently, the Court accepted that the mother's financial circumstances represented a genuine obstacle to her returning.

However, this would be addressed if the father was willing and able to provide mother and child with suitable accommodation and to provide adequate maintenance during the pendency of the proceedings. Residence in a mobile home and $200 per week would suffice but the Court found on the evidence that the father could not be relied upon to make such provision for the duration of the proceedings.

In these circumstances, the Court exercised its discretion not to make a return order.

INCADAT comment

- **> Economic Factors**
- **> Establishing Consent**
- **> Limited Nature of the Exceptions**

Family Court of Australia - Full Court

⇦ Harris & Harris ⇨ [2010] FamCAFC 221; (5 November 2010)

Last Updated: 23 November 2010

FAMILY COURT OF AUSTRALIA

⇦ HARRIS & HARRIS ⇨ [2010] FamCAFC 221

FAMILY LAW - APPEAL – CHILD ABDUCTION – PROCEDURAL FAIRNESS –Whether the manner in which the proceedings were conducted denied the father procedural fairness – Where it was asserted the father received erroneous information from the Commonwealth and State Central Authorities – Proceedings conducted "on the papers" without cross-examination – Where initial advice from the Central Authority was erroneous and misleading – Whether the trial Judge erred in failing to enquire whether the father had been informed of his rights and had elected not to participate in the proceedings – Whether, in cases where the evidence regarding domestic violence is controversial, there is a duty on the trial Judge to go behind the application to ensure the unrepresented father's rights were fully protected – No procedural unfairness established – No merit in procedural fairness grounds.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge erred in approach to application by not considering the return of the child separate from return with the mother – Where it was the common expectation of the parties that if an order was made the mother would return to Norway and father only sought supervised contact – No error established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge erred in making factual findings of domestic violence and abuse that were not supported on the evidence – Whether the trial Judge erred in making findings of fact that were based on inadequate or inconclusive corroborative evidence – Whether the trial Judge erred in accepting the mother's untested evidence relating to domestic violence while rejecting other parts of her untested evidence – Where trial Judge placed significant weight on the mother's evidence of domestic violence that was independently corroborated in accordance with approach endorsed in Panayotides v Panayotides (1997) FLC 92-733 – Where the status and weight afforded to hearsay statements improperly relied on by trial Judge did not impugn the balance of the finding of domestic violence – Where balance of trial Judge's conclusions were based on independently corroborated evidence of domestic violence – Where the inferences drawn by trial Judge were open to her Honour on the evidence – Whether the trial Judge failed to have appropriate regard to the standard of proof to be applied – Where trial Judge applied the standard of proof required by s 140 of the Evidence Act 1995 (Cth) – No error in factual findings or standard of proof established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Gra
of physical or psychological harm to the child or placing the child in an intolerable situ
Whether the trial Judge erred in failing to properly consider conditions that could be a

to an order for the return of the child – Whether the trial Judge erred in finding that the mother would not be protected in Norway – Whether trial Judge failed to assess the distinct issue of the risk to the child of return – Recognition afforded to serious nature of domestic violence and its effect on the victim and actual or potential effect on the child – Trial Judge erroneously conflated psychological risk to the child with the risk of physical harm to the child – Where trial Judge considered separately the defence of intolerable situation – Where the trial Judge's findings that the mother and the child would be in an extremely vulnerable financial position, without emotional support and isolated if ordered to return to Norway were open to the trial Judge on the evidence – Where these findings supported the trial Judge's conclusion that the mother and the child would be in an intolerable situation if a return to Norway was ordered – No appealable error established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge failed to properly consider conditions that could be attached to an order for return – Where trial Judge extensively considered evidence of domestic violence, and support and protection available to the mother on return – Where conditions attached to orders would not overcome vulnerability of mother or result in satisfactory living arrangements – No appealable error established – Appeal dismissed.

FAMILY LAW - APPEAL – APPLICATION TO ADDUCE FURTHER EVIDENCE – Father sought to adduce evidence of correspondence with Commonwealth and State Central Authorities to support procedural unfairness ground – Correspondence admitted by consent – Balance of evidence sought to be adduced was contentious and would not affect the outcome of the appeal – Application allowed in part.

FAMILY LAW - APPEAL – HAUGE CONVENTION – Operation of convention in Australia – Discussion of role and responsibilities of Commonwealth and State Central authorities.

FAMILY LAW - APPEAL – COSTS – No order for costs – Each party to pay their own costs of and incidental to the appeal.

Convention on the Civil Aspects of International Child Abduction
Evidence Act 1995 (Cth), s 140
Family Law Act 1975 (Cth) ss 92, 111B(1), 117, 117AA
Family Law (Child Abduction Convention) Regulations 1986

Beazley v McBarron [2009] NZHC 37
C v C (Minor: Abduction: Rights of Custody) [1989] 2 All ER 465
CDJ v VAJ (1998) 197 CLR 172
Central Authority v Houwert [2007] ZASCA 88; [2007] SCA 88 (RSA)
De L v Director-General, New South Wales Department of Community Services [1996] HCA 5; (1996) 187 CLR 640
De Lewinski and Legal Aid Commission of New South Wales v Director-General, New South Wales Department of Community Services (1997) (1997) FLC 92-737
Department of Community Services & Frampton [2007] FamCA 1064; (2007) FLC 93-340
Director-General NSW Department of Community Services & JLM [2001] FamCA 1338; (2001) FLC 93-090
DP v Commonwealth Central Authority [2001] HCA 39; (2001) 206 CLR 401
Laing v Central Authority [1999] FamCA 100; (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92-849
McDonald & Director-General, Department of Community Services (NSW) [2007] FamCA 1400; (2006) FLC 93-297
Murray v Director of Family Services ACT [1993] FamCA 103; (1993) FLC 92-416
MW v Director-General, Dept of Community Services [2008] HCA 12; (2008) 39 Fam LR 1
Panayotides v Panayotides (1997) FLC 92-733
Pennello v Pennello [2003] ZASCA 147; [2004] 1 All SA 32 (SCA)
Quarmby & Anor v Director-General, Department of Community Services (NSW) [2005]

FamCA 843; (2005) 34 Fam LR 8
Re: F (A Minor: Abduction: Rights of Custody Abroad) (1995) 3 All ER 641
Re F (Hague Convention: Child's Objections) [2006] FamCA 685; (2006) FLC 93-277
TB v JB (Abduction: grave risk of harm) [2001] 2 FLR 515
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
Zafiropoulos & The Secretary of the Department of Human Services State Central Authority [2006] FamCA 466; (2006) FLC 93-264

APPELLANT:	Mr ⇦ **Harris** ⇨
RESPONDENT:	Ms ⇦ **Harris** ⇨
FILE NUMBER:	SYC 3064 of 2009
APPEAL NUMBER:	EA 58 of 2010
DATE DELIVERED:	5 November 2010
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Bryant CJ, Finn & Boland JJ
HEARING DATE:	17 August 2010
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	13 April 2010
LOWER COURT MNC:	[2010] FamCA 261

REPRESENTATION

COUNSEL FOR THE APPELLANT:	Mr Kearney with Ms Barnett
SOLICITOR FOR THE APPELLANT:	Barkus Doolan Kelly
COUNSEL FOR THE RESPONDENT:	Mr Simpson SC
SOLICITOR FOR THE RESPONDENT:	Watts McCray

ORDERS

(1) The appeal is dismissed.
(2) By consent the father's application to adduce further evidence filed 30 June 2010 is allowed in part.
(3) There be no order as to costs.

IT IS NOTED that publication of this judgment under the pseudonym ⇦ Harris & Harris ⇨ is approved pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 58 of 2010
File Number: SYC 3064 of 2009

Mr ⇦ Harris ⇨

Appellant

And

Ms ⇦ Harris ⇨

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 13 April 2010 Ryan J made orders dismissing an application brought by the Director-General, Department of Human Services NSW as the NSW appointee of the Commonwealth Central Authority ("the Commonwealth Central Authority") under the Family Law (Child Abduction Convention) Regulations 1986 ("the regulations") for the return of a child, ("the child") to Norway. The regulations give effect to Australia's obligations under the Convention on the Civil Aspects of International Child Abduction ("the Convention"). In these reasons we will refer to the Director-General, Department of Human Services NSW as "the State Central Authority".
2. The child, who has both Norwegian and Australian nationality, and was born in 2007, was almost three years old at the date of the trial Judge's orders. This appeal is an appeal by the child's father, Mr ⇦ **Harris** ⇨ ("the father"), against her Honour's orders.
3. On 19 March 2009 the father requested the Norwegian Central Authority to apply to the Commonwealth Central Authority for the return to Norway of the child. He asserted the child had been wrongfully removed by Ms ⇦ **Harris** ⇨ ("the mother") from Norway to Australia in November 2008 or wrongfully retained in Australia after 10 January 2009. Accordingly, at the direction of the Commonwealth Central Authority, the State Central Authority brought the application which was dismissed by Ryan J on 13 April 2010.
4. Formally therefore, the father was not the applicant in the proceedings before the trial Judge. He is however a person affected by the orders of the trial Judge, and his appeal was brought on that basis. Thus it is without doubt that the father being a person with the requisite rights of custody in respect of the child, and being affected by the orders under appeal, has standing to commence and prosecute the appeal.
5. The State Central Authority is not named as a party to the appeal, and advised the Court that it did not wish to participate in the appeal. However, in the event that the Full Court allowed the appeal, re-determined the application and ordered the return of the child to Norway, the State Central Authority said it would assist in arrangements for the child's return.
6. The trial Judge found the prerequisite conditions for return prescribed in the regulations were satisfied. The child had been habitually resident in Norway at the time of his removal by the mother, or in the alternative wrongfully retained by her in Australia after 10 January 2009. Her

Honour found the father had rights of custody in respect of the child at the time of his removal and wrongful retention. Her Honour went on to find that to return the child to Norway would expose him to a grave risk of physical and psychological harm and to an intolerable situation. Thus she dismissed the State Central Authority's application.

7. Unsurprisingly, no challenge is raised in the father's appeal to the trial Judge's findings as to the child's habitual residence and the father's rights of custody at the time of his removal, or to her Honour's findings in respect of the child's removal, or to her finding that the removal to, or retention in, Australia by the mother was wrongful. No cross-appeal was filed by the mother challenging these findings.

BACKGROUND

8. The background facts appear in the trial Judge's reasons at paragraphs 8 to 79. To give context to this appeal we repeat some of relevant paragraphs of her Honour's reasons:
    9. The mother was born in Australia in 1971. The mother is an Australian citizen and her family lives in Australia.
    10. The father was born in Norway on in 1972. He is a Norwegian citizen and his family lives in Norway.
    11. The mother and father met in France in August 2005 which is when they commenced an intimate relationship. In her application filed on 24 December 2008 the mother said that she and the father began living together in August 2005. Thereafter they spent time in Norway and holidayed in Asia and Canada before returning to Norway in mid 2006. In August 2006 the mother and father separated. While the father remained in Asia, the mother returned to Australia. Not long after she arrived, the mother learned she was pregnant to him.
    12. The father joined the mother in Australia in September 2006. The parties remained in Australia and in November 2006 they married.
    13. In December 2006 the father and mother returned to Norway to live. The father and mother moved into the father's grandfather's house near [G]. Other than when they visited Australia, this is where they lived until November 2008.

...

15. During February 2007 the father and mother attended marriage counselling at the family centre in [G].
16. That same month the mother attended a crisis centre where she sought advice concerning domestic violence. The father said he wanted both of them to attend upon the domestic violence counsellor but in the end he spoke with the counsellor on the telephone and nothing further came of it.
17. The child was born in Norway in 2007...
18. Between 8 August 2007 and 14 September 2007, with the father's consent, the mother brought the child to Australia. The father remained in Norway for work.
19. In the later part of 2007 the father took about 26 weeks paternity leave. It seems likely this was between the child's two 2007 trips to Australia. Although the mother said the father was not involved in the child's care there is sufficient evidence to corroborate his evidence that he was. His two periods of paternity leave amplified his opportunity for significant, albeit secondary to the mother's, role in the child's care.
20. Between 6 December 2007 and 8 February 2008, with the father's consent, the mother holidayed in Australia with the child. The father remained in Norway.
21. On 14 May 2008 the mother was treated in hospital for a fractured left ulna. It is the mother's evidence that the father broke her arm. There is no doubt the parents [sic] engaged in a physical altercation during which the mother's arm was broken. Each accused the other of being the aggressor. The mother gave a history of the injury to the hospital that she fell. At this initial consultation the father was present. Two days later the mother returned to hospital and informed a doctor she had not fallen and that her arm was broken when the father hit her. The treating doctor and attending nurse spoke to the mother about reporting the incident to the police. The mother indicated she wanted her information recorded but not reported to police. The father was not injured in this incident.

...

34. As they had planned, on 23 May 2008 the father, mother and child travelled together to Australia. In Australia they resided in a small flat at the mother's parent's home [in the western suburbs of Sydney].
35. On the evening of 22 June 2008 the mother refractured her left arm in the same place as her earlier injury. The mother and father give divergent accounts of an ugly dispute that evening which appears to have been about whether they would separate. Each accuses the other of being the aggressor and of physical aggression. The gravamen of the father's evidence was that to the extent there was a physical altercation that evening it was primarily instigated by the mother with the only physical aspects which may have resulted in the mother's arm being injured having occurred during the melee between her and her parents. The mother says her arm was broken when the father pushed her into a wall. The father agreed he pushed the mother. He was not injured in this incident.
36. The following morning the mother's mother took her to Westmead Hospital where her injury was treated by her arm being placed in a sling. The mother reported to Westmead Hospital that the father had previously broken her arm and was responsible for this injury. Upon the doctor's suggestion the mother accepted a referral to a hospital social worker. The father moved out of the [...] flat for a few days and stayed in a motel.

...

