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ABSTRACT

This thesis critically assesses the Hague Child Abduction Convention (“the Convention”). It examines whether or not the Convention’s return mechanism produces outcomes aligned with the original rationale for the Convention: The prompt return of children so that the parenting dispute can be determined in the most appropriate forum. Accordingly this thesis provides a critique of the Convention’s efficacy by examining the outcomes produced by its operation. It specifically considers outcomes for abducting primary-carer mothers and their children, post-return to Australia under the Convention. It does this through a mixed research methodology that incorporates a survey, case-law analysis, and a review of the relevant interdisciplinary literature.

Because the circumstances giving rise to the Convention have changed it is no longer judicious to deem the Convention’s operation successful on the basis that it achieves comity, functions as a deterrent to abduction, and is thus in the best interests of children. Instead, the gendered shift in abducting parents together with the emergence of the “transnational family” phenomenon means that the original rationale for the Convention is no longer ideal. It is contended that a better measure of the Convention’s success is to assess the outcomes it produces as part of an entire system designed to address the problem of international parental child abduction. This is achieved by assessing both the operation of Convention return proceedings and Australian family law post-return. Convention return proceedings and the resolution of the parenting dispute post-return to Australia are not distinct stages operating in
isolation. Viewing them as such is a purely theoretical exercise divorced from the reality of the lives of transnational families.

Specifically, this thesis critically assesses two fundamental assumptions underpinning the Convention’s operation, where the abduction is by the child’s primary-carer mother and the child is returned to Australia. Firstly, it is assumed that the Convention operates in the best interests of children generally, by promptly restoring them to their habitual residence immediately preceding their abduction. Secondly, it is assumed that the individual child’s best interests will be adequately assessed post-return to Australia as the child’s habitual residence. Whether or not these fundamental assumptions are accurate is a moot point, yet their legitimacy has been left largely unquestioned.

Two significant and unanticipated changes have emerged since the Convention was conceived. These changes threaten the validity of the fundamental assumptions. The first change has been a trend away from abducting fathers to abducting mothers. The second change has been the incidence and extent of what is known as the “transnational family” phenomenon. This thesis reveals their effect on the continued validity of the assumptions that have been used to support the Convention’s efficacy. It is demonstrated that the collective operation of the two fundamental assumptions can have a twofold effect. Firstly, an abducting primary-carer mother may be compelled to reside and litigate the parenting dispute in a jurisdiction where she and the child have few meaningful social, cultural, linguistic and economic connections. Secondly, the parenting dispute may be determined without the individual child’s best interests, and the primary-carer mother’s intrinsically intertwined circumstances,
being sufficiently examined. The effects of a child’s return to Australia under the Convention, when they and their primary caregiver lack meaningful connections to the child’s habitual residence, can be exacerbated by aligning their best interests with equal shared parental responsibility and shared care post-return.
STATEMENT OF AUTHORSHIP

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, this thesis contains no material previously published or written by any other person except where due reference is made in the thesis itself.

(Signed) _________________________________ (Date) ______________

Danielle Bozin-Odhiambo
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- Appoint one author to be the executive author to record authorship and manage correspondence about the work with the publisher and other interested parties.
- Acknowledge all those who have contributed to the research, facilities or materials but who do not qualify as authors, such as research assistants, technical staff, and advisors on cultural or community knowledge. Obtain written consent to name individuals.

Included in this thesis is a paper in Chapter Four for which I am the sole author.
The bibliographic details for this paper are: Danielle Bozin-Odhiambo, ‘Re-examining habitual residence as the sole connecting factor in Hague Child Abduction Convention cases’ (2012) 3(1) Family Law Review 4.

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CHAPTER ONE

INTRODUCTION

OVERVIEW

This thesis examines the social phenomenon of international parental child abduction by critiquing the Hague Child Abduction Convention’s\(^1\) (hereafter “the Convention”) efficacy. The act of international parental child abduction is a consequence of families’ inability to resolve complex parenting disputes for which there are no easy solutions. Families that experience international parental child abduction are likely to have distinctive characteristics that make the resolution of their parenting dispute particularly challenging. The parents may have a cross-cultural relationship with each of them being of different nationalities. The family unit may also be accustomed to a mobile lifestyle having lived in two or more countries. For these families there is typically going to be a set of traumatic issues following separation, for the children and parents alike.

If a primary caregiving mother abducts her child from one country to another which she considers to more closely constitute her home, there are two broad possible scenarios. If the child is returned to and remains in the country it was physically residing in before the abduction, then the mother must choose to live in a country

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where she may have few meaningful connections, if she wishes to remain with her child. The dilemma is that her freedom to live in an environment where she has meaningful social, cultural, linguistic and economic connections is constrained. This is so that the child can enjoy meaningful physical contact with both of their parents, and the father can reside in his country of choice. Alternatively, if the child is not returned and remains in the mother’s country of choice, then in all likelihood the aggrieved father will only have limited contact with and influence in his child’s life. The dilemma is that the child will be deprived of the meaningful presence of both of their parents on a regular basis. In addition the father will be left to try to move on with his life without the joy of day-to-day interactions with his child.

A third post-separation scenario can exist for families that are cross-cultural and mobile, which is in contrast to the above two scenarios. Both parents are happy to reside in a country that is not their home (the “content transnational person”) but the child is separated from their extended family. The dilemma is that the child does not have the benefit of the nurturing influence of their extended family. This includes the rich cultural identity that these family members can provide. Also, both parents may have a limited support network close at hand. Inevitably there will be negative consequences that will flow from each of the above three scenarios.

This thesis specifically examines the first scenario. It provides a critique of the Convention’s efficacy, by examining the outcomes produced by its operation for abducting primary-carer mothers and their children, post-return to Australia. This focus is not intended to diminish the undeniable experiences of left-behind fathers, who find themselves divested of the joy that a meaningful relationship with their child
brings. There are no easy solutions and this thesis does not purport to suggest that there are.