39. The parents disagree about which of them instigated their resumption of cohabitation. Irrespective of who it was by no later than 29 June 2008 they were living together as a family at the [mother's parents'] flat.
40. Together, the father, mother and child returned to their home in Norway on 25 – 26 August 2008. Once there, the father resumed full time employment with his former employer. According to the father upon their return to Norway with the child the parents understood the purpose of the rights of access agreement was spent. I accept this was the parents' intention when they entered into the agreement.

...

42. On 18 September 2008 the mother attended a casualty clinic where she was observed as 'showing signs of physical violence in the shape of haematoma on the left upper arm, haematoma around the right eye.' The mother gave a history of physical violence from the father which she said had commenced in February 2006. The mother was advised to report her situation to police but did not. The clinic also referred the mother to an attorney, who was [Mr O]. It is likely that to hide the bruise around her right eye that [S] saw the mother with 'strange make up' around her eye.

...

51. On 27 November 2008, without the father's knowledge, the mother departed Norway with the child. The child travelled on his Australian passport. Although the father knew the mother had the child's Australian passport he wrongly believed that absent his consent she would only be able to remove the child from Norway on his Norwegian passport. Accordingly and to prevent the child's removal not long before she departed for Australia the father removed the child's Norwegian passport from the mother's possession.

...

54. The mother and child arrived in Australia on 29 November 2008...
55. During a telephone conversation in mid December 2008 the father threatened to kill at least the mother and her parents. The mother said he said 'If you don't cooperate and do exactly what I want, then I will fly to Australia and kill you, [the child], your father and your mother.' The father said '...I completely lost my temper and screamed in despair that I wanted to kill her and her family. Of course I did not mean this and I have since apologized for this.'

...

57. On 24 December 2008 the mother filed in the Family Court at Parramatta an Application for Final Orders and simultaneously an Application in a Case for interim orders...

...

60. On 23 January 2009 the father consulted a lawyer in Norway.

61. In January 2009 the father filed a child abduction complaint in Norway against the mother. Had the complaint been established the mother would have been subject to a possible term of imprisonment.

...

THE GROUNDS OF APPEAL

9. In his amended Notice of Appeal the father relies on nine grounds of appeal which contain various sub-grounds. The grounds were distilled by the father's counsel into five discrete topics:
    - The first challenge asserted the manner in which the proceedings were conducted was procedurally unfair to the father because:

- they were conducted on the papers without the father's knowledge of or consent to that procedure,

- no challenge was raised by the State Central Authority to the admissibility of evidence relied on by the mother, and

- findings of fact adverse to the father were made without him having an opportunity to ensure the mother was cross-examined on her evidence

("the procedural fairness challenge").

- Secondly, the father asserted error of approach by the trial Judge in considering the application on the basis that if the orders sought in the application were granted, the mother and child would be returned to Norway rather than, as the application and regulations required, considering separately the return of the child to Norway ("the challenge to the trial Judge's approach").
- Thirdly, that her Honour erred in making factual findings not supported by the evidence, or based on inadequate or inconclusive corroborative evidence, or erred in accepting the mother's untested evidence on the topic of domestic violence whilst rejecting other parts of her untested evidence. Encompassed in this challenge is an assertion that, although her Honour identified the correct standard of proof, she erred in failing to have appropriate regard to that standard ("the asserted factual finding errors").
- Fourthly, that the findings underpinning her Honour's conclusions that the child would be exposed to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation if a return was ordered were not made out ("the asserted error in determining 'grave risk'").
- Fifthly, a failure by the trial Judge to properly consider appropriate conditions which could be attached to any orders for return of the child ("the conditions challenge").

10. We think the most convenient manner to address the father's appeal is to consider the topics in the order identified above.
11. As will shortly become apparent from our discussion of the further evidence admitted by consent, this appeal has raised issues about the role and responsibilities of the State Central Authority. It is unfortunate that the State Central Authority was instructed by the Commonwealth Central Authority not to participate in this appeal. We are however, satisfied that procedural fairness was afforded by us to the State Central Authority whose decision was taken after service of all relevant material on it, and we acceded to the request of the State Central Authority (and to which we later refer) that this Court receive a copy of an email from Ms P (a solicitor employed by the Department of Human Services, NSW (the State Central Authority)) to the father dated 6 July 2009.
12. As the father's procedural fairness challenge involved consideration of the provisions of legal representation to a person in the position of the father, and aspects of the role and operation of the Commonwealth Central Authority and the State Central Authority in proceedings under the regulations, we propose to discuss these issues before turning to that challenge.

THE PRACTICAL OPERATION OF THE CONVENTION IN AUSTRALIA

13. Unlike other countries which are signatories to the Convention, Australia has not directly incorporated the Convention into its domestic law, but s 111B(1) of the Family Law Act 1975 (Cth) ("the Act") provides for the making of regulations to enable the performance of Australia's obligations under the Convention (Family Law (Child Abduction Convention) Regulations 1986 ("the regulations")).
14. Regulations 1 to 4 inclusive are essentially concerned with definitions.
15. The powers, duties and functions of the Commonwealth Central Authority are set out in reg 5 as follows:

(1) In addition to the other functions conferred on the Commonwealth Central Authority by these Regulations, the functions of the Commonwealth Central Authority are-

(a) to do, or co-ordinate the doing of, anything that is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention; and

(b) to advise the Attorney-General, either on the initiative of the Commonwealth Central Authority or on a request made to that Authority by the Attorney-General, on all matters that concern, or arise out of performing, those obligations, including any need for additional legislation required for performing those obligations; and

(c) to do everything that is necessary or appropriate to give effect to the Convention in relation to the welfare of a child on the return of the child to Australia.

(2) The Commonwealth Central Authority has all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention.

(3) The Commonwealth Central Authority must perform its functions and exercise its powers as quickly as a proper consideration of each matter relating to the performance of a function or the exercise of a power allows.

16. Regulation 6 of the regulations, since its amendment in 2004, makes it clear that a person, institution or other body that has rights of custody may make an application for the return of a child (or other relief) under the regulations. That regulation provides as follows:

6. **These Regulations do not affect other powers of, or rights of application to, a court**

(1) These Regulations are not intended to prevent a person, an institution or other body that has rights of custody in relation to a child for the purposes of the Convention from applying to a court if the child is removed to, or retained in, Australia in breach of those rights.

(2) These Regulations are not to be taken as preventing a court from making an order at any time under Part VII of the Act or under any other law in force in Australia for the return of a child.

17. Regulation 7 provides an immunity to the Commonwealth Central Authority and a State Central Authority against a costs order in performing its function (see also s 117AA of the Act).
18. Regulation 8 empowers the Attorney-General to appoint a person to be a Central Authority of the State for the purposes of the regulations.
19. The duties, powers and functions of a State Central Authority are set out in reg 9. That regulation provides as follows:

Subject to subregulation 8 (3), a State Central Authority has all the duties, may exercise all the powers, and may perform all the functions, of the Commonwealth Central Authority.

20. Regulation 14 provides as follows:

14. **Applications to court**

(1) If a child is removed from a convention country to, or retained in, Australia:

(a) the responsible Central Authority may apply to the court, in accordance with Form 2, for any of the following orders:

(i) a return order for the child;

(ii) an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention;

(iii) an order for the issue of a warrant mentioned in regulation 31;

(iv) an order directing that:

(A) the child not be removed from a specified place; and

(B) members of the Australian Federal Police prevent the child being removed from that place;

(v) an order requiring that arrangements be made (as necessary) to place the child with an appropriate person, institution or other body to secure the welfare of the child, until a request under regulation 13 is determined;

(vi) any other order that the responsible Central Authority considers appropriate to give effect to the Convention; or

(b) a person, institution or other body that has rights of custody in relation to the child for the purposes of the Convention may apply to the court, in accordance with Form 2, for an order mentioned in subparagraph (a) (i), (ii), (iii), (iv) or (v).

(2) If the responsible Central Authority, or a person, institution or other body that has rights of custody in relation to a child for the purposes of the Convention, has reasonable grounds to believe that there is an appreciable possibility or a threat that the child will be removed from Australia, the responsible Central Authority or person, institution or other body may:

(a) apply to the court, in accordance with Form 2, for an order for the issue of a warrant mentioned in regulation 31; or

(b) apply to the court for an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention.

(3) If a child is wrongfully removed from Australia to, or retained in, a convention country, the responsible Central Authority may apply to the court, in accordance with Form 2, for:

(a) an order that the responsible Central Authority considers necessary or appropriate to give effect to the Convention in relation to the welfare of the child after his or her return to Australia; or

(b) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.

(4) If a copy of an application made under subregulation (1), (2) or (3) is served on a person:

(a) the person must file an answer, or an answer and a cross application, in accordance with Form 2A; and

(b) the applicant may file a reply in accordance with Form 2B.

21. Thus it may be seen that an application for the return of a child wrongly removed to, or retained in Australia, may be made by a person or body whose rights of custody in respect of the child have been breached (Regulation 6), or by the relevant Australian Central Authority (Regulation 14).
22. Counsel for the father drew our attention to cases decided under the Convention in overseas jurisdictions where the applicant for return is the parent, and is the named party to the proceedings, and receives legal aid in the country in which the proceedings are conducted, or is a joint applicant with the Central Authority (see Pennello v Pennello [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); Central Authority v Houwert [2007] ZASCA 88; [2007] SCA 88 (RSA) at paragraph 22,

where Van Heerden JA noted that in that case the father was not joined as a co-applicant "as is usually the case when a return application under the Convention is instituted by the Central Authority". See also Beazley v McBarron [2009] NZHC 37 referring to an article by J Wademan 'The Hague Convention on International Child Abduction: the role of the Central Authority in Court proceedings' (2008) 6 New Zealand Family Law Journal 105, which article notes that the New Zealand Central Authority "performs a facilitative role rather than initiating proceedings as a party").

23. We note that absent the participation by the State Central Authority at the hearing of this appeal we were unable to have the benefit of submissions as to whether the regulations would permit concurrent applications by both the State Central Authority and the parent seeking return to be heard and determined by the Court and Australia's obligations, if any, under Article 25. As we will shortly explain in our observations about the role of the State Central Authority, and its duty to put all relevant evidence before a court and perhaps craft appropriate conditions sought on the return of a child, we accept that the interests of the State Central Authority and a parent seeking return may not necessarily coincide in all respects.
24. We think it sufficient for the purposes of this case to note that reg 14, on its face, does not, as it is drafted in the alternative, support the concept of concurrent applications by the State Central Authority and a parent. However, we express no concluded view.
25. We accept that there are inherent difficulties if proceedings are commenced by a parent with rights of custody for the return of a child, and subsequently the State Central Authority seeks to be substituted for that parent in circumstances where no request for return of the child has been made by the parent to the State Central Authority in the place of habitual residence (see Quarmby & Anor v Director-General, Department of Community Services (NSW) [2005] FamCA 843; (2005) 34 Fam LR 8). But as presently advised we see no reason in practical terms why, if proceedings are commenced by a State Central Authority, that with the consent of the State Central Authority, the parent seeking return could be not substituted for the State Central Authority.
26. However, reg 14 may not rule out intervention under s 92 of the Act by a parent to proceedings instituted by the State Central Authority, but again in absence of submission by the State Central Authority, and as it was not a matter raised by counsel for the father, it is unnecessary we determine this matter.
27. We note that the authors of International Movement of Children: Law Practice and Procedure observe that "as far as [they] are aware Australia is the only Contracting State where the Central Authority applies as the applicant" (Nigel Lowe, Mark Everall and Michael Nicholls International Movement of Children: Law Practice and Procedure, Jordan Publishing, Bristol, UK, 2004 at 513).
28. We turn now to the role of the Central Authority. In Re F (Hague Convention: Child's Objections) [2006] FamCA 685; (2006) FLC 93-277 the Full Court (Bryant CJ, Kay and Boland JJ) reviewed a number of decisions which discussed the role of the Central Authority, and the scope of its duties. The Full Court referred to the decision of an earlier Full Court in Laing v Central Authority [1999] FamCA 100; (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92-849. Their Honours quoted from the judgment of Kay J in Laing where his Honour said:

...There is weight in the submission that the Central Authority needs to act to some degree as an honest broker. Its role may be likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but to implement the requirements of the Convention.

...

[94] If in implementing the requirements of the Convention it obtains the return of a child who ought to be returned then it is carrying out its function. If it draws to the Court circumstances which might lead the Court to make an order other than the return of a child then it is also carrying out its function. (paragraph 77)

29. The Full Court also referred to the separate judgment of Nicholson CJ Laing where his Honour said:

...Organisations comparable to the Central Authority here are State and Territory child protection services, or, for example, to look to other jurisdictions, prosecutors in criminal matters and government departments in freedom of information applications.

[65] In my view, the repeat involvement of such organisations in forensic disputes places them in a circumstance of greater awareness of decisions which are material to their routine work. That awareness brings responsibilities. In matters of law, the playing field is not even when repeat organisational players are in dispute with a party who lacks a similar familiarity to be informed and lacks the organisationally vested responsibility to be vigilant for the effect of decisions as to the law in the area of their mandate. I would therefore place at a more stringent level than Kay J, the obligation upon the Central Authority as to the applicable regulations and the question of preventing a perfected order discussed below.

[66] A Central Authority is by design within a system of intelligence as to legal developments that cannot be deemed as equivalent to an individual respondent to an application under the Regulations. There are advantages in litigation that cannot be glossed over. As will become evident, such a view of the responsibilities which come from being a repeat player have bearing upon the question of how my findings to this point affect the view I have taken of the power to reopen. (paragraph 78)

30. The Full Court then described the role of the State Central Authority at paragraph 80 as follows:

The State Central Authority is charged with the obligation to do anything that is necessary to enable the performance of the obligations of Australia under the Convention (Regulation 5(1)(a)). In our view not only does that obligation extend to the requirement to facilitate the return of a child where such an order has been made, but it also requires the Central Authority to actively partake in proceedings brought by it under the Regulations and to assist the Court in determining the proper application of the Regulations to the facts of any one case...

31. We endorse the observations set out in the earlier Australian authorities referred to above about the role and responsibilities of the Commonwealth and State Central Authorities. We would emphasise those responsibilities include a requirement that both the Commonwealth Central Authority and a State Central Authority exercise particular care in the preparation of, and conduct of, proceedings in the Court. We see this role as extending to encompass the making of proper enquiries from the requesting Central Authority about relevant domestic violence legislation in the requesting State when a reg 16 "defence" is raised by the "abducting" parent. We accept that, if the Commonwealth or a State Central Authority agrees to correspond directly with a parent seeking return of a child, any information provided to that parent (or to the requesting Central Authority) should be clear and unambiguous.
32. We take this opportunity to make some further observations about the operation of the Convention. Australia has not, as provided by Article 42 of the Convention, reserved its rights to "exclude" compliance with certain provisions of the Convention, although it has declared that the Convention shall extend to "the legal system applicable only in the Australian States and mainland Territories". We will return shortly to further discuss the question of reservation of rights.
33. The United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as many other signatory countries, have by notification of a reservation, declared their country will not be bound by Article 26 of the Convention. It is noted by Beaumont and McEleavy (The Hague Convention on International Child Abduction, Oxford University Press, Oxford, 1999, at 249) that although the United Kingdom took up the reservation it has not implemented its reservation in respect of Article 26(3). It is useful at this point we set out both Article 25 and 26 of the Convention. They provide as follows:

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

34. Regulation 30, which was amended effective from 24 July 2007, provides that the Central Authority may apply to the Court for an order that the person who retained or removed the child pay costs including the costs of the proceedings, and the costs and expenses of the return of the child. An "Article 3 applicant" may also make an application to the Court for legal costs of the proceedings and travel expenses. Regulation 30 does not appear to otherwise replicate the obligations in Article 25 and 26 of the Convention.
35. The differing approach to the practical application of the Convention is referred to by Beaumont and McEleavy at 248-256 of their publication. But the procedure adopted in countries such as New Zealand, where legal aid is provided to the parent to bring the application, is not the course adopted by the Australian Government to implement the Convention.

THE PROCEDURAL FAIRNESS CHALLENGE

36. We turn now to the specific grounds of appeal. At the commencement of our discussion of the procedural fairness challenge it is convenient that we refer to the further evidence sought to be adduced by the father and which was contained in affidavits filed 30 July 2010 and 16 August 2010.
37. The evidence, if accepted, was asserted to demonstrate that the father had been denied procedural fairness before the trial Judge because the proceedings had been conducted "on the papers" and without any cross-examination. The father asserted this occurred without his knowledge or consent. He also asserted he was denied the opportunity of putting evidence before the Court of the legal remedies, including domestic violence personal protection orders, available under Norwegian law which could be utilised to protect the mother if she returned with the child to Norway.
38. The mother's senior counsel did not object to paragraphs 1 to 18 of an affidavit sworn by the father and filed on 30 July 2010 ("the first affidavit") being admitted by way of further evidence, nor did he oppose an annexure to an affidavit of the father filed 16 August 2010 being adduced. That annexure was the email from Ms P dated 6 July 2009. It is the same document the State Central Authority requested be drawn to our attention. Senior counsel for the mother otherwise opposed the father's application to adduce further evidence. We do not propose to receive any further evidence other than that which is consented to, or not opposed. We will explain our reasons later.
39. In paragraphs 1 to 18 of his first affidavit the father deposed to communicating with both "the Norwegian and Australian Authorities" in respect of his legal representation in the proceedings. The father annexed to his affidavit an email from an officer of the Norwegian Ministry of Justice and the Police (Mr J) dated 10 June 2009 and a response of the same day from Mr S, Legal Officer, International Family Law Section of the Australian Attorney-General's Department as the Commonwealth Central Authority. Mr J's email included the following request for information:

...

Furthermore, the father is wondering whether he will be represented by an attorney in Australia. If so, does the Central Authority appoint an attorney on his behalf? As it seems to be several aspects that have

to be assessed closely by the court in this matter, the father has great concerns as to how he can ascertain that his rights are safeguarded during the Hague proceedings.

...

40. The father then annexed the chain of emails which are set out as follows:

I would kindly remind you of my e-mail 10 June 2009.

The father is very concerned about the further proceedings in this matter and whether he will be represented by an Australian attorney. Thus, I allow myself to remind you of this issue.

...

...

[The father] will indeed be represented in Australian by an attorney. I am in close contact with [the father's] attorney. [The father's] attorney is extremely experienced in Hague abduction applications and admits that there are several aspects of the application which will be closely scrutinised by the court. It would be greatly appreciated if you could please inform [the father] that his attorney will, of course, act diligently and always in his interests.

...

41. On 22 June 2009 Mr J wrote to Mr S by email in the following terms:

...

Is it possible for [the father] to get in contact with his Australian attorney? Since there are several aspects that have to be closely considered I assume that it would be most practical if [the father's] Norwegian and Australian attorney get in direct contact with each other.

...

42. By email dated 23 June 2009 Mr S responded to Mr J's email as follows:

Thank you for the e-mail. I have spoken with [the father's] counsel and she is fine with me providing you her e-mail address. This can be passed on to [the father] and his Norwegian attorney.

[The father's] counsel is Ms. [P]. Her e-mail address is [omitted]

However, [the father] should be aware that instructions to his counsel have to come from the Australian Central Authority.

...

43. The father deposed that he thereafter wrote to Ms P by letter dated 28 June 2009 (a copy of letter which was annexed to his affidavit) as follows:

I am informed by the Norwegian authorities that you are representing me in the case of [the mother] abducting my son [the child].

Im am very glad to get in contakt with you and have a few questions for you.

First of all am I wondering what Mr. [S] ment in his mail by writing:

'However, [the father] should be aware that instructions to his counsel have to come from the Australian Central Authority.'

Second I would like to know if I can only have limited contakt with you.

Basically what rights do [the child] and I have and what you can do for us?

I have been told that you are an experienced lawer. And that you have pointed at some holes in my paperwork. I am looking forward to hear more about what you think and am more than willing to answer any questions. I have a lot of material / proof . Please let me know what I can do to update you.

I am very depentent of somone to take charge. So far I have not found anyone to do that.

Looking forward to hearing from you. (original spelling and grammar)

44. The father corresponded directly to the Commonwealth Central Authority on 1 July 2009. The father wrote to an officer of the Commonwealth Central Authority, Ms M as follows:

...

I was informed that you are the new case officer of Australian Central Authority after [Mr S].

If there are anything I can do for you. Papers you need, proof, questions etc. please don't hesitate to ask.

I would like to make contakt with my counsel Ms. [P]. Her e-mail address that was sendt to me is: [omitted]

I have sendt her an e-mail last Sunday, but I have not received any answer.

... (original spelling and grammar)

45. The annexures to the father's first affidavit disclosed that on 3 July 2009 Ms M advised the father that she was the case officer working on his matter, that Ms P was "currently out of the office and will be returning early next week". Ms M concluded her email as follows:

In the future, if you have any queries or questions regarding your matter, please communicate through the Norwegian Central Authority.

46. Mr J wrote to Ms M on 3 July 2009 pointing out that Mr S had given permission to the father and his then Norwegian attorney, Mr [O], to make direct contact with Ms P.
47. The father also sought to rely on his affidavit filed on 16 August 2010 ("the second affidavit"). He annexed to his affidavit an email forwarded to him by Ms P on 6 July 2009. As we have previously recorded, senior counsel for the mother objected to the affidavit but did not object to the annexure, the contents of which are as follows:

I am sorry it took me a few days to respond to your e-mail.

Although I am happy to communicate with you need [sic] to know that as the Central Authority for NSW my instructions come from the Australian Commonwealth Central Authority. The Convention is about an agreement between countries – here the agreement between Norway and Australia. I am not your lawyer although I am dealing with the application for the return of the child to Norway.

Yes I think you have a difficult case – although the mother's material under theses [sic] proceedings will be filed tomorrow I have seen her evidence in the parenting proceedings. The mother says that she has been subjected to violence and that includes a fracture to her arm – there are a lot of particularised details about the alleged violence. I know you reject strongly the contention that you have been violent to your child – but if there has been extensive violence to the mother and the child has witnessed the violence then it is arguable that the defence under article 13 is likely to be made out. Article 13 provides:

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-(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.

Please discuss this with your Norwegian lawyer to see if there are any solutions you can put forward to negate this potential defence.

... (original emphasis)

48. At paragraph 16 of his first affidavit, the father deposed:

On 13 July 2009, ..., the Higher Executive Officer at the Royal Ministry of Justice and the Police sent a letter to [Ms M]. **Attached and marked "8"** is a copy of the letter dated 13 July 2009. I had had discussions with the Norwegian authorities about my representation in the proceedings. I cannot recall if I was aware at the time that the letter had been sent. I was not provided with a copy of the letter at the time. (original emphasis)

49. Annexure "8" of his first affidavit, which is a facsimile transmission dated 13 July 2009, was forwarded by the Royal Ministry of Justice and the Police to the Commonwealth Central Authority. The facsimile includes the following:

...

Reference is made to previous correspondence in the above-mentioned case, latest your e-mail dated 9 July 2009.

Please be informed that [the father] has contacted us and requested information about finding an attorney in Australia.

We kindly ask you to provide us with the information necessary on legal aid in child abduction cases in Australia, including the procedure regarding a possible application for free legal aid in child abduction cases, and how to establish contact with an appropriate attorney in Australia.

50. The father also annexed to his first affidavit an email to him from Ms M dated 20 July 2009 which concluded as follows:

...

I would also like to confirm receipt of your fax dated 13 July 2009. I am currently drafted [sic] a response which with [sic] provide you with further information about the process in Australia.

...

51. On 27 July 2009 the father forwarded an email to Ms P in the following terms:

Can you please give me information about how the prosedure is in the courtroom.

Are [the mother] allowed to com there?

Should I bee there?

Are you representing both [the mother] and me, or only me.

Is the material going to be presented verbally in the court room. Who are doing that?

Are you presenting only my material or both [the mother's] material and mine?

... (original spelling and grammar)

52. By email of the same date, Ms P replied as follows:

Dear [the father]

Yes [the mother] will be present but generally she will not be able to talk. The judge will decide the case on papers filed by both sides. No you do not need to be in Australia – the other side have not asked and generally we do not ask the left behind parent to travel to Australia.

I am not representing you but I will argue the case for the return. This application is brought by the Australian Govt as a result of the request by the Norwegian Govt – it is an obligation the [sic] both countries have under the Convention.

I have asked a very experience [sic] barrister to argue your case. She has all the paperwork and we are now waiting for your material.

The barrister made the following observation on your case:

It seems to me that if we are to have any chance of winning this case we must obtain an affidavit from the Central Authority in Norway setting out:

(a) the law in relation to domestic violence, custody cases involving domestic violence, and payment of maintenance; (b) what facilities are available to a mother who is afraid of the father of her small child – e.g. refugee, DVO orders, police protection etc..

(c) what funds would be available to assist the mother if she were living separately from the father, possibly in a different village.

In short, we need some official answer to the things she states she has been told. It will not be enough for the father to deny any or all of the alleged incidents of violence, because her story has the ring of truth about it and I am unlikely to be able to make her resile from it to any great extent in cross examination

I agree with the barrister's comments. I have just sent the barrister's comments to the Australian Commonwealth Central Authority and asked them to get a response from the Norwegian Central Authority. It will be helpful if you too can ask your Central Authority to address the issued [sic] identified by the barrister. (original emphasis)

53. The annexures to the father's first affidavit also disclose an email, in the Norwegian language, to his lawyer, Mr V, dated 28 July 2009 which includes the following English title "FW: Information about the court procedure...".
54. The balance of the father's first affidavit refers to events occurring after the hearing before the trial Judge. The evidence sought to be adduced by the father includes correspondence from the Ministry of Justice and the Police regarding remedies available in the Norwegian court system. Senior counsel for the mother objected to us receiving this evidence on the basis that it was readily available prior to the hearing before the trial Judge. We do not propose to admit this material as, if admitted, it would not affect the outcome of the appeal.
55. The father also sought, outside the time provided in the rules, to adduce evidence, being the affidavit of his Norwegian lawyer, Mr V, filed 13 August 2010 and his former lawyer, Mr O, sworn 16 August 2010. Objection was taken to each of these affidavits on the basis they were contentious and the mother was not able to test the evidence due to the late filing of the affidavits.
56. We accept the submissions of senior counsel for the mother that the evidence in affidavits of the lawyers, if adduced, is contentious and would result in a denial of procedural fairness to the mother who could not, in the short time available after filing of the father's material (13 and 16 August 2010), take reasonable steps to test the material, or to adduce evidence in response (see CDJ v VAJ (1998) 197 CLR 172). It is for this reason we do not propose to admit these two affidavits, or the second affidavit of the father save and except the annexure to that affidavit being the email from Ms P dated 6 July 2009.
57. In support of the procedural fairness challenge the submissions (oral and written) of Counsel for the father were:
    - that the response from Mr S to the father's enquiry as to whether he would be represented in Australia was clear and unequivocal, but fundamentally wrong;
    - the father should have been advised by the Commonwealth Central Authority from the outset the nature of its role, and the choice available to the father, if he thought it necessary, to

protect his own rights and interests, to obtain his own representation and be heard in the proceedings;

- the father was not represented, and there was confusion created by the advice from the Commonwealth Central Authority and the State Central Authority as to whether he was represented, or could be represented (this was exacerbated because the father was a foreign person coming from a foreign (inquisitorial) system);
- that the advice in Ms P's email of 6 July 2009 to the father was inadequate to properly alert the father of his rights;
- being unrepresented the father was significantly disadvantaged in being denied the opportunity of instructing counsel to cross-examine the mother (it was readily conceded by the father's counsel that if he had been represented, and his counsel had chosen not to cross-examine the mother, the father could have no complaint);
- in a prosecutorial model involving a fundamental factual contest between the mother and the non-party father, the trial Judge needed to make an enquiry and be satisfied that the father had been informed of his rights and had elected not to participate in the proceedings by means of adducing oral evidence or cross-examination; and
- as the father was not represented he was denied the opportunity of counsel objecting to parts of the evidence, including an unsworn witness statement annexed to the mother's affidavit filed 8 July 2009.