The transnational family experience and the immense challenges that these families face post-separation, means that it is no longer judicious to deem the Convention’s operation successful simply based on the achievement of its stated goal: the prompt return of children to their habitual residence immediately preceding their abduction. Whether or not the Convention operates in the best interests of children cannot be critiqued in an insular fashion. Convention return proceedings, and substantive parenting dispute proceedings under the Family Law Act 1975 (Cth) post-return to Australia, are not distinct stages operating in isolation. Viewing them as such is a purely theoretical exercise divorced from the reality of the lives of transnational families. These families are required to manoeuvre through the complex dilemma of where the parents and their children should live post-separation. A better measure of the Convention’s success is the outcomes it produces as part of the entire system designed to address the contemporary problem. When a child is returned to Australia this system includes the operation of Australian family law.

The principal focus of scholarly debate concerning the Convention has been the interpretation of its key concepts, jurisdictional requirements, and the defences to a child’s return. This thesis contributes an original critique of the Convention’s
operation, by examining whether or not the Convention’s return mechanism produces outcomes aligned with the original rationale for the prompt return of children.⁴

Examining outcomes produced by the operation of a private international law instrument that essentially determines forum, requires the selection of a jurisdiction in which to study tangible outcomes. This thesis empirically examines outcomes for abducting primary-carer mothers and their children post-return to Australia as the child’s habitual residence. The focus is on Convention cases where the abduction was out of Australia, and the child was returned back to Australia under the Convention. This means that in the cases reported in this thesis’ empirical study, the Convention return proceedings took place in a Convention country other than Australia. These proceedings resulted in the child being returned to Australia. The study of outcomes is also limited to cases where the abduction was by the child’s primary-carer mother. This has been done because the impact of the relatively recent “feminization” of international parental child abduction is yet to be explored empirically.

This thesis examines two fundamental assumptions that operate in the context of Convention returns to Australia, where the abduction is by the child’s primary-carer mother. These assumptions are at the heart of the Convention’s objective of promptly re-establishing the status quo regarding a child’s habitual residence. First, it is assumed that the Convention operates in the best interests of children generally, by promptly restoring them to their habitual residence immediately preceding their abduction. Second, it is assumed that the individual child’s best interests will be adequately assessed post-return to Australia as the child’s habitual residence. Whether

or not these fundamental assumptions are given proper effect by the Convention is a moot point. We must analyse these assumptions rather than simply assuming that they are accurate.

Two significant and unanticipated challenges have emerged to threaten the validity of these assumptions: A change in the gender dynamics underpinning international parental child abduction, and the “transnational family” phenomenon. This thesis demonstrates how these changes affect the validity of the assumptions that have been used to support the Convention’s efficacy. This thesis critically assesses the collective operation of the two fundamental assumptions. It argues that the assumptions are unreliable with the result that the Convention’s prompt return mechanism, together with Australian family law post-return, may place children and their abducting primary-carer mothers in a precarious state. This thesis argues that the collective operation of these two assumptions can have a twofold effect. First, an abducting primary-carer mother may be compelled to litigate the parenting dispute in a jurisdiction where she and the child have few meaningful social, cultural, linguistic and economic connections. Second, the parenting dispute may be determined without the individual child’s best interests, and the primary-carer mother’s intrinsically intertwined circumstances, being sufficiently assessed. If this occurs the finding of habitual residence made during Convention return proceedings is determinative of the parenting dispute.

Comity and reciprocity\(^5\) are central considerations during Convention return proceedings. This is because it is assumed that if the individual child’s best interests

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\(^5\) These terms are defined below in the terminology section of this chapter.
are to be considered, it is most appropriate that this takes place post-return in the jurisdiction deemed to be the child’s habitual residence.

Comity has been defined...as the basis of international law, a rule of international law, a rule of choice of law, courtesy, politeness, convenience or good will between sovereigns, a moral necessity, expediency, reciprocity, or considerations of high international politics concerned with maintaining amicable and workable relationships between nations.\(^6\)

Protecting the individual child’s best interests during Convention return proceedings, and promoting comity between contracting states, are perceived to be largely incompatible aspirations. This incompatibility is most often resolved in favour of facilitating comity. This choice has been rationalised with the erroneous assumption that the child’s best interests can be reserved for consideration post-return in the child’s habitual residence. From a practical perspective accepting this assumption as accurate has been the easy solution. Because ‘Hague Convention return proceedings are prompt in nature, they are not ideally designed to determine contradicted issues of fact’.\(^7\) Contradicted issues of fact may include each party’s submissions concerning the child’s best interests and the merits of the substantive parenting dispute. However, the proposition that the Convention achieves comity, acts as a deterrent, and is thus in the best interests of children generally, does not in itself provide an answer to questions surrounding the Convention’s efficacy.

This introductory chapter offers a brief overview of the central arguments made by this thesis. It also provides a definitional list of key phrases and terms used throughout the thesis. Chapter Two provides an overview of the Convention’s protocols and practices. This discussion serves as the foundation upon which the contestability of

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the two fundamental assumptions will be critiqued in both Chapter Four and Chapter Five. Accordingly, the overview is limited in the sense that its purpose is to provide an understanding of only those protocols and practices necessary to critique the fundamental assumptions.

It is impractical to examine the protocols and practices of each Convention country from which a child may be returned to Australia. This thesis is not a comparative analysis of how courts in different Convention countries conduct Convention return proceedings. Chapter Two illustrates the Convention’s protocols and practices with an emphasis on how Australian courts handle return proceedings. Australia provides an excellent illustration as it is a strong advocate of the Convention, with a significant body of case law interpreting the Convention’s threshold requirements and defences to a child’s return. However, it is important to note that the empirical study reported in later chapters specifically concerns cases in which the return proceedings took place in a Convention country other than Australia. Consequently the child was returned to Australia.

Chapter Three explains the mixed methodological approach adopted by this thesis. Each method is explained and justified. In particular it provides a detailed description of, and justification for, the primary research used to support the thesis: A study of outcomes post-return to Australia under the Hague Child Abduction Convention for abducting primary-carer mothers and their children (hereafter “The Australian Study of Hague Child Abduction Convention Outcomes”). Most importantly it explains how the empirical study’s design facilitates an examination of the contestability of the two

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8 At present the Convention has 89 contracting states.
fundamental assumptions. It also clarifies how the survey tool’s format and questions test the thesis hypothesis. Chapter Three also presents a preliminary analysis of the research findings. A more detailed analysis is then incorporated into Chapter Four and Chapter Five, where the data is used to support the substantive examination of the collective operation of the two fundamental assumptions.