Discussion

58. At the commencement of our discussion it is instructive to note that, at a time when he was represented by Norwegian lawyers, the father's lawyer made an application on his behalf to the Norwegian Central Authority on 19 March 2009 requesting the authority to seek the return of the child to Norway.
59. We accept that the correspondence received by the father from the Commonwealth Central Authority dated 22 June 2009 was erroneous and misleading. The error was compounded by the further email dated 23 June 2009 sent to the father providing Ms P's details.
60. We are satisfied however that by 6 July 2009, as a result of Ms P's advice, the father had been made aware she was not personally representing him, that he had a difficult case, and his attorney's letter dated 13 July 2009 to the Commonwealth Central Authority confirms that the father was certainly aware he could obtain his own legal representation and that he sought to do so.
61. We are unaware whether the Commonwealth Central Authority replied to the attorney's letter of 13 July 2009. However, the father's later correspondence dated 27 July 2009 with Ms P implies that he was aware of the State Central Authority's role in the proceedings, and sought advice about how the State Central Authority would conduct the proceedings. We note Ms P's reply was forwarded to the father's attorney, and that the father could have, and perhaps did, thereafter receive advice from that attorney about retaining his own legal representation. These factors lead to an inference the father had determined at this point to rely on the State Central Authority to conduct the application.
62. Notwithstanding we accept the father did receive initially misleading and perhaps deficient information from the Commonwealth Central Authority, overall we are not satisfied that the advice received, taken as a whole, denied him procedural fairness. While we were initially concerned on the material originally filed that the procedural fairness ground was arguable, the contents of Ms P's email of 6 July 2009 clarified what might have otherwise been misleading.
63. Counsel for the father did not suggest a trial Judge's responsibilities required him or her to "go behind" the application in every case brought for return of a child under the Convention to ensure the rights of a parent seeking return of a child were fully protected. Rather, he sought to limit the duty to cases such as the present where the evidence about domestic violence was controversial, and where neither party before the trial Judge sought there should be cross-examination of the mother and or the father. In these circumstances, he submitted it was incumbent on a trial Judge, and where the "left behind" parent was not legally represented, to enquire whether that parent knew he or she, if represented, could seek to cross-examine the person who had removed or retained the child.
64. We do not accept, as asserted by the father's counsel, that there is an obligation on a trial Judge to go beyond the case presented by the applicant, in this case the State Central Authority, and to independently require evidence that a "left behind parent" is aware that, if independently represented, he or she may instruct counsel to seek cross-examination of the party opposing return.

65. A trial Judge may independently determine that he or she requires cross-examination of a party or witness. It is to be remembered the proceedings in the Court are adversarial. It is not a requirement, nor could it properly be a requirement, for a trial Judge to engage in an independent or inquisitorial exercise to determine what might be the knowledge of a party who has requested the assistance of the Central Authority of his or her State to seek an order for the return of a child.
66. Nor do we accept, as submitted on behalf of the father, that Ms P's advice of 27 July 2009 was such to lead the father to believe there would be cross-examination of the mother, notwithstanding the extract from counsel's advice to her contained in her email. Ms P's advice was clear – the case would be conducted "on the papers", and cross-examination of the mother was unlikely to cause her to depart from her evidence in chief.
67. The father's counsel raised, but did not strongly press in his oral submissions, a submission that it was incumbent on the trial Judge to have required cross-examination because of the contradictory evidence of the parties regarding incidents of domestic violence.
68. At paragraph 80, the trial Judge explained how the proceedings had been conducted and the approach she intended to apply as follows:

Prior to MW v Director-General, Dept of Community Services [2008] HCA 12; (2008) 39 Fam LR 1 the general approach to Abduction Convention hearings was that they tended to be undertaken without cross-examination. Post MW v Director-General, Dept of Community Services where parties seek to test the evidence through cross-examination it is usually permitted. Nonetheless and notwithstanding the conflicted nature of the parties [sic] evidence, they elected to conduct this hearing without cross-examination. The Central Authority submitted that where there is conflict in the evidence I would prefer the evidence given by the father in preference to the mother's. While I accept there are internal inconsistencies in aspects of the mother's evidence her evidence is not so compromised that I would be prepared to adopt this approach. I have applied the approach adopted by Jordan J, which was cited with approval by the Full Court in Panayotides v Panayotides (1997) FLC 92-733 per Fogarty and Baker JJ (with whom Finn J agreed), namely:

The first thing to observe is that there is much conflict in the evidence. These are summary proceedings and issues must be determined on the papers. This often presents the Court with difficulties. It would generally be inappropriate to absolutely reject the sworn testimony of a deponent (see, Re F [1992] 1 FLR 548). As was submitted by counsel for the Central Authority, I simply must do the best I can. I look to the versions of each of the parties, I find the common ground, and I note the areas of conflict. I can look to the inherent probabilities. Of course, when one is talking about the intent of parties, where this is a matter of some conjecture, one looks to the conduct of the parties, and any documentary or corroborative evidence which may help to determine that issue.

69. Although her Honour's statement in paragraph 80 about the general approach adopted in Convention cases before the decision of the High Court in MW v Director-General is perhaps somewhat widely stated, having regard to decisions such as De L v Director-General, New South Wales Department of Community Services [1996] HCA 5; (1996) 187 CLR 640 and Director-General NSW Department of Community Services & JLM [2001] FamCA 1338; (2001) FLC 93-090, we are not satisfied that her Honour fell into appealable error by not requiring cross-examination. It must be remembered that both parties before her Honour were represented by counsel experienced in the jurisdiction. Both counsel made a forensic decision that the matter should be conducted on the papers. Counsel for the State Central Authority determined to run the case without testing the mother's evidence. In so concluding we are mindful of the observations of Gummow, Heydon and Crennan JJ in MW v Director-General, Department of Community Services at paragraphs 45 and 46 and that her Honour could, if she thought essential, have required the mother and father to be available for cross-examination.
70. Before us the father's counsel submitted that not only did the forensic decision not to cross-examine result in procedural unfairness to the father, but the failure of counsel for the State Central Authority to object to certain documents annexed to the mother's affidavit was also prejudicial to him, it being asserted that the documents would have been challenged had he been represented. We will deal with this complaint when discussing the grounds in respect of "factual finding errors".
71. In summary we find no merit in the procedural fairness challenge.

THE APPROACH CHALLENGE

72. The father's counsel submitted the trial Judge had erred by approaching the matter on the basis that, if the orders sought in the application were granted, the mother and child would be returned to Norway rather than, as the application and regulations required, considering separately the return of the child to Norway ("the challenge to the trial Judge's approach). He drew our attention to the application itself which required the return of the child (but not the mother) to Norway, and the wording of reg 14.
73. We accept both the application made to the Norwegian Central Authority and the Commonwealth Central Authority, and reg 14, refer to the return of a child, and not the return of the mother (or father) and child.
74. The father's counsel relied on a letter from the father's Norwegian Attorney, Mr [V], to Ms P dated 28 July 2009 in support of his assertion that the child should be returned to Norway without consideration of his return with the mother. The relevant passage from Mr [V's] letter is as follows:

On behalf of [the father] I ask the court to order the following :

1. [The child] should be returned to Norway without an unnecessary delay.
2. If [the mother] does not return [the child] in spite of a court order, [the father] should have the right to bring [the child] to Norway, if necessary by the assist [sic] of the Australian authorities.

...

The trial Judge's approach to the application

75. Her Honour's discussion of this topic is understandably brief. That is explicable when regard is had to the outline of case relied on by counsel for the State Central Authority at page 21 which was in the following terms:

4. The father has proposed a regime whereby he have supervised contact with the child pending the determination by a court of the appropriate residence and contact arrangements for the child in the long term. The father's mother has offered the respondent a flat to live in and she has repeated this offer. [footnote omitted]

76. Although the mother opposed the return order, at no time was it her case that she would not return to Norway if an order was made for the return of the child.
77. At paragraph 180, her Honour commenced her discussion of the Norwegian domestic law by saying "I turn next to consideration of what may happen were the child returned to Norway". At paragraph 189 of her reasons, the trial Judge explained that on return to Norway the mother would be likely to seek police protection.
78. There was no serious dispute in this case that the mother had been the primary carer of the child in Norway and that he was a toddler when taken to Australia in November 2008. He was almost three years old at the date of the orders of the trial Judge. The father did not propose that the child should be returned to his care unless the mother failed to comply with an order of the Court to return to child to Norway. Rather, as is clear from his material, he proposed that he exercise supervised contact to the child. Thus, the case proceeded on the basis it was the common expectation of the parties if an order for return was made, the mother would return to Norway.
79. In these circumstances we think it would have been artificial for the trial Judge to determine the application on the basis the child should be returned independently from consideration of his return with the mother.
80. We consider the facts in this case distinguish it from those cases where, for whatever reason, a parent who has removed a child from his or her habitual residence determines that he or she will not return with the child to the place of habitual residence, and seeks to rely on a defence of physical or psychological harm to the child, or otherwise placing the child in an intolerable situation because of the absence of the primary caregiver in the place of habitual residence. Thus observations such as those of Butler-Sloss LJ in C v C (Minor: Abduction: Rights of Custody) [1989] 2 All ER 465 at 471 where her Honour said:

The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him ... Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it

would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children.

have no application to the facts of this case. We see no merit in this ground.

THE ASSERTED ERRORS IN FACT FINDINGS CONCERNING GRAVE RISK

81. While the father's counsel provided detailed submissions about this topic, those submissions may be summarised as asserted errors by her Honour in making factual findings which were not supported by the evidence, or based on inadequate or inconclusive corroborative evidence, or that the trial Judge erred in accepting the mother's untested evidence on the topic of domestic violence whilst rejecting other parts of her untested evidence. Counsel for the father also asserted that, although her Honour correctly identified the standard of proof to be applied, she erred in failing to have appropriate regard to that standard.
82. In order to examine this complaint, it is necessary we refer to the trial Judge's reasons which ultimately led to her Honour's conclusion of grave risk to the child of physical and psychological harm if returned to Norway. As we have already explained, it was common ground between the parties that the proceedings would be heard "on the papers" and without cross-examination of any witness. In her recitation of the evidence under the heading "Background facts" and later in her reasons when considering "the defences" her Honour set out the history of alleged injuries sustained by the mother and occasions when the parties and/or the mother sought counselling assistance which the mother relied on to support her contention of grave risk.
83. The findings which ultimately led to her Honour's conclusion of grave risk to the child of physical and psychological harm if returned to Norway are found in paragraph 173 of the trial Judge's reasons. These findings are important and we set them out in full:

In summary, in relation to the mother's allegations of verbal abuse and physical violence I am satisfied that the father:

- Between December 2006 and February 2007 was verbally abusive and physically violent towards the mother which prompted her to seek assistance from a domestic violence counsellor in February 2007.
- In March 2007 using a closed fist punched the mother in the face.
- On 20 November 2007, in the course of an argument, jabbed his finger in her eye which resulted in an eye injury and the mother requiring treatment at hospital.
- On 14 May 2008 broke the mother's arm.
- On 22 June 2008 pushed the mother into a wall which caused her arm to be re-broken.
- Attempted to strangle the mother which resulted in bruises to her face and 'red strangling marks around her neck' as observed at the crisis centre.
- On 18 September 2008 physically assaulted the mother as a result of which he blackened her right eye and bruised her left upper arm, which injuries were observed at a casualty clinic.
    - On 15 December 2008 threatened to kill the mother.

84. At paragraph 174, her Honour referred to other evidence of the mother as follows:

While the mother, as I have already found, gave evidence of more pervasive violence, I have been unable to conclude that this more pervasive violence occurred. However, even without the additional matters deposed to by the mother being taken into account, the mother has satisfied me she has been the victim of severe violence inflicted upon her by the father.

85. The conclusions about grave risk which the trial Judge drew, based on her factual findings, are found in paragraphs 175 to 190 of her Honour's reasons. We will refer to those conclusions in greater detail when we examine the grave risk defences.
86. At the commencement of her reasons, the trial Judge, at paragraph 80, referred to the state of the evidence before her. It is useful we again repeat the salient portion of that paragraph:

... The Central Authority submitted that where there is conflict in the evidence I would prefer the evidence given by the father in preference to the mother's. While I accept there are internal inconsistencies in

aspects of the mother's evidence her evidence is not so compromised that I would be prepared to adopt this approach. ...

87. Her Honour discussed the way the proceedings were conducted at paragraph 143 of her reasons where she noted:

For reasons best known to them, the parties adopted the course of deciding against cross examination. This has made resolution of this case and analysis of these risk issues very difficult. The father's concession put it beyond dispute there has been verbal and physical violence between the parents and behaviour which would almost certainly have been psychologically harmful to the child.

88. The trial Judge indicated the specific approach she intended to take to the voluminous evidence relied on by the State Central Authority and the mother by noting:

... It would not aid the adjudication of these matters to recite in their entirety the various allegations and denials. The approach I have determined upon is to recount some key elements which give the flavour of the disputed evidence as well as to highlight where concessions were made, **unchallenged evidence and otherwise disputed facts which were corroborated by compelling evidence**. (paragraph 140) (our emphasis)

89. Her Honour then went on to say she proposed to deal with the evidence adopting the approach used by Jordan J in Panayotides & Panayotides which we have set out in paragraph 68, having regard to the comments of the Full Court in that case when the matter was subject of an appeal.
90. Also relevant to this discussion is her Honour's explanation in paragraph 82 of her reasons. There she said:

Fortunately in relation to a number of factual disputes there is independent evidence available to which it is appropriate to attach significant weight. There is also a considerable amount of evidence from the parties close friends and family members filed in support of their respective cases. Unless stated differently this evidence is not sufficiently independent that it would be appropriate to attach to it the degree of weight which would be required to resolve disputed evidence.