Chapter Four of this thesis establishes the unreliability of the first fundamental assumption. This assumption is that the Convention operates in the best interests of children generally, by promptly restoring them to their habitual residence immediately preceding their abduction. This jurisdiction does not necessarily possess the quality of the child’s home environment. Also it does not automatically represent the most appropriate moral and cultural framework in which to construct the child’s best interests. This chapter critiques the usefulness of habitual residence as the sole connecting factor in Convention cases. This is achieved by examining the quality of this jurisdiction. This is done in light of changes in the gender dynamics underpinning international parental child abduction and the “transnational family” phenomenon.

The principal focus of scholarly debate concerning habitual residence in the context of international parental child abduction has been to call on courts to ‘clarify their jurisprudence on the issue of habitual residence and adopt a uniform standard for determining the state of the children’s habitual residence.’\textsuperscript{9} This thesis seeks to broaden this debate, and facilitate dialogue about the emerging incompatibility

between the quality of a child’s habitual residence and the achievement of the Convention’s stated goals.10

When the test for determining a child’s habitual residence is applied during Convention return proceedings, the analysis does not necessarily yield a jurisdiction that represents the child’s home environment. That is an environment where they possess meaningful social, cultural, linguistic and economic connections. This outcome is contrary to the objective of prompt return provided within the Convention’s Explanatory Report.11 This objective is to return the child to stability, back into the arms of the parent charged with their upbringing, and the environment in which their life has developed.12 Arguably the child’s habitual residence as a home environment of the nature anticipated by the Convention’s drafters is an increasingly out-dated construct. This is due to an increase in both the number of abducting primary-carer mothers and their families’ growing mobility.

Judicial determinations of habitual residence made during Convention return proceedings are entrenched in a state centric paradigm. This paradigm is becoming increasingly incompatible with the lives of families that experience international parental child abduction. When a family leads a transnational lifestyle, examining their child’s connections to a physical state or jurisdiction can be a futile and misguided exercise. Chapter Four proposes that in such circumstances the framework

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12 Ibid 432.
in which a child’s identity is constructed and defined, can be viewed as the primary-care setting. This framework is an alternative to considering a particular geographical space the child’s home. Restoration or preservation of this home environment is of principal importance. This ensures a child’s stability, at minimum whilst the substantive parenting dispute is being resolved.

Chapter Five of this thesis establishes the unreliability of the second fundamental assumption. This assumption is that the individual child’s best interests can be adequately assessed post-return to Australia as the child’s habitual residence. If the substantive parenting dispute is adjudicated post-return to Australia, statutory criteria found in Part VII of the Family Law Act 1975 (Cth) apply. These criteria guide the exercise of judicial discretion to determine an individual child’s best interests towards an outcome of equal shared parental responsibility and shared care. This chapter’s examination of Australian family law is therefore limited. It specifically considers whether the equal shared parental responsibility and shared care approach accommodates transnational families’ unique circumstances and needs. Accordingly, this chapter does not comprise a broad all-encompassing critique of the equal shared parental responsibility and shared care approach.

*The Australian Study of Hague Child Abduction Convention Outcomes* examines the impact of the equal shared parental responsibility and shared care approach on families post-return to Australia. The approach guides the exercise of judicial discretion to determine a child’s best interests. On the basis of this study’s findings, it is asserted that the result is a parenting arrangement that is incompatible with the lifestyle lead by transnational families. Despite this incompatibility because equal
shared parental responsibility and shared care has been aligned with the best interests of children, these parenting arrangements have increased since the approaches’ introduction in 2006. Chapter Five considers the implications of this. It demonstrates how the detrimental effects of a child’s return, when they and their primary caregiving mother lack meaningful connections to Australia, can be exacerbated. This can occur when the child’s best interests are aligned with equal shared parental responsibility and shared care.

The collective operation of Convention return proceedings and equal shared parental responsibility and shared care post-return, can create artificial living arrangements and jurisdictional links. It can do this rather than preventing them as was desired by the Convention’s drafters. The application of equal shared parental responsibility and shared care post-return may not only alter the pre-existing primary-care arrangement but also restrict freedom of movement. This relegates the primary caregiver and child to living in one geographical space, even if they have established minimal connections there. This occurs because the other parent (most often the child’s father) has chosen to continue to reside in the child’s habitual residence. Also, the formulation of an equal shared parental responsibility and shared care arrangement post-return, fails to recognise that maintaining the pre-existing primary-care setting ensures the child’s continued stability and development.

Abducting primary-carer mothers are not principally motivated by a desire to alter the prevailing primary-care and custody arrangement. Instead they are invariably driven by a complex mix of circumstances that may include: a need to flee domestic violence

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and/or child abuse; a desire to return to their homeland coupled with the longing to return to family and social support networks; and a desire to improve their economic situation.\textsuperscript{14} In the landmark Australian relocation decision \textit{U v U},\textsuperscript{15} Kirby J aptly recounted:

\begin{quote}
[T]he burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting. Effectively…it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound.\textsuperscript{16}
\end{quote}

The operation of the Convention’s return mechanism together with Australian family law post-return, may force an abducting primary-carer mother to accept burdens. These burdens include living in a geographical space where she and her child have few meaningful connections, if she wishes to remain with her child in Australia. As Roebuck suggests ‘a mother’s desire to relocate should equate to a father’s decision not to.’\textsuperscript{17}

\begin{flushright}
\textsuperscript{14} See the data from \textit{The Australian Study of Hague Child Abduction Convention Outcomes} discussed in Chapter Three.
\textsuperscript{15} [2002] HCA 36.
\textsuperscript{16} Ibid [142].
\end{flushright}
TERMINOLOGY

In this part key phrases and terms used throughout the thesis are defined. Where phrases and terms are not defined within the substantive chapters of this thesis the below definitions should be adopted.

‘abduction’ and ‘removal or retention’ These terms are used interchangeably. Abduction means the wrongful removal or retention of a child from one contracting state to another. A child’s removal or retention is wrongful when (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.18 The term removal is specifically used when the initial physical removal of the child from their habitual residence was wrongful. The term retention is used when consent was given for the child’s initial physical removed from their habitual residence, but the child was later retained without the required consent. For example, the child was retained beyond the time period agreed for an overseas holiday.

‘artificial jurisdictional links’ An abducting parent’s use of force (i.e. the act of abduction) to move the child from their habitual residence to another Convention country has been viewed as creating artificial jurisdictional links to the second

jurisdiction. This is because the Convention’s drafters viewed the child’s habitual residence as the family and social environment in which their life had developed. Consequently the child’s presence in the second jurisdiction has been perceived as establishing artificial jurisdictional links.

‘central authority’ The administrative body within each contracting state which is the repository of the duties that the Convention imposes on contracting states. Each central authority’s structure and capacity to act are governed by the internal laws of the relevant contracting state. Principal functions that a central authority must discharge include (a) initiating or facilitating the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access (b) discovering the whereabouts of a child who has been wrongfully removed or retained (c) preventing further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures and (d) providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.

‘child-country connection versus the child-parent connection’ The test for determining a child’s habitual residence during Convention return proceedings values the child-country connection over and above the child-parent connection. The child-country connection values the child’s physical presence in a geographical space that is

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20 Ibid 438.
defined using state boundaries. The child-parent connection values the child’s connection to their mother derived from maternal nurturing\textsuperscript{22} that results in emotional stability.

\textit{‘comity and reciprocity’} ‘The basis of international law, a rule of international law, a rule of choice of law, courtesy, politeness, convenience or good will between sovereigns, a moral necessity, expediency, reciprocity, or considerations of high international politics concerned with maintaining amicable and workable relationships between nations.’\textsuperscript{23}

\textit{‘contracting state’ and ‘Convention country’} These terms are used to refer to a state that has acceded to the Convention.

\textit{‘defences to a child’s return’} An abducting parent has the opportunity to raise several possible defences to an order for the child’s return to their habitual residence. These defences provide the Court with a limited opportunity to examine a child’s best interests. This opportunity can be circumscribed by a narrow interpretation of the defences, which inevitably limits the child’s interests as a consideration. The law is unsettled regarding whether judicial discretion to order the child’s return is still retained, even if a defence is successfully raised by the abducting parent.

\textit{‘family violence’} In this thesis this term is given the definition provided in section 4AB of the \textit{Family Law Act 1975} (Cth). Family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family,

\textsuperscript{22} Note that the word ‘maternal’ is used here as this thesis’ focus is international parental child abductions by primary-carer mothers.

\textsuperscript{23} Paul, above n 6, 3.
or causes the family member to be fearful. Examples of behaviour that may constitute family violence include (but are not limited to): (a) an assault; or (b) a sexual assault or other sexually abusive behaviour; or (c) stalking; or (d) repeated derogatory taunts; or (e) intentionally damaging or destroying property; or (f) intentionally causing death or injury to an animal; or (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty. A child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence. Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child: (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.
‘forum shopping’ ‘The tactical activity of a litigant to choose (amongst several available venues) a specific forum in a specific jurisdiction in order to achieve the application of the most favourable procedural and substantive law to a case. As the choice of a specific forum may give the party some control over both, procedural and substantive law, this could offer the opportunity to the plaintiff to influence the applicable law by choosing one specific forum amongst several competent and available venues.’  

‘equal shared parental responsibility and shared care’ Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. An order for equal shared parental responsibility is taken to require each parent to consult with the other, and make a genuine effort to come to a joint decision about, any major long-term decisions relating to the child’s welfare. Equal shared parental responsibility requires parents to adopt a collaborative parenting approach. The exercise of equal shared parental responsibility requires that, any short-term decisions about the child’s welfare are made by the parent who has care of the child at that time, without the need to consult the other parent. Shared care for the purposes of this thesis’ empirical study means a parenting arrangement where each parent spends approximately equal amounts of time with the child. Although it is important to note that shared care arrangements come in an array of time formulations.

25 Family Law Act 1975 (Cth) s 61B.
26 Ibid s 65DAC(3)(a).
27 Ibid s 65DAC(3)(b).
28 Ibid s 65DAC(2).
29 Ibid s 60DAA(1)−(2).
'habitual residence’ Generally speaking a child’s habitual residence is the state that the parents together intended their child to reside for settled purposes. This test is not concerned with whether or not the child has established meaningful connections to the state. Consequently a child’s habitual residence can remain unchanged even if the child has been living away from the jurisdiction for a period of time. Conversely, where there is a shared and settled parental intention to relocate the child to another country the child's habitual residence can change quickly. Recently the High Court of Australia expressed the view that determining a child’s habitual residence involves consideration of a multiplicity of circumstances.30 When determining a child’s habitual residence considerations are not necessarily confined to physical presence and parental intention. However, the parents past and present intentions are still a key consideration.

‘Hague Child Abduction Convention return proceedings’ Judicial proceedings brought by a contracting state’s central authority on behalf of the left-behind parent seeking an order for the child’s return. In the Australian context these proceedings are initiated in the Family Court of Australia, and appeals are heard by the Full Court of the Family Court and the High Court of Australia. Not all Convention cases are resolved using judicial process. A central authority may first seek to secure the voluntary return of the child.

‘incoming and outgoing cases’ This thesis is concerned with the outcomes produced by the Convention’s operation post-return to Australia. In this context an outgoing case involves a parent abducting their child from Australia to another Convention

30 LK v Director-General, Department of Community Services [2009] HCA 9, [23]; See also State Central Authority v Truman [2009] Fam CA 1175.
country. In these cases the Convention process will be initiated by the left-behind parent and central authority in Australia. The return proceedings will take place in the Convention country to which the child was taken. It is this category of cases with which this thesis’ empirical study is concerned. An incoming case involves a parent abducting their child from another Convention country to Australia. In these cases the Convention process will be initiated by the left-behind parent and central authority in the Convention country from which the child was taken. The return proceedings will take place in an Australian Court.

‘left-behind parent’ The parent who remains in the child’s habitual residence and seeks the child’s return under the Convention. This thesis’ empirical study examines international parental child abductions by the child’s primary-carer mother. Consequently in the cases reported by the participants the left-behind parent is most often the child’s father who was, prior to the act of abduction, seeing his child but did not have primary-care of them. Note this definition assumes that the parents’ relationship is a heterosexual one.