91. It is clear from her Honour's explanation in paragraph 82 she rejected as having sufficient probative weight to determine the serious issue of physical and psychological abuse much of the evidence relied on, particularly by the father, which evidence included statements from his family members and others who had seen him interact with the child.
92. Her Honour commenced her consideration of grave risk of physical or psychological harm, or placing the child in an intolerable situation, at paragraph 138 of her reasons. Having been referred to the relevant authorities on the burden of proof and the construction of reg 16 as expounded by the High Court in DP v Commonwealth Central Authority [2001] HCA 39; (2001) 206 CLR 401, her Honour further particularised the parties' evidence of the incidents of domestic violence and, at paragraph 142, noted the father's denial of the majority of the mother's allegations. In respect of this evidence her Honour said:

... If his evidence were accepted the mother would be found to be the aggressor in their verbal and physical altercations and he the victim of numerous rapes. He said she was a martial arts expert and that as well as being violent to him, the mother threatened to harm the child on several occasions. It was his evidence that: 'On some occasions [the mother's] aggression has resulted in all out brawls in which we both suffered bodily injuries'. For example, he gave evidence he had twice suffered a black eye inflicted by the mother.

93. At paragraph 145, the trial Judge set out the father's account of the first domestic dispute between the parties and noted that the mother denied that evidence.
94. The trial Judge recorded that the mother asserted the father repeatedly threatened to kill her if she went to the police or told a doctor. The father denied the allegation. The father's mother and sister denied the mother informed them of these threats, or that they heard the father make the threats.
95. At paragraph 157, the trial Judge dealt with the mother's interaction with the father's mother. Her Honour observed the following about the father's mother's evidence:

... I have no difficulty accepting her denial and accept that she tried to find a way, within the privacy of the family, to help the parents resolve their marital discord but not at the expense of personal safety. The father agreed that the parents discussed the violence in their marriage with his mother and that she advised him he must not, no matter what hit the mother.

96. Commencing at paragraph 160, her Honour discussed in detail the evidence concerning the incident on 14 May 2008 when the mother's arm was broken.
97. At paragraph 162 of her reasons, the trial Judge recorded "there is no dispute that the mother's arm was broken and that the injury occurred during a violent altercation between her and the father". Her Honour observed that although the father said the mother pushed and attacked him, that contrary to other incidents, he gave no evidence of the manner of attack or being afraid. Her Honour noted the father was not injured, and it was only the following morning that he took the mother to hospital and remained with her when she informed the doctor her arm was broken in a fall.
98. Having referred to the hospital notes of 16 May 2008, which her Honour set out in full, at paragraph 164, her Honour concluded:

... The evidence does not demonstrate that the father actions were in any way proportionate to the level of aggression, which, if his evidence was accepted, had been initiated by the mother. His actions were disproportionate to the situation and are very troubling.

99. At paragraph 166 and following, the trial Judge dealt with the incident on 22 June 2008 when the mother's arm was re-broken. Having set out both the mother and father's versions of the incident her Honour concluded:

... Again although some of the surrounding circumstances are in dispute there is no dispute that during an argument the father pushed the mother, which is how she said she was injured. I am satisfied this is how the mother's arm was re-broken.

100. Her Honour then went on to deal with the mother's evidence about the father's asserted aggression on the parties' return to Norway, including her evidence that the father had struck both herself and the child. Having recorded that the father denied ever assaulting the child her Honour said, at paragraph 170:

... The frequency and the severity of beatings which the mother said the father inflicted upon the child suggests that one at least of the numerous witnesses would have seen signs of physical abuse on the child. That there are none persuades me that on this matter the mother's evidence warrants considerable caution.

101. In dealing with the incident in which the mother attended a casualty clinic on 18 September 2008 when she suffered a black eye and bruising to her arm, the trial Judge noted the clinic notes did not record the mother as having disclosed the father was also beating the child. Again the trial Judge found, having regard to the father's denial, and lack of corroborative evidence in relation to the child, she was not satisfied that the father had assaulted the child.
102. After the mother's arm was broken in May 2008 the trial Judge explained, at paragraph 150, that the mother had again consulted the crisis centre. The statement from a Ms B at the Norwegian crisis centre included her hearsay evidence that one of her colleagues had witnessed bruises to the mother's face and "red strangling marks around her neck". Of Ms B's evidence the trial Judge observed:

... [Ms B] is independent of the parents and her evidence warrants reasonable weight. It corroborates the mother's evidence of physical abuse of her and her concern that the father's verbally abusive behaviour was also directed to their son. This evidence of the mother's complaint and injury well prior to separation tends to undermine the suggestion made by the Central Authority of in effect recent invention by the mother of the father's mistreatment of her and the child. (paragraph 150)

103. In his written summary of argument, counsel for the father submitted there were a number of difficulties with the reliance placed by the trial Judge on Ms B's evidence. He referred to the fact that her statement was an unsworn document, that the father's evidence disclosed no notes were maintained by her organisation, the generality of the matters in her statement, a lack of reporting by

the mother of the injuries reported by Ms B's colleague, and asserted failure to link the assertions of the mother to the corroborative evidence of Ms B. It was submitted (father's submissions, paragraph 112, p 27) that the trial Judge erred in relying upon and giving "reasonable weight" to the statement of Ms B.

104. Ms B's evidence was not contained in an affidavit. Her signature was not witnessed. The "evidence" was a statement annexed to the mother's affidavit and read as follows:

...

[The mother] contacted [G crisis centre] early 2007.

I spoke with her on several occasions, she told me about the physical abuse she was exposed to from her husband

She also spoke of the psychological abuse both she and her son [the child] experienced.

How she planned the day to keep [the child] and herself safe, when her husband was at home she would walk the streets and not return until she knew he had left for work.

One of my colleges [...], witness [sic] bruises on her face and red strangling marks Around her neck

She told me about the concern she had that one day he would go to [sic] far and the damage would be fatal.

Do not hesitate to contact me for any further information.

...

105. We observe the following concerning the statement:
    - the statement contains a hearsay statement of observations of another worker at the crisis centre; and
    - the statement is non specific as to the dates when the mother attended the crisis centre although it does refer to the mother contacting the centre in early 2007.
106. While we accept Ms B's statement, if admissible, gives some corroboration to the mother's allegations of violence between December 2006 and February 2007 we have been unable to locate any primary evidence of the mother which Ms B's evidence purports to corroborate that the father attempted to strangle the mother which resulted in "bruises on her face and 'red strangling marks [a]round her neck'". We do however observe that the evidence of the mother's friend Ms T, who was on affidavit, said during a two week visit in 2007 that the father "attacked her [referring to the mother] again, trying to strangle her".
107. We see some inconsistencies in the father's submissions in respect of his challenge to Ms B's statement. First, material in the State Central Authority case, and on which the father sought to rely in the appeal, included another unsworn statement by Ms B annexed to his affidavit. Secondly, the information in the letter from the Royal Ministry of Justice and the Police dated 3 August 2009 (annexed to an affidavit of Ms P filed 5 August 2009) indicates affidavits "do not apply" in Norway. This suggests to us, as Norway is not a common law country, the importance of Ms B's evidence being set out in an affidavit drafted in admissible form would be unknown in that country, although we accept the mother's Australian solicitors were aware of the requirements for admissibility in Australian proceedings. Thirdly, as we have noted, very experienced counsel appeared on behalf of the State Central Authority before the trial Judge, and although objections were noted in the case outline to parts of the evidence in the mother's case, no objection was sought to be taken to this annexure to the mother's affidavit.
108. Notwithstanding these matters, we accept even if Ms B's statement was admissible before her Honour, that reliance on the hearsay statement in it was unsafe. This is particularly so when the mother does not depose to any incident in her affidavit of the father causing bruising to her face and causing red strangling marks around her neck.
109. Our concern about the status and weight which should have been afforded to Ms B's evidence causes us some disquiet as to the weight afforded to the finding reached by her Honour in paragraph 173 that the father had attempted to strangle the mother resulting in bruises to her face and red

strangling marks around her neck. However, as we will shortly explain in greater detail, we do not think reliance on this evidence has vitiated the balance of her Honour's factual findings in respect of domestic violence perpetrated by the father on the mother.

110. It is timely at this point that we should repeat the caution sounded by the Full Court in De Lewinski and Legal Aid Commission of New South Wales v Director-General, New South Wales Department of Community Services (1997) (1997) FLC 92-737 (at 83,941) about the way applications are prepared, particularly when in many cases the application will be dealt with without cross-examination.
111. The father also seeks to challenge the trial Judge's consideration of the events in March 2007 when the mother asserted the father attacked her in the car. Having detailed the matters which her Honour referred to in accepting the mother's evidence on this basis, the father's written submissions criticise her Honour's determination to accept the mother's evidence without proper regard for the father's assertion that the mother made up incidents and the unspecified nature of other incidents which the trial Judge appears to have accepted. It is asserted "that there is no compelling evidence justifying the rejection of the sworn denial of [the father] on this point".
112. Counsel for the father also complained that the trial Judge erred in considering as relevant the fact the father did not, in his affidavit evidence, refer to an incident on 20 November 2007 when the mother asserted she suffered an injury to her eye and the father's mother took her to an outpatient clinic.
113. At paragraph 118 of his submissions (p 28), counsel for the father differentiated between the drawing of inferences in proceedings in Australia and those which pertain to a person in circumstances such as the father from an overseas inquisitorial system. Counsel for the father referred to inferences drawn by her Honour about the incident when the mother's arm was broken in May 2008.
114. Counsel for the father also submitted that the trial Judge's conclusion in relation to the re-breaking of the mother's arm was "not a safe, necessary or compelling conclusion that on the evidence that [the father] was responsible for breaking the [mother's] arm". Reference was made to the absence of evidence from the mother's father in respect of this incident. Like the earlier challenges, these challenges were all directed to the assertion that the inferences drawn by the trial Judge were not open to her Honour.
115. Complaint was also addressed by counsel for the father to the trial Judge's acceptance of the mother's evidence in respect of an assault on 18 September 2008 in circumstances where, on the father's case presented by the State Central Authority, there was a fundamental factual conflict which it is asserted was not resolved by her Honour. It is submitted that the mother's evidence should have been rejected by the trial Judge.
116. It is unnecessary for us to traverse each and every matter raised in the meticulous and detailed submissions by counsel for the father. It is important to bear in mind these proceedings were not the final hearing of the parenting dispute. No doubt in the parenting proceedings which the mother has commenced in this Court, all of the relevant evidence will be fully tested. The complaints about the trial Judge's disregard for certain aspects of the voluminous evidence, such as the mother's possible selection in the wrestling championship, or her Honour's findings that the father's response to the domestic violence was disproportionate, are without merit given the nature of these proceedings in which the opportunity for testing of evidence is limited. We think it is important to record however that a number of the submissions deal with incidents other than those detailed in paragraph 173 of the trial Judge's reasons, and the dissection of individual incidents and parts of the evidence of those incidents without examination, as her Honour did, of the cumulative effect of all of the evidence does not accurately reflect the reality of the domestic violence, which on the corroborated evidence, the trial Judge found to be serious and concerning.
117. Senior counsel for the mother addressed each of the assertions made in counsel for the father's detailed written submissions orally.
118. Senior counsel for the mother submitted that her Honour's reasoning was fully exposed in her judgment. He further submitted that the trial Judge avoided "the error of treating adverse credit findings on other issues as necessarily determinative" (transcript, 17 August 2010, p 62). He went on to note that the evidence given by the mother had not been accepted by the trial Judge in some instances, but rather her Honour had adopted a course of making findings "determined by the existence of corroborative evidence" (transcript, 17 August 2010, p 63).
119. Thus he submitted that her Honour had determined the issue applying an appropriate standard of proof in dealing with each of the injuries suffered by the mother, that the mother's injuries had been

observed by medical professionals, and there was no dispute, notwithstanding his apology, that the father admitted the threat made on 15 December 2008 to kill the mother.

120. In respect of the corroborating evidence, particular emphasis was placed by senior counsel for the mother on the clinical notes of the social worker to whom the mother was referred at Westmead Hospital. We agree that the history reported to the social worker by the mother and the social worker's observations of the mother, made at a time prior to the parties' reconciliation and return to Norway, was cogent corroborative evidence of the domestic violence and its effect on the mother and the trial Judge was entitled to place significant weight on that evidence.
121. Senior counsel for the mother referred us to the statement of principle in Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531. We accept the submissions of the mother's senior counsel that the inferences drawn by the trial Judge were open to her on the evidence.
122. We do not accept the submission of counsel for the father that there was a disjunction between her Honour's recounting of the evidence of incidents of domestic violence and the summary of findings which appeared in paragraph 173 of her Honour's reasons and that each of them, albeit in different categories, was not without some deficiency.
123. It is apparent to us that her Honour placed significant weight on incidents of domestic violence which were independently corroborated in accordance with the approach endorsed in Panayotides and applying the standard of proof required by s 140 of the Evidence Act 1995 (Cth), having regard to the seriousness of the allegations made. In so concluding we consider that her Honour's acceptance of the mother's evidence of domestic violence in 2007 was corroborated by her attendance at the crisis centre, and her findings in respect of the incident of 20 November 2007 were corroborated by hospital notes and to an extent by the father's mother's evidence. The serious incident of 14 May 2008 which resulted in the fracture of the mother's arm was corroborated by the hospital records, as was the mother's version of the second injury to her arm. Similarly the evidence of the incident of 18 September 2008 was corroborated by hospital notes. The father's threat to kill the mother, the child and her parents was not denied by the father. While we accept the corroborative evidence relied on to support the attempted strangulation of the mother and bruising to her face was hearsay evidence and deserving of no or little weight, we do not think the inclusion of that injury in paragraph 173 of her Honour's reasons should be considered to impugn the balance of her findings.
124. As we have already observed, the task which her Honour undertook was to evaluate, and where appropriate, draw inferences from the evidence before her.
125. The chronology of the independently corroborated violence considered overall led her Honour to the conclusions she reached. As we have already noted the inferences drawn by the trial Judge were open to her. Thus we are satisfied the grounds asserting error in findings of fact and the standard of proof applied have no merit.