‘meaningful connection’ This phrase is used when questioning a child’s connection to the state deemed to be their habitual residence. A meaningful connection in this context represents a social, cultural, linguistic and economic connection rather than a connection denoted by mere physical presence.

‘Part VII substantive parenting dispute cases’ Parenting cases concerning each parent’s responsibilities concerning their child, and how much time they will each spend with their child. These cases take place post-return to Australia under the
Convention. These cases are determined in accordance with the statutory criteria found in Part VII of the *Family Law Act 1975* (Cth). They may be resolved through court process or alternative dispute resolution practices. Their resolution can result in a final order or private agreement.

‘primary-carer mother’ A mother who provides her child with the majority of their care needs. The child also spends more physical time in her care than in the care of their father (more than 50%).

‘prompt return’ The judicial and administrative authorities of contracting states are required to act expeditiously in proceedings for the return of children under the Convention. Consequently the return process is often described as prompt. Generally Convention return proceedings are viewed as summary in nature. This means that findings of fact are made “on the papers” without the benefit of oral evidence and the cross-examination of witnesses on disputed facts. Recently in *MW v Director-General, Department of Community Services* the High Court of Australia acknowledged that return proceedings are typically dealt with via affidavit evidence without the benefit of cross-examination. However, the Court said that the policy of prompt return does not preclude issues of disputed fact being examined through the expeditious giving of oral evidence that is subject to cross-examination.

‘re-establishing the status quo’ The prompt return of children to their habitual residence under the Convention has been rationalized on the basis that this action will

32 [2008] HCA 12.
restore the status quo. Status quo is an ‘absence of change, conservation of the same situation, equilibrium, maintenance of regularity, things as they are.’³³ A change in the gender dynamics underpinning international parental child abduction, and the “transnational family” phenomenon mean that the Convention’s return mechanism merely restores the geographical status quo. The prompt return of children no longer necessarily prevents abducting parents from creating artificial jurisdictional links to alter the existing custody status quo.

‘final orders’ The cases reported by participants in this thesis’ empirical study were resolved during a period of time when changes were made to the types of orders and agreements that parents could have concerning their children. Changes were also made to the judicial processes for obtaining orders or formalising agreements. Consequently to ensure that the analysis of cases encompassed the different avenues available the broad terms ‘final orders’ and ‘private agreements’ were adopted. When the term final order is used this encompasses judicially determined final court orders, as well as consent orders. If a consent order was lodged with the Court there was no hearing. Instead a Registrar in chambers would determine whether or not the terms agreed to by the parties were in the best interests of the child, before granting what was considered a final order. Those who resolved their parenting dispute post-return to Australia with a final order were unable to reach a resolution without the assistance of lawyers and judicial process.

‘private agreements’ The cases reported by participants in this thesis’ empirical study were resolved during a period of time when changes were made to the types of orders

and agreements that parents could have concerning their children. Changes were also made to the judicial processes for obtaining orders or formalising agreements. Consequently to ensure that the analysis of cases encompassed the different avenues available the broad terms ‘final orders’ and ‘private agreements’ were adopted. Between 1996 and 2006 it was possible for parties to register their private parenting agreements (parenting plans) with the Court. This process did not involve a judicial officer. Registration was only conditional on a third party lawyer signing the agreement to say that they had provided legal advice. Alternatively parents have always been able to reach an informal private parenting agreement without the assistance of a lawyer or any form of judicial process or registration. When the term private agreement is used this encompasses both of these options. Those who resolved their parenting dispute post-return with a private agreement, were able to reach a resolution with minimal legal assistance from a lawyer. Also, no legal process other than possibly filing their agreement with the Court was required.

’relocation cases’ These cases involve a parent’s move with their child either within Australia (intrastate or interstate) or internationally. A fundamental tension exists in these cases. The tension is between the child’s right to have a relationship with their non-primary-carer parent, and the child’s interest in having a primary-carer whose social, cultural, linguistic, economic and emotional needs are met by living in the country of their choice.\(^{34}\) The Family Law Act 1975 (Cth) does not define relocation.

\(^{34}\) Family Law Council, Report to the Australian Commonwealth Attorney-General’s Department, Relocation (May 2006) 10.
‘rights of custody’ For the Convention’s purposes they include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.\textsuperscript{35}

‘rights of access’ For the Convention’s purposes they include the right to take a child for a limited period of time to a place other than the child's habitual residence.\textsuperscript{36}

‘substantial and significant time’ A parenting arrangement that requires that the time that a child spends with both of their parents includes both weekdays and weekends.\textsuperscript{37} This is so that each parent can be involved in the child’s daily routine, in addition to occasions and events that are of particular significance to the child.\textsuperscript{38}

‘the best interests of children generally versus the best interests of the individual child’ The Convention focuses on the best interests of children generally rather than the best interests of the individual child. The action of prompt return is seen as maintaining comity and re-establishing the status quo regarding a child’s habitual residence. This is considered to be in the best interests of children generally. The defences to a child’s return provide for minimal consideration of the welfare of the individual child.

\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid s 65DAA(3)(a)(i).
\textsuperscript{38} Ibid s 65DAA(3).
‘the child protection rationale’ The Convention is supported by an underlying desire to protect children internationally from the harmful effects of parental child abduction.

‘the feminization of international parental child abduction’ There has been a gradual increase in the number of abducting parents who are primary-carer mothers.

‘transnational family’ A family unit that plays out its social interactions across geographical borders and is characteristically mobile.
CHAPTER TWO

THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL PARENTAL CHILD ABDUCTION: PROTOCOLS AND PRACTICES

INTRODUCTION

This thesis asserts that the Hague Child Abduction Convention’s\(^1\) (hereafter “the Convention”) efficacy cannot remain unchallenged on the basis that it achieves comity, acts as a deterrent, and is thus in the best interests of children generally. At the heart of the Convention’s objective of promptly re-establishing the status quo regarding a child’s habitual residence, are two fundamental assumptions. Firstly, it is assumed that the Convention operates in the best interests of children generally, by promptly restoring them to their habitual residence. Prompt return is seen as ensuring that the substantive parenting dispute is adjudicated in the most appropriate forum. Secondly, it is assumed that the individual child’s best interests will be adequately assessed post-return to Australia as the child’s habitual residence. Whether or not these fundamental assumptions are accurate is a moot point, yet their legitimacy has been left largely unquestioned. This thesis proposes that the cost of maintaining comity can be that an abducting primary-carer mother and her child live in a precarious state post-return to Australia. The individual child’s best interests and their primary-carer mother’s intrinsically intertwined circumstances may never be sufficiently examined.