GRAVE RISK TO THE CHILD OR PLACING THE CHILD IN AN INTOLERABLE SITUATION

126. The gravamen of the father's complaint is the trial Judge, having found comparable protections under the law in both Norway and Australia, then had no basis for finding the mother would not be protected in Norway, and thus the child would not be subject of grave risk of physical or psychological harm.
127. Counsel for the father pointed out to us that although while in Australia the mother had been given advice by the social worker from Westmead Hospital she had not taken up that advice. He submitted, as a result of the trial Judge's approach in considering the return of both the mother and child to Norway, she had failed to assess as a distinct issue the risk to the child of return. Counsel went on to submit, at paragraph 159 of his written submissions:

The findings of Her Honour are submitted to impermissibly have regard to the possibility of exposure of the child to harm not as a consequence of the child's return, but rather as a consequence "of that which might emerge at a future time, if after return an unsatisfactory situation is allowed to persist without alteration": see Zafiropoulos and Central State Authority [2006] FamCA 466; (2006) FLC 93-264 at 80,490. (father's submissions, p 36)

128. At paragraph 175 of her reasons, the trial Judge recorded the contention made on behalf of the State Central Authority that:

... 'At its highest, the mother's case must be that if she and the father lived together in the future, the child might be at risk of witnessing or being caught up in domestic violence. As the father has indicated that he has no wish to resume the relationship, and has suggested minimising contact between the parents, there is no risk of harm to the child.'

129. Although, at paragraph 178, the trial Judge explained she had not accepted the mother's evidence that the father was physically violent to the child, she went on to note there had been serious verbal and physical violence between the parents following the child's birth while he was in their care. Her Honour went on to record that:

... While the child probably did not see the father injure the mother, the likelihood is that he overheard some perhaps all. Even though he was not directly involved, his presence in the home during violent altercations between his parents placed him in a highly risky situation. ... (paragraph 178)

130. Her Honour thus concluded:

... Because the child was so young and dependant upon the mother (from whom he had never been separated) as his primary carer, that she was so seriously abused and injured within his hearing was psychologically abusive of him. (paragraph 178)

131. Her Honour went on to note that the type of violence was such that it could easily occur in a situation "into which the child was drawn".
132. Having made these findings, her Honour then turned to consider what might happen if the child returned to Norway. There is no dispute that her Honour correctly recorded the provisions of the relevant Norwegian legislation, nor is there any challenge to her conclusion that Norway has "a well structured legislative and community framework for dealing with family law cases which involve allegations of domestic violence" (reasons, paragraph 181).
133. The trial Judge, having referred in some detail to the protections available in both Norway and Australia, noted that, up until the date of the hearing, there had been no reporting to relevant authorities of the abuse in Norway, and in Australia reporting by the social worker from Westmead Hospital had been ineffective. Her Honour's findings on this topic are found at paragraph 189 which we now set out in full:

Although on return to Norway the mother would be likely to seek police protection and orders which on their face would protect her and the child from the father and keep the child safe, I am not satisfied the orders would achieve their intended effect. For the child, the reality would be that he would primarily be reliant upon a personally isolated primary carer who historically has been unable to protect him from the risk of harm discussed earlier. The mother's personal isolation increases the gravity of risk of harm to the child. This is because her isolation would mean that there would be few people intimately involved in her and the child's life who could themselves intervene if her will to take further necessary action failed her. The evidence suggests that the violence which the father inflicted upon the mother ceased primarily because the mother moved to another country. There is a real risk that the type of violence which the father may inflict is not amenable to the type of constraints which the interim orders and the criminal law would impose. In this regard it is noteworthy that even after the mother had removed herself and the child from Norway the father's threats to her continued. His threat to kill her is a threat with the potential of the gravest consequences to her and the child. I am not confident that the father's apology and his failure to act in accordance with the threat, means it has abated.

134. Her Honour's crucial findings on the topic are found at 190. After referring to her concern about the ability of the father's family to provide appropriate support for the mother her Honour concluded:

... In short, the totality of the evidence persuades me that if the child returned to Norway with the mother there exists a grave risk of grave physical harm to the mother and a risk of commensurate severity of physical and psychological harm to the child. While in Australia domestic violence has rarely been found to bring this defence into play (see Murray v Director of Family Services ACT [1993] FamCA 103; (1993) FLC 92-416, Zafiropoulos and the Secretary of the Department of Human Services State Central Authority [2006] FamCA 466; (2006) FLC 93-264) I am persuaded that this is one of those rare occasions where the facts support such an outcome. (paragraph 190).

135. Her Honour thereafter considered whether the father's family would be able to provide the necessary emotional and practical support for the mother and found they would not.
136. At her commencement of discussion of "Grave risk of harm or an intolerable situation" at paragraph 139 and following of her reasons, the trial Judge had set out the principles enunciated by Gaudron, Gummow and Hayne JJ in DP v Commonwealth Central Authority, at paragraphs 40 to 43 of their reasons. We now set out those paragraphs and think it is also appropriate to include paragraphs 44 and 45:

> 40. So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that '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'. If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

'Narrow construction'?

41. In the judgment of the Full Court of the Family Court which gives rise to the first of the matters now under consideration (DP v Commonwealth Central Authority) it was said that there is a 'strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed'. Exactly what is meant by saying that reg 16(3)(b) is to be narrowly construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in 'an intolerable situation'. That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.
42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description 'grave'. Leaving aside the reference to 'intolerable situation', and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would expose the child to harm.
43. Because what is to be established is a grave risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.
44. These considerations, however, do not warrant a conclusion that reg 16(3)(b) is to be given a 'narrow' rather than a 'broad' construction. There is, in these circumstances, no evident choice to be made between a 'narrow' and 'broad' construction of the regulation. If that is what is meant by saying that it is to be given a 'narrow construction' it must be rejected. The exception is to be given the meaning its words require.
45. That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return. (footnotes omitted, original emphasis)

137. The principles clearly set out how the grave risk and intolerable situation defences are to be considered, and paragraph 45 emphasises the limitations on reliance on those defences.
138. We accept the submission made on behalf of the father that the authorities both in Australia and overseas on the question of grave risk or intolerable situation do not readily admit a clear statement of principle but rather tend, understandably, to turn on the facts before a trial Judge dealing with a return application.
139. In Zafiropoulos & The Secretary of the Department of Human Services State Central Authority, Kay, Coleman and Warnick JJ conducted an extensive review of the cases dealing with the grave risk exception to return and concluded, at 80,507:

...ultimately the final decision appears to come back to the words of Gleeson CJ in DP v Cth Central Authority [2001] HCA 39; (2001) 206 CLR 401, 407-408, at par 9 that:

"The meaning of the regulation is not difficult to understand. The problem in a given case is more likely to be found in making required judgment. That is not a problem of construction, it is a problem of application."

140. The problem of application is that it may often involve a careful balancing of relevant considerations having regard to the purpose for which the Convention was established, and the giving due recognition of the systems and protections afforded by the country from which the child was removed or wrongfully retained. Appropriate recognition must be afforded to the serious and invidious nature of domestic violence, its effect on the victim and the corresponding actual or potential effect on a child, or the consequences of requiring the returning child (and perhaps a primary care giver) being isolated and living in impoverished circumstances until parenting proceedings are determined.
141. In these circumstances, we see little utility in discussing cases where a return has been refused on the basis of grave risk of physical or psychological harm and those where, notwithstanding evidence of domestic violence, grave risk has not been found or, if found, the discretion to dismiss the application has not been exercised. We note those cases range from extreme domestic violence perpetrated on both a mother and child such as in Re: F (A Minor: Abduction: Rights of Custody Abroad) (1995) 3 All ER 641 to facts such as found in Zafiropoulos.
142. We think the problems which confront a judge such as confronted the trial Judge in this case were eloquently explained by Hale LJ (as her Ladyship then was) in her dissenting judgment in TB v JB (Abduction: grave risk of harm) [2001] 2 FLR 515 at paragraphs 43 & 44 and 57 & 59 as follows:

[43] ... when the Hague Convention was first drafted, the paradigm abductor was not the children's primary carer, but the other parent who 'snatched' them away from her. Hence a deliberate distinction was drawn between rights of custody and rights of access. Summary return was not the remedy to protect mere rights of access. Now, however, in 72% of cases, the abductor is the primary carer: the parent who has always looked after the children, upon whom the children rely for all their basic needs, and with whom their main security lies. The other parent is using the Hague Convention essentially to protect his rights of access. He can do this because "rights of custody" include the right to veto travel abroad, and most such parents now enjoy that right. But return to the home country may be a sledge hammer to crack a nut, because however much the children need contact with the other parent, they need a secure happy home with a competent and caring parent even more. There is often good reason to believe that the home country will allow them all to emigrate. It is therefore regarded as a real risk by the Hague Conference that spurious Art 13(b) defences will be raised in such cases: there is equally a real risk that the courts of the requested states will either succumb too readily to such defences, out of the kindness of their hearts and a natural reluctance to do anything which does not appear to them to be in the best interests of the children, or alternatively become unsympathetic and fail to recognise those few which should succeed.

[44] It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it...

...

[57] But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems...

...

[59] ... It would require more than a simple protection order in New Zealand to guard the children against the risks involved here...

143. While we are not troubled by the overall findings of her Honour in respect of domestic violence, we are less than satisfied her Honour's conclusion of grave risk of physical and psychological harm to the child, which her Honour found in paragraph 190, was open to her. Her Honour had rejected the mother's evidence that the father had physically harmed the child. The evidence was that the parties would not be living together in Norway, nor was there evidence that the father had ever breached a domestic violence order which could have led to a conclusion such an order would not adequately protect the mother and child.
144. While we readily accept that if future violence occurred in the presence of the child it could be psychologically damaging to him, her Honour did not separately assess that risk and the risk of physical harm to the child but rather conflated those risks. Although our conclusion may seem semantic the risk of either physical or psychological harm (or both) to the child which must be established by the person opposing return, as indicated in paragraph 55 in DP v Commonwealth Central Authority, and at paragraph 57 of Hale LJ's reasons in TB v JB (Abduction: grave risk of harm), are qualified by the adjective "grave".
145. As will be shortly seen, notwithstanding our conclusions that her Honour's conflated finding of grave risk of physical and psychological harm to the child was unsafe, her Honour went on to consider separately the defence of intolerable situation.
146. The trial Judge dealt with the intolerable situation defence commencing at paragraph 191 of her reasons. Her Honour recited the support which the father proposed to give to the mother, which included paying the rent on an apartment for one month and support for the mother and child in the sum of NOK 4,000.00, together with ongoing support of NOK 4,000.00 each month for the child until an administrative or court decision determined his level of ongoing child support. The trial Judge then discussed the evidence from the Royal Ministry of Justice and the Police and concluded that the mother would not be eligible for financial support as she had not been resident in Norway for three years prior to making application for such support.
147. The trial Judge noted the father's contention that the mother could support herself by getting work in Norway. However, her Honour concluded that she was not satisfied the work the mother previously undertook in Norway would provide her with sufficient supplementary income to bridge the gap between her approximate rental costs and what the father said he would pay.
148. Having referred to the fact that the mother was in receipt of social security benefits in Australia, the trial Judge said she accepted the mother's evidence she had few financial supports and "that she and the child would be in a financially extremely vulnerable position were the child ordered to return to Norway" (reasons, paragraph 194).
149. Her Honour set out her conclusions on intolerable situation at paragraph 195 of her reasons as follows:

I am persuaded that the child and the mother if the child were to be ordered to be returned to Norway, would be placed in an intolerable situation. That is, from the child's perspective, not only without provision of basic essentials but reliant upon the mother as his primary carer who would almost certainly be isolated and terrified. In short, there is compelling evidence the mother genuinely and reasonably believes her life is at risk from the father if she returns to Norway. The seriousness of the past domestic violence and abuse discussed above when combined with his threat to kill her would place her in an intolerable situation. Because of the child's reliance upon her for the entirety of his physical and

psychological needs, these factors add to my satisfaction that a return order would also place him in an intolerable situation.

150. We conclude that findings which underpinned her Honour's conclusion that the mother and child would be placed in an intolerable situation if a return to Norway was ordered were well open to her on the evidence. We also think it is of significance that the State Central Authority, after having the benefit of her Honour's reasons, determined not to file an appeal.
151. Her Honour then, having found the defences were made out, considered whether, in the exercise of her discretion, a return should be ordered. Having considered the ability of the father to participate in the parenting proceedings in Australia commenced by the mother and considered the child's present living arrangements, her Honour concluded as follows:

... Until the father arrives in Australia the risk of harm to the mother and child from his domestic violence is virtually non-existent. While upon his arrival the risk increases, that the mother and child reside with her parents moderates this risk... (paragraph 199)

152. The learned authors Beaumont and McLevy refer to the intolerable situation defence at p 151-154 of their monograph. Although we accept the cases cited therein (and bearing in mind the book was published in 1999 and reprinted in 2004 such that it does not contain discussion of more recent decisions), generally concluded where social security benefits were available in the place of habitual residence, that although children's standard of living may be reduced, that reduction could not be said, of itself, to constitute an intolerable situation, the facts in this case were different in that social security benefits were not available to the mother in Norway.
153. We do not discern any error in the exercise of discretion by the trial Judge in the circumstances of this case. It was open to her Honour to find on the evidence the mother was not eligible for social security benefits in Norway, and based on her past employment unlikely to be able to meet her housing and other expenses, notwithstanding the receipt of child support by the father, and that she would be in a vulnerable financial situation.
154. Given the past attitude of the father's family we are satisfied her Honour was correct in finding the mother would be without necessary support emotionally, and would be isolated. Corroboration for that finding had earlier been made by the trial Judge in her reference to the social worker's notes.
155. The task in which the trial Judge engaged was that averted to by Gaudron, Gummow and Hayne JJ in DP v Commonwealth Central Authority at paragraph 41, that is, the task her Honour engaged in was the making of "some prediction, based on the evidence, of what may happen if the child [was] returned" (original emphasis). Further, as noted by Gaudron, Gummow and Hayne JJ, that did involve some consideration of the interests of the child. We discern no error by the trial Judge. Accordingly, this ground which challenges the intolerable situation "defence" is without merit.

CONDITIONS

156. Counsel for the father submitted that the trial Judge had failed to adequately consider the undertakings offered by the father and failed to adequately consider conditions which would afford appropriate protections to the mother on her return to Norway.
157. Counsel for the father submitted that the trial Judge could have prevented, until the Norwegian courts were seized of the matter, any contact between the father, mother and child.
158. Although counsel for the father referred us to the dissenting judgment of Kirby J in DP v Commonwealth Central Authority at paragraphs 147 and 148, we think it is also important to consider the comments of the majority at paragraph 40 of the same judgment where their Honours said "[e]nsuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be voluntarily or, if not met voluntarily, can readily be enforced" (see also the comments of the Full Court in McDonald & Director-General, Department of Community Services (NSW) [2007] FamCA 1400; (2006) FLC 93-297 and Department of Community Services & Frampton [2007] FamCA 1064; (2007) FLC 93-340).
159. We think the comments of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in De L v Director-General, New South Wales Department of Community Services at 662 are

particularly relevant to this matter. Their Honours, after referring to Canadian and English decisions, explained:

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. (footnote omitted)

160. There is no suggestion that the trial Judge's recording of the father's proposals for financial support on the mother's return were anything but accurately recorded by her Honour.
161. Her Honour's conclusion on the question of conditions is set out in paragraph 200 of her reasons as follows:

As must be clear from my findings made in consideration of the defences I am not satisfied that it is possible to construct enforceable conditions for the child's return which would moderate the gravity of the risk of harm to the child to a level which would reasonably address his safety needs or place him in anything other than an intolerable situation.

162. Prior to reaching these conclusions her Honour had extensively canvassed the evidence in relation to the incidents of domestic violence, and legal and other support which would be available to the mother on her return. We have already discussed her Honour's conclusions that the mother would be in a financially vulnerable position notwithstanding the offers of support made by the father.
163. We are satisfied her Honour thoroughly canvassed and took into account the availability of protective orders which could be made in favour of the mother in Norway. We accept her Honour's conclusion, that she could not craft conditions which would overcome the vulnerability suffered by the mother as a result of the prior domestic violence, or which would result in satisfactory living arrangements for the mother and the child where the mother who had no access to social security benefits and would be isolated with lack of family support, was open to her on the evidence. Accordingly we satisfied this complaint is not established.
164. We think it important that we again emphasise in dealing with this ground that the State Central Authority chose not to appeal her Honour's orders, nor did they participate in the appeal. Thus we did not have the benefit of any submissions on the type of conditions, if any, which could have alleviated risk of harm to the child or the child being placed in an intolerable situation. We may infer the State Central Authority too found her Honour's reasoning on intolerable situation, and lack of conditions which could overcome that situation, satisfactory.
165. No ground of appeal having been established, the father's appeal must be dismissed.

COSTS

166. At the conclusion of the appeal we sought submissions from each party in respect of costs. Senior counsel for the mother sought, in the event the appeal was dismissed, that the father pay the mother's costs. Senior counsel for the mother advised us the mother was on legal aid, a relevant factor for us to take into account.
167. The father's counsel sought if the appeal was dismissed that no order for costs should be made having regard to the circumstances of the case and the nature of the issues agitated.
168. Section 117AA of the Act deals with costs in respect of proceedings under the regulations. We did not have the benefit of argument as to whether this section applies in the case of an appeal or only at first instance. However, as we will now explain, that consideration is irrelevant to our determination. Section 117AA provides as follows:

(1) In proceedings under regulations made for the purposes of Part XIIIAA, the court can only make an order as to costs (other than orders as to security for costs):

(a) in favour of a party who has been substantially successful in the proceedings; and

(b) against a person or body who holds or held an office or appointment under those regulations and is a party to the proceedings in that capacity.

(2) However, the order can only be made in respect of a part of the proceedings if, during that part, the party against whom the order is to be made asserted a meaning or operation of this Act or those regulations that the court considers:

(a) is not reasonable given the terms of the Act or regulations; or

(b) is not convenient to give effect to Australia's obligations under the Convention concerned, or to obtain for Australia the benefits of that Convention.

(3) In proceedings under regulations made for the purposes of section 111B, the court can also make an order as to costs that is:

(a) against a party who has wrongfully removed or retained a child, or wrongfully prevented the exercise of rights of access (within the meaning of the Convention referred to in that section) to a child; and

(b) in respect of the necessary expenses incurred by the person who made the application, under that Convention, concerning the child.

169. Whether we were determining costs under this provision or the costs under s 117 of the Act, we are satisfied in the circumstances of this case that there should be no order for costs, and each party should pay their own costs of and incidental to the proceedings.

I certify that the preceding one hundred and sixty nine (169) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court delivered on 5 November 2010

Associate:

Date: 5 November 2010

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CASE Download full text EN

Case Name **Harris v. Harris [2010] FamCAFC 221**

INCADAT reference HC/E/AU 1119

Court

Country	AUSTRALIA
Name	Family Court of Australia
Level	Appellate Court
Judge(s)	Bryant CJ, Finn and Boland JJ.

States involved

Requesting State	NORWAY
Requested State	AUSTRALIA

Decision

Date	5 November 2010
Status	Final
Grounds	Grave Risk - Art. 13(1)(b) | Undertakings | Role of the Central Authorities - Arts 6 - 10 | Procedural Matters
Order	Appeal dismissed, return refused
HC article(s) Considered	13(1)(b)
HC article(s) Relied Upon	13(1)(b)
Other provisions	-
Authorities | Cases referred to	Beazley v. McBarron [2009] NZHC 37; C. v. C. (Minor: Abduction: Rights of Custody) [1989] 2 All ER 465; C.D.J. v. V.A.J. (1998) 197 CLR 172; Central Authority v. Houwert [2007] ZASCA 88; [2007] SCA 88 (RSA); De L. v. Director-General, New South Wales Department of Community Services (1996) 187 CLR 640; De Lewinski and Legal Aid Commission of New South Wales v. Director-General, New South Wales Department of Community Services (1997) (1997) FLC 92-737;

Department of Community Services & Frampton (2007) FLC 93-340; Director-General NSW Department of Community Services & JLM (2001) FLC 93-090; D.P. v. Commonwealth Central Authority (2001) 206 CLR 401; Laing v. Central Authority (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92-849; McDonald & Director-General, Department of Community Services (NSW) (2006) FLC 93-297; Murray v. Director of Family Services ACT (1993) FLC 92-416; M.W. v. Director-General, Dept of Community Services (2008) 39 Fam LR 1; Panayotides v. Panayotides (1997) FLC 92-733; Pennello v. Pennello [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); Quarmby & Anor v. Director-General, Department of Community Services (NSW) (2005) 34 Fam LR 8; Re F. (A Minor: Abduction: Rights of Custody Abroad) (1995) 3 All ER 641; Re F. (Hague Convention: Child's Objections) (2006) FLC 93-277; T.B. v. J.B. (Abduction: grave risk of harm) [2001] 2 FLR 515; Warren v. Coombes (1979) 142 CLR 531; Zafiropoulos & The Secretary of the Department of Human Services State Central Authority (2006) FLC 93-264.

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INCADAT comment

Exceptions to Return

Grave Risk of Harm Economic Factors
Australian and New Zealand Case Law

Implementation & Application Issues

Measures to Facilitate the Return of Children Undertakings

SUMMARY

Summary available in EN | FR

Facts

The application concerned a child born in 2007 in Norway to an Australian mother and a Norwegian father. The parents had married in Australia in November 2006 and moved to Norway in December 2006. Except for holidays in Australia, this is where they lived until the child's removal in November 2008.

The marriage was characterised by domestic violence. On 27 November 2008 the mother left Norway with the child without the father's knowledge and travelled to Australia. The father applied for the return of the child on 19 March 2009.

Ruling

Removal wrongful and return refused; Article 13(1)(b) had been proved to the standard required under the Convention.

Grounds

Grave Risk - Art. 13(1)(b)

The mother alleged various incidents of physical and verbal abuse commencing in February 2006. These included being punched in the face, jabbed in the eye, pushed against a wall and strangled. As a result of the father's violence, she broke her arm twice and experienced haematoma on her arm and around her eye. During a telephone conversation in December 2008 the father threatened to kill the mother, the child and her parents.

The Court accepted the trial judge's findings of abuse except for the mother's allegation that the father attempted to strangle her. This was based on hearsay evidence from a worker at the crisis centre which the mother attended. The trial judge was wrong to attach "reasonable weight" to this unsworn statement. However, the inclusion of this incident in the trial judge's findings of fact did not undermine her overall conclusion that the father had verbally and physically abused the mother.

The Court criticised the trial judge for conflating the risk of psychological harm and the risk of physical harm to the child. The trial judge had rejected the mother's allegation that the father had physically harmed the child but determined that violence against the mother in earshot of the child was sufficient to cause a grave risk of psychological harm. Her conclusion that returning the child to Norway would expose him to a grave risk of physical and psychological harm was therefore unsafe.

Notwithstanding the Court's concerns, it accepted the trial judge's finding that returning the child to Norway would place him in an intolerable situation. The mother would be in a financially precarious position in Norway. She would not be entitled to social security benefits and any earnings based on her past employment would be unlikely to meet the shortfall between her housing and other costs and the child support provided by the father.

Furthermore, she would be without emotional support, isolated and fearful of the father's violence following his threat to kill her. In addition, the Court regarded the decision of the State Central Authority not to appeal as persuasive. As the child was dependent on the mother for all his needs, a return to Norway would place him in an intolerable situation.

Undertakings

The Court accepted the conclusion of the trial judge that no undertakings would be sufficient to mitigate the vulnerability and financial hardship of the mother and thus

prevent the child being placed in an intolerable situation on his return to Norway.

Role of the Central Authorities - Arts 6 - 10

Australia was the only Contracting State where the Central Authority applied as the applicant. Hence the father was not a party to the proceedings at first instance, the application being made by the Central Authority. However, the Central Authority declined to appeal against the decision. As a result, the father brought the appeal in his own name.

Procedural Matters

The father alleged that he had been denied procedural fairness before the trial judge because, without his knowledge or consent, the proceedings had been conducted 'on the papers' and without any cross-examination.

The Court accepted that the father had received initially misleading and perhaps deficient information from the Commonwealth Central Authority but was not satisfied that the advice received, taken as a whole, denied him procedural fairness. An e-mail from the Central Authority's counsel clarified what otherwise might have been misleading.

There was no obligation on a trial judge to go beyond the case presented by the father and to require evidence that he was aware that, if independently represented, he may instruct counsel to seek cross-examination of the party opposing return.

Counsel for the Central Authority made it clear in an e-mail to the father that the case would be conducted "on the papers" and that cross-examination of the mother was unlikely to cause her to depart from her evidence. The decision not to cross-examine the evidence of the parents was made by both counsels and could have been overruled by the trial judge, had she thought it essential.

Authors of the summary: Jamie Yule & Peter McEleavy

INCADAT comment

> **Economic Factors**

> **Australian and New Zealand Case Law**

> **Undertakings**

2012 WL 254496
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

In re the Marriage of Elizabeth Mary SHULTS, petitioner, Appellant,
v.
Fount LeRon SHULTS, Respondent,
Ramsey County, intervenor, Respondent.

No. A11–935.
|
Jan. 30, 2012.

Ramsey County District Court, File No. 62–FA–10–2324.

Attorneys and Law Firms

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John Choi, Ramsey County Attorney, Patrick M. Hest, Assistant County Attorney, St. Paul, MN, for respondent county.

Considered and decided by HUDSON, Presiding Judge; PETERSON, Judge; and STONEBURNER, Judge.

UNPUBLISHED OPINION

PETERSON, Judge.

***1** In this appeal from a district court order dismissing appellant-wife's petition to dissolve the parties' marriage, wife argues that the district court (a) erred in ruling that wife did not accomplish service of her petition on August 31, 2010, under Minnesota Law and the Hague Service Convention; (b) misunderstood Norwegian law when it ruled that respondent-husband's application for a Norwegian divorce license precluded wife's Minnesota dissolution proceeding and, in any event, the Minnesota dissolution proceeding preceded the Norwegian proceeding and the Minnesota proceeding should have been given precedence; and (c) should have allowed wife to proceed in Minnesota on a forum non conveniens basis. We reverse and remand.

FACTS

The parties were married in 1984, and they have three children. Only the youngest child was a minor when the dissolution proceeding began. During the marriage, husband earned two doctorate degrees, and wife stayed home to care for the children. In 2006, the family relocated from Minnesota to Norway.

In 2009, wife and the minor child returned to Minnesota. Soon after, the parties decided to divorce. Under Norwegian law, before a dissolution may be granted, the parties must file for and be granted a legal separation and live apart for at least one year. The parties submitted a joint application for legal separation in Norway, and, on August 31, 2009, they were granted a separation license. In July 2010, husband applied for a divorce license in Norway. No hearing was held regarding the issuance of the divorce license.[1] Dissolution of the marriage was the sole purpose of the divorce-license proceeding under Norwegian law, and no adjudication of child custody, property, or spousal maintenance was contemplated.

On August 27, 2010, wife filed a summons and a petition for dissolution of marriage in Ramsey County District Court. An affidavit of personal service, filed on September 29, 2010, states that the affiant served the summons and petition on husband on August 31, 2010, by placing copies of the documents in husband's mailbox in Norway according to Norwegian law. Husband claims that the documents were placed in the wrong mailbox. A second affidavit of personal service, filed on October 18, 2010, states that, on October 8, 2010, the affiant served wife's summons and petition for dissolution on husband by handing the documents to him personally in Norway, which is considered due and proper service under the laws of Norway.

On September 30, 2010, the parties were granted a divorce license in Norway. In an October 4, 2010 letter, husband notified the Minnesota District Court that the parties were granted a divorce license in Norway on September 30, 2010.