The Convention’s operation and key concepts will be examined in this chapter in three parts. The first part will provide a general discussion of the Convention’s objectives and threshold (also known as jurisdictional) requirements. These qualifying requirements must be established by the left-behind parent for them to be eligible for an order for their child’s return. The Convention’s focus on the best interests of children generally will be examined. The threshold requirement that a child must have been habitually resident in a Convention country immediately preceding their abduction will also be considered. This examination will inform Chapter Four’s critique of the assumption that the Convention operates in the best interests of children generally by promptly returning them to their habitual residence.

The second part will consider the Australian judiciary’s interpretation of each of the defences to a child’s return. These defences provide the Court with an opportunity to assess the individual child’s best interests. However, Australian courts have a tendency to interpret the defences narrowly. A narrow interpretation curtails the child’s best interests as a consideration during Convention return proceedings. Chapter Five will investigate how this approach becomes problematic if the child’s best interests are also insufficiently examined post-return to Australia. Chapter Five contends that the application of equal shared parental responsibility and shared care post-return to Australia can result in the child’s best interests being overlooked. This is because a second fundamental assumption operates in the Australian context; that

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2 The central authority in the requesting Convention country acts on behalf of the left-behind parent. The central authority is the applicant in the Convention return proceedings.

3 Once the child’s habitual residence is determined this is the jurisdiction to which the child is returned, if all threshold requirements are satisfied, and if no defences to return are established.

4 Chapter Four will examine the quality of this jurisdiction in light of changes in the gender dynamics underpinning international parental child abduction and the “transnational family” phenomenon. It presents the argument that the child’s habitual residence as a home environment of the nature anticipated by the Convention’s drafters is an increasingly out-dated construct.

5 This thesis examines outcomes for abducting primary-carer mothers and their children post-return to Australia under the Convention.
the equal shared parental responsibility and shared care approach accommodates transnational families’ unique circumstances and needs.

The third part will critique the incompatibility between promoting comity between Convention countries and assessing the individual child’s best interests during Convention return proceedings. A degree of judicial discomfort exists about this incompatibility, and it is most often resolved in favour of facilitating comity. This is done on the basis that the individual child’s best interests can be reserved for consideration in the child’s habitual residence post-return.

LIMITATIONS

The purpose of this chapter is to provide an overview of the Convention’s protocols and practices. This discussion will serve as the foundation upon which the contestability of the two fundamental assumptions will be critiqued in both Chapter Four and Chapter Five. This overview is limited in the sense that its purpose is to provide an understanding of only those protocols and practices necessary to critique the fundamental assumptions. Also, it is impractical to examine the protocols and practices of each Convention country from which a child may be returned to Australia. Therefore this chapter illustrates the Convention’s protocols and practices with an emphasis on the ways in which Australian courts handle return proceedings.⁶

⁶ Note that this thesis’ empirical study specifically concerns cases in which the Convention return proceedings took place in a Convention country other than Australia. The child was then returned to Australia.
THE HAGUE CHILD ABDUCTION CONVENTION’S PRINCIPAL OBJECTIVES

The Convention is a multilateral treaty that establishes procedures to secure the prompt return of children to their habitual residence. Children must be deemed to have been wrongfully removed from, or retained outside of, their habitual residence, in breach of rights of custody.\(^7\) In its preamble the Convention describes signatory states including Australia,\(^8\) as desiring to protect children internationally from the harmful effects of parental child abduction: This is the child protection rationale. The Convention’s Explanatory Report articulates that ‘the problem with which the Convention deals…derives all its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial.’\(^9\) The Convention’s return mechanism is premised on a belief that the prompt return of children restores the status quo. This is said to facilitate issues relating to parental responsibility being resolved in the most appropriate jurisdiction; the child’s habitual residence immediately preceding abduction.

The Convention has two principal objectives articulated in article 1.\(^10\) The Convention seeks to secure the prompt return of children wrongfully removed to, or retained in, any contracting state. Also, it endeavours to ensure that rights of custody under the law of each contracting state are effectively respected by the other contracting states. These objectives focus implicitly on re-establishing the status quo regarding a child’s

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\(^8\) The Convention is implemented into Australian domestic law by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).


\(^10\) See also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 1A.
habitual residence. The Convention’s principal function as a forum decider is evident in article 19. This article provides that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue. Article 16 further reflects this approach. It provides that the judicial and administrative authorities in a contracting state that a child has been abducted to, shall not determine the merits of the parenting dispute until it has been determined that the child is not to be returned.

Re-establishing ‘the status quo disturbed by the actions of the abductor’ was rationalised on the basis that to do otherwise would assist the abductor to gain an unfair advantage. The Convention was therefore a response to what is colloquially called “forum shopping”. The action of prompt return is seen as a means by which an abductor can be prevented from choosing a new forum in which to litigate the parenting dispute. This prevents them from altering the existing custody arrangement and adopting a forum they view as advantageous for their claims. Prompt return entails swift court proceedings generally heard “on the papers”.

11 Ibid reg 18(1)(c).
12 Ibid reg 19.
14 Ibid 429.
15 Ibid.
16 Convention return proceedings are generally summary in nature. This means that findings of fact are usually made “on the papers” without the benefit of oral evidence and the cross-examination of witnesses on disputed facts. The problems associated with this were discussed in Laing v Central Authority 21 Fam LR 24, 33; However, in MW v Director-General, Department of Community Services [2008] HCA 12 the High Court of Australia said that although these applications are typically dealt with via affidavit evidence without the benefit of cross-examination [38], the prompt return policy does not prevent issues of disputed fact from being examined through the expeditious giving of oral evidence which is subject to cross-examination [46] – [56]; See also Zotkieswicz v Commissioner of Police (No 2) (2011) 46 Fam LR 335; LK v Director-General, Department of Community Services (2009) 83 ALJR 525; De L v Director-General, NSW Department of Community Services [1996] HCA 5.
The prompt nature of Convention return proceedings helps ensure that the objective of maintaining comity between contracting states is promoted. An assessment of the merits of the substantive parenting dispute is preserved for consideration post-return, once Convention return proceedings are complete.