A district court referee determined that Minn.Stat. § 518.11(a) (2010) required that wife's summons and petition be served upon husband personally and that placing the summons and petition in husband's mailbox was not personal service. The referee concluded that the district court lacked jurisdiction over the Minnesota dissolution proceeding because the Minnesota proceeding was commenced by personal service of the summons and petition on husband on October 8, 2010, which was after the proceeding in Norway was commenced and concluded. The district court confirmed the referee's order, and wife moved for reconsideration.

***2** Upon the motion for reconsideration, the referee found that "[t]he Minnesota divorce proceeding commenced October 8, 2010, when the Summons and Petition for Dissolution of Marriage were personally served upon Husband." The referee further found that when the Minnesota proceeding commenced, there was a pending proceeding in Norway, the divorce had already been granted, and the Norwegian court has jurisdictional primacy. In an attached memorandum, the referee explained:

> Minnesota law, not the Hague Convention, controls commencement of a dissolution proceeding. Personal service—that is, service in hand delivered to the person of the Respondent (not substitute service, not abode service, not service by mail or service by publication)—is necessary wherever in the world that person may be found, unless that person is in a war zone, failed state, or in some other manner beyond personal service. In such case, upon proper application the Court approves service by alternate means.

The referee recommended that the motion to reconsider be denied, and the district court adopted the recommendation.

DECISION

This court reviews legal issues concerning jurisdiction de novo. *McLain v. McLain,* 569 N.W.2d 219, 222 (Minn.App.1997), *review denied* (Minn. Nov. 18, 1997). The Minnesota marital-dissolution statute provides:

> (a) Unless a [dissolution] proceeding is brought by both parties, copies of the summons and petition [for dissolution of marriage] shall be served on the respondent personally.
>
> (b) When service is made out of this state and within the United States, it may be proved by the affidavit of the person making the same. When service is made without the United States it may be proved by the affidavit of the person making the same, taken before and certified by any United States minister, charge d'affaires, commissioner, consul or commercial agent, or other consular or diplomatic officer of the United States appointed to reside in such country, including all deputies or other representatives of such officer authorized to perform their duties; or before an officer authorized to administer an oath with the certificate of an officer of a court of record of the country wherein such affidavit is taken as to the identity and authority of the officer taking the same.

Minn.Stat. § 518.11 (2010).

Under section 518.11(a), wife was required to serve the summons and petition on husband personally. And under section 518.11(b), because husband was served outside the United States, wife was permitted to prove service by the affidavit of the person who made the service if the affidavit was taken before and certified by one of several specifically identified officials. But section 518.11 does not specify how personal service is to be effected.

The Minnesota Rules of Civil Procedure specify how personal service is to be made when the person served is outside the United States. The rules state:

> Unless otherwise provided by law, service upon an individual other than an infant or an incompetent person, may be effected in a place not within the state:
>
> ***3** (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[.]

Minn. R. Civ. P. 4.04(c).

There is no dispute that personal service of wife's dissolution petition upon husband was required and that husband was served outside the United States. The United States Supreme Court has considered when service is compatible with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 361 (Hague Service Convention). *Volkswagenwerk Aktiegnesellschaft v. Schlunk,* 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). In *Schlunk,* the Supreme Court explained:

> The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. The Convention revised parts of the Hague Conventions on Civil Procedure of 1905 and 1954. The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.

Id. at 698, 108 S.Ct. at 2107.

The Supreme Court explained further that "[b]y virture of the Supremacy Clause, U.S. Const., Art. VI, the [Hague Service] Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Id.* at 699, 108 S.Ct. at 2108. Finally, the Supreme Court explained that "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." *Id.* at 700, 105 S. Ct at 2108. Thus, because husband was in Norway when wife attempted service, the applicable method of service under Minn.Stat. § 518.11 and Minn. R. Civ. P. 4.04(c) required the transmittal of documents abroad, and the district court erred in determining that the Hague Convention does not control the manner of service. *See Hammond v. Hammond,* 708 S.E.2d 74, 79 (N.C.2011) (stating that Hague Service Convention "procedures must be followed in all cases where there is occasion to transmit judicial or extrajudicial document for service abroad") (quotation omitted).

Because we hold that the district court erred in determining that the Hague Convention does not control the manner of service, we reverse and remand for a determination whether wife's attempted service on August 31, 2010, complied with the Hague Service Convention and, if it did, whether the district court has jurisdiction. We decline to address wife's additional arguments regarding the nature and effect of the proceedings in Norway and whether Minnesota is a convenient forum for the dissolution action because those issues have not been addressed by the district court. *See Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn.1988) (stating that "reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it" (quotation omitted)).

***4 Reversed and remanded.**

All Citations

Not Reported in N.W.2d, 2012 WL 254496

Footnotes

1 The parties dispute whether wife was served with husband's application for the divorce license. In a January 21, 2011 letter to the district court referee, husband's counsel asserts that the Norwegian court notified wife of the divorce proceeding

with a document dated September 2, 2010. In our review of the file, we have not found any document from the Norwegian court that notifies wife of the divorce-license proceeding.

End of Document

Case Law Search New search

CASE No full text available

Case Name **CA Paris, 13 avril 2012, No de RG 12/0617**

INCADAT reference HC/E/FR 1189

Court

Country	FRANCE
Name	Cour d'appel de Paris, Pôle 1, chambre 1
Level	Appellate Court
Judge(s)	Périé (président), Chadeville (présidente, déléguée à la protection de l'enfance), Guihal (conseillère)

States involved

Requesting State	BELGIUM
Requested State	FRANCE

Decision

Date	13 April 2012
Status	Subject to appeal
Grounds	Removal and Retention - Arts 3 and 12 | Grave Risk - Art. 13(1)(b) | Objections of the Child to a Return - Art. 13(2)
Order	Appeal allowed, return refused
HC article(s) Considered	13(1)(b) 13(2)
HC article(s) Relied Upon	13(1)(b) 13(2)
Other provisions	Art. 11 Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003)
Authorities | Cases referred to	-
Published in	-

INCADAT comment **Exceptions to Return**

EXHIBIT
tabbies
2

Grave Risk of Harm Primary Carer Abductions
Child's Objection Nature and Strength of Objection

SUMMARY

Summary available in EN | FR

Facts

The case concerned two girls, born in 1998 and 2000, among four siblings. Their two elder brothers were of full age. The family lived in Belgium. In 2010, the parents divorced; parental authority was then exercised jointly but the daughters' residence was set at their father's home in Belgium.

In June 2011, the father moved to France with his daughters. On 20 March 2012, a ruling at first instance ordered the children's return to Belgium. The father appealed against that ruling.

Ruling

Appeal allowed; return refused. The daughters objected to a return that exposed them to a grave risk of danger, whereas no adequate measures had been taken in Belgium.

Grounds

Removal and Retention - Arts 3 and 12

The Court held that since custody was exercised jointly and the mother objected to the transfer of the daughters' principal residence to France, their removal had been wrongful.

Grave Risk - Art. 13(1)(b)

The Court referred to Article 13 of the 1980 Hague Child Abduction Convention and to Article 11 of Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003), and in particular Article 11(4) where under a court may not refuse to order a child's return pursuant to Article 13(1)(b) of the Convention if it is established that adequate measures have been taken to secure its protection after the return.

It observed that the father had moved to France with his partner, the latter's child, their child, and his own daughters. He had found employment there. Accordingly, a return to Belgium with his daughters could not be contemplated. As a result, the children could only be returned to the mother or to a care entity.

But it was established that the material conditions of the mother's living were incompatible with care for the daughters (two-room accommodation, where the two brothers of full age, one of whom was very violent, also lived), and that the mother's

home did not offer a suitable mental and educational environment.

The Court also pointed out that in the divorce proceedings, the Belgian courts had set the children's principal residence with the father on a provisional basis.

It concluded that the father had proved that returning the children to the mother would expose them to a grave physical and mental risk whereas the Public Prosecutor's Office had not established that adequate measures had been taken to secure the children's protection after their return.

Objections of the Child to a Return - Art. 13(2)

The Court observed that the girls, then aged 11 and 13, had been interviewed in the lower-court proceedings, and on that occasion had clearly stated their wish to live with their father.

Author of the summary: Aude Fiorini

INCADAT comment

> **Primary Carer Abductions**

> **Nature and Strength of Objection**

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State;

and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[***]

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.

[***]

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

[***]

518.552 MAINTENANCE.

Subdivision 1. **Grounds.** In a proceeding for dissolution of marriage or legal separation, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and which has since acquired jurisdiction, the court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:

(a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

(b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Subd. 2. **Amount; duration.** The maintenance order shall be in amounts and for periods of time, either temporary or permanent, as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;

(c) the standard of living established during the marriage;

(d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;

(e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;

(f) the age, and the physical and emotional condition of the spouse seeking maintenance;

(g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and

(h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

Subd. 3. **Permanency of award.** Nothing in this section shall be construed to favor a temporary award of maintenance over a permanent award, where the factors under subdivision 2 justify a permanent award.

Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.

Subd. 4. **Reopening maintenance awards.** Section 518.145, subdivision 2, applies to awards of spousal maintenance.

Subd. 5. **Private agreements.** The parties may expressly preclude or limit modification of maintenance through a stipulation, if the court makes specific findings that the stipulation is fair and equitable, is supported by consideration described in the findings, and that full disclosure of each party's financial circumstances has occurred. The stipulation must be made a part of the judgment and decree or a post-decree stipulated order. The parties may restore the court's authority or jurisdiction to award or modify maintenance through a binding stipulation.

Subd. 6. **Cohabitation.** (a) Spousal maintenance may be modified pursuant to section 518A.39, subdivision 2, based on the cohabitation by the maintenance obligee with another adult following dissolution of the marriage. The modification may consist of a reduction, suspension, reservation, or termination of maintenance. In determining if maintenance should be modified due to cohabitation, the court shall consider:

(1) whether the obligee would marry the cohabitant but for the maintenance award;

(2) the economic benefit the obligee derives from the cohabitation;

(3) the length of the cohabitation and the likely future duration of the cohabitation; and

(4) the economic impact on the obligee if maintenance is modified and the cohabitation ends.

(b) The court must not modify a maintenance award based solely on cohabitation if a marriage between the obligee and the cohabitant would be prohibited under section 517.03, subdivision 1, clause (2) or (3). A modification under this subdivision must be precluded or limited to the extent the parties have entered into a private agreement under subdivision 5.

(c) A motion to modify a spousal maintenance award on the basis of cohabitation may not be brought within one year of the date of entry of the decree of dissolution or legal separation that orders spousal maintenance, unless the parties have agreed in writing that a motion may be brought or the court finds that failing to allow the motion to proceed would create an extreme hardship for one of the parties.

History: *1978 c 772 s 51; 1979 c 259 s 26; 1982 c 535 s 1; 1985 c 266 s 2; 1986 c 444; 1988 c 668 s 19; 1989 c 248 s 7; 2015 c 30 art 1 s 8; 2016 c 132 s 1*

518D.302 ENFORCEMENT UNDER HAGUE CONVENTION.

Under sections 518D.301 to 518D.317 a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

History: *1999 c 74 s 2*

518D.207 INCONVENIENT FORUM.

(a) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) the length of time the child has resided outside this state;

(3) the distance between the court in this state and the court in the state that would assume jurisdiction;

(4) the relative financial circumstances of the parties;

(5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for marriage dissolution or another proceeding while still retaining jurisdiction over the marriage dissolution or other proceeding.

History: *1999 c 74 s 7*

TITLE 22. FOREIGN RELATIONS AND INTERCOURSE

CHAPTER 97. INTERNATIONAL CHILD ABDUCTION REMEDIES

22 USC § 9001 et. seq.
(International Child Abduction Remedies Act – ICARA)

§ 9001. Findings and declarations

(a) Findings. The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations. The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes--

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 9002. Definitions

For the purposes of this Act--

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act (42 U.S.C. 653);

(4) the term "petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 7(a) [22 USCS § 9006(a)].

§ 9003. Judicial remedies

(a) Jurisdiction of the courts. The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions. Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice. Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case. The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof.

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence--

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing--

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of the Convention. For purposes of any action brought under this Act--

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to

the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit. Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) Remedies under the Convention not exclusive. The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

§ 9004. Provisional remedies

(a) Authority of courts. In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 4(b) of this Act [42 USCS § 11630(b)] may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority. No court exercising jurisdiction of an action brought under section 4(b) [22 USCS § 9003(b)] may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 9005. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 4 [22 USCS § 9003], which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 9006. United States Central Authority

(a) Designation. The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions. The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this Act.

(c) Regulatory authority. The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this Act.

(d) Obtaining information from Parent Locator Service. The United States Central Authority may, to the extent authorized by the Social Security Act [42 USCS §§ 301 et seq.], obtain information from the Parent Locator Service.

(e) Grant authority. The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for

purposes of accomplishing its responsibilities under the Convention and this Act.

(f) Limited liability of private entities acting under the direction of the United States Central Authority.

(1) Limitation on liability. Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this Act, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct. The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this Act.

(3) Exception for ordinary business activities. The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

§ 9007. Costs and fees

(a) Administrative costs. No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions.

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 4 [22 USCS § 9003] shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 4 [22 USCS § 9003] shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

§ 9008. Collection, maintenance, and dissemination of information

(a) In general. In performing its functions under the Convention, the United States Central Authority may, under such

conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority--

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this Act.

(b) Requests for information. Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities. Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which--

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13, United States Code;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) Information available from Parent Locator Service. To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping. The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 9009. Office of Children's Issues

(a) Director requirements. The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing. Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact. The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents.

(1) In general. Except as provided in paragraph (2), beginning 6 months after the date of enactment of this Act [enacted Nov. 29, 1999], and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception. The requirement in paragraph (1) shall not apply in a case of an abducted child if--

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

§ 9010. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5, United States Code [5 USCS §§ 5701 et seq.], for employees of agencies.

§ 9011. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.