By focusing on maintaining comity and re-establishing the status quo regarding a child’s habitual residence, the Convention provides for minimal consideration of the welfare of each individual child. Consequently, prompt return is considered to be in the best interests of children generally, rather than the best interests of the individual child. The Convention’s text does not openly refer to the best interests of the child concept. Instead its preamble provides that it is a central theme permeating the Convention’s protocols and practice by implication.

Comity and reciprocity are central considerations during Convention return proceedings. This is because it is assumed that if the child’s best interests are to be considered, it is most appropriate that this takes place post-return in the child’s habitual residence. This assumption is precarious because the Convention does not provide a mechanism by which the resolution of the parenting dispute is assured post-return. Furthermore, as will be discussed in Chapter Four, the quality of the child’s habitual residence has altered. This is due to changes in the gender dynamics underpinning international parental child abduction and the “transnational family”

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17 Note that even if a defence to return is established by the abducting parent, judicial discretion to dismiss the return order application must still be exercised.
18 During the Convention’s drafting it was agreed that the Convention’s principal aim should be to give effect to the best interests of children generally rather than the best interests of individual children; See Michael Freeman, ‘The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?’ (1997) 3(11) International Journal of Law Policy and the Family 360.
phenomenon. Chapter Five will then examine the precarious state that abducting primary-carer mothers and their children may find themselves in post-return to Australia. If the parenting dispute is adjudicated post-return, the equal shared parental responsibility and shared care statutory criteria guide the exercise of discretion to determine a child’s best interests, towards an outcome which is often incompatible with the lives of transnational families.  

THE INTERPRETATION OF THE THRESHOLD REQUIREMENTS: DEFINING THE HAGUE CHILD ABDUCTION CONVENTION’S SCOPE.

To be eligible for a return order a left-behind applicant parent must satisfy several threshold requirements. These requirements are found in article 12. First, the child must have been habitually resident in a contracting state immediately before their removal or retention. Second, the left-behind parent must possess rights of custody, and have been exercising them immediately preceding the child’s removal or retention. Third, the child must have been under 16 years of age when the return application was made, and must not have turned 16 before the return order is made. Once these threshold requirements are established the Convention’s return mechanism is triggered. Judicial interpretation of the first two of these threshold requirements will

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19 This argument will be examined in Chapter Four.
be considered below. Whether or not they are interpreted narrowly or broadly has a significant bearing on the scope of the Convention’s application.

Once the threshold requirements are satisfied the child will be returned to the Convention country deemed to be their habitual residence, unless the abducting parent can establish one of the defences to return.\(^{24}\) If a defence is established during Convention return proceedings, the judge must still elect to exercise judicial discretion to dismiss the return order application.\(^{25}\) If a period of more than one year has passed since the abduction the Court must still order the child’s return, unless it is demonstrated that the child is now settled in his or her new environment.\(^{26}\)

There are differing judicial opinions about the interpretation of the threshold requirements, and the extent to which the defences to return should allow for consideration of a child’s welfare.\(^{27}\) Australian courts have demonstrated a tendency to interpret the qualifying threshold requirements broadly and the defences to a return narrowly. Collectively these two approaches increase the ambit of the Convention’s reach. This is an outward manifestation of the value placed upon promoting comity and reciprocity between Convention countries.


\(^{27}\) This will be explained in the next section of this chapter.
THE CHILD MUST HAVE BEEN HABITUALLY RESIDENT IN A
CONTRACTING STATE IMMEDIATELY PRECEDING THEIR ABDUCTION.

Prompt return has been rationalized on the basis that, a child’s habitual residence provides the most appropriate moral and cultural framework, in which to construct their best interests and determine the merits of the substantive parenting dispute.\(^2\) If a return order is made, the child’s habitual residence immediately preceding their abduction is the jurisdiction to which the child is physically returned. Furthermore, when deciding whether or not a left-behind parent possesses the necessary rights of custody, it is the law of the child’s habitual residence that establishes the issue. Consequently habitual residence has been described as the central concept that often determines the outcome in Convention return proceedings.\(^2\)

Courts are reluctant to find that a child does not have a habitual residence. This is principally to support the child protection rationale and ensure that cases do not fall outside of the Convention’s scope.\(^3\) Consequently, this threshold requirement has been interpreted broadly. Any subjective argument that the child lacks a meaningful connection to the jurisdiction the left-behind parent is claiming is the child’s habitual residence is immaterial.\(^4\) Pragmatically the child protection rationale for prompt return should be conditional upon the child possessing more meaningful connections in their habitual residence, than in the country they were removed to or retained in.\(^5\)


\(^6\) Schuz, above n 29, 122-123.
Beaumont and McEleavy regard the judicial position of always finding the existence of a habitual residence as too simplistic.33 This is because this position fails to consider whether the child has a genuine connection to their habitual residence immediately preceding their abduction. Schuz suggests:

[The principle that a child should have a habitual residence at all times to ensure the child be protected from abduction should only apply where the child has a sufficiently close connection with the parent or the country to which the child is to be returned.]34

A reluctance to find that a child does not have a habitual residence ‘reflects the tension in the Convention between the child-parent connection on the one hand and the child-country connection on the other’.35 The broad test for determining a child’s habitual residence during Convention return proceedings reveals how this tension is presently resolved. The child-country connection is valued over-and-above the child-parent connection.36

**How is a child's habitual residence determined during Convention return proceedings?**

Australian courts have followed the shared parental intention test for determining a child’s habitual residence. This test was established in the English case *Re B (Minors) (Abduction) (No 2).*37 This approach has had a profound impact on the interpretation of habitual residence in Australia. It requires a shared parental intention to reside in

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34 See also Schuz, above n 29, 122.
36 Chapter Four asserts that the child-parent connection should take precedence in cases where the family has a transnational quality and the abducting parent is the child’s primary carer mother.
37 [1993] 1 FLR 993; See, eg, the Australian cases *State Central Authority v CR* [2005] Fam CA 1050; *DW v Director-General, Department of Child Safety* (2006) 197 FLR 371; *Kilah v Director-General, Department of Community Services* (2008) 39 Fam LR 431; *De Lewinski v Director-General, New South Wales Department of Community Services* [1996] HCA 9; *Laing v Central Authority* (1996) 21 Fam LR 24; See also the United States case *Mozes v Mozes* 239 F. Supp. 3d 1067 (9th Cir, 2001).
the jurisdiction claimed to be the child’s habitual residence for settled purposes, for the time being, whether that is for a long or short period of time. Essentially a shared and settled parental intention to abandon the child’s existing habitual residence must exist before a new habitual residence can be acquired. Consequently, where a shared and settled parental intention to relocate the child to another country cannot be ascertained, the child's existing habitual residence remains unchanged. Difficulty ascertaining shared parental intention is usually due to conflicting factual evidence given by each parent that cannot be adequately assessed during Convention return proceedings. In these circumstances the child's habitual residence may remain the same, even if the child has been living away from that jurisdiction for an extended period of time. Conversely, where a shared and settled parental intention to relocate the child to another country is found to exist, the child's habitual residence can change extremely quickly. This can occur regardless of whether or not the child has established meaningful connections in their new habitual residence, and even if the relocation is for a defined and short period of time.

Australian courts have however acknowledged that shared and settled parental intention is not the sole determining factor. Consideration will still be given to the actual change in geography, and whether there is evidence that the child has become

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38 Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993, 995.
39 See, eg, the Australian cases Director-General, Department of Human Services v Parry [2010] Fam CA 689; DW v Director-General, Department of Child Safety (2006) 34 Fam LR 656.
40 See, eg, the Australian case State Central Authority v Brume (No 2) [2010] Fam CA 458.
41 See, eg, the Australian cases Director-General, Department of Community Services v Harris (2010) 43 Fam LR 170; Secretary of the Department of Human Services v CR (2005) 34 Fam LR 354; See also the United States case Mozes v Mozes 239 F.3d 1067 (9th Cir, 2001).
42 See eg, the Australian cases HBH v Director-General, Department of Child Safety (2006) 36 Fam LR 333; DW v Director-General, Department of Child Safety (2006) 34 Fam LR 656; In the Marriage of R and SS Hanbury Brown (1995) 20 Fam LR 334.
acclimatized to their new environment.\textsuperscript{43} Nevertheless, under this approach courts warn against being too quick to permit a child's acclimatization to displace their parents' shared and settled intention.\textsuperscript{44} Consequently shared and settled parental intention has dominated the assessment. Despite this test being about parental intention it still focuses on the child-country connection rather than the child-parent connection. This is because it values the physical jurisdiction in which the parents intended their child to reside for settled purposes.\textsuperscript{45} This issue will be examined in detail in Chapter Four.

\textit{LK v Director-General, Department of Community Services}\textsuperscript{46} is the most recent Convention decision of the High Court of Australia to consider the test for determining a child’s habitual residence. In a unanimous decision the Court confirmed that the past and present intentions of the parents are often an essential consideration. However, their Honours were of the view that determining a child’s habitual residence involves consideration of a multiplicity of circumstances.\textsuperscript{47} ‘Considerations relevant to deciding where a person is habitually resident are not necessarily confined to physical presence and intention, and intention is not to be given controlling weight.’\textsuperscript{48}

\textsuperscript{43} See eg, the Australian cases \textit{DW v Director-General, Department of Child Safety} (2006) 34 Fam LR 656; \textit{Secretary of the Department of Human Services v CR} (2005) 34 Fam LR 354; See also the United States case \textit{Mozes v Mozes} 239 F. Supp. 3d 1067 (9th Cir, 2001).
\textsuperscript{44} Ibid.
\textsuperscript{45} The shared and settled parental intention test’s focus on the jurisdiction in which the parents intended their child to reside for settled purposes, does not necessarily yield a jurisdiction in which the child possesses meaningful cultural, social and linguistic connections. When a child is returned to a habitual residence which does not possess this quality their restoration to stability is not assured; This argument will be discussed in detail in Chapter Four.
\textsuperscript{46} [2009] HCA 9; See also the High Court of Australia decision on habitual residence \textit{MW v Director-General, Department of Community Services} [2008] HCA 12.
\textsuperscript{47} \textit{LK v Director-General, Department of Community Services} [2009] HCA 9 [23]; See also \textit{State Central Authority v Truman} [2009] Fam CA 1175.
\textsuperscript{48} \textit{LK v Director-General, Department of Community Services} [2009] HCA 9 [28].
In this case the mother left Israel for Australia with her four children upon an understanding that they would return only if she and the father reconciled.\textsuperscript{49} Prior to leaving Israel, as well as upon arriving in Australia, the mother began integrating the children into a new life in Australia. She did this by; acquiring Australian citizenship for the children; enrolling them in school and extra-curricular activities; applying for Centrelink benefits; and renting a home.\textsuperscript{50} Two months after their arrival, the father requested a divorce and demanded the children’s return to Israel. The Full Court of the Family Court of Australia ordered the children’s return, treating the parents’ lack of a settled intention to abandon Israel as the children’s habitual residence as decisive.\textsuperscript{51}

The High Court of Australia acknowledged that there are circumstances in which parents’ intentions may be ambiguous.\textsuperscript{52} Their actions are not always informed by a ‘clearly formed and singular view of what it is intended (or hoped) that the future will hold.’\textsuperscript{53} In such cases focusing on the parents’ intentions is futile. The High Court explained:

The mother left Israel on the understanding that if the marriage was reconciled she would return, but if it was not, she would not return. In those circumstances, it is not possible to say that the mother then had a settled intention which was sufficiently described either as being an intention to reside permanently in Israel or an intention to reside permanently in Australia. Neither description would acknowledge the significance attached to the possibility of reconciliation.\textsuperscript{54}

\textsuperscript{49} The children had lived in Israel their entire lives but had dual Israeli-Australian citizenship.
\textsuperscript{50} \textit{LK v Director-General, Department of Community Services} [2009] HCA 9, [30].
\textsuperscript{51} \textit{Kilah & Director-General, Department of Community Services} (2008) 39 Fam LR 431.
\textsuperscript{52} \textit{LK v Director-General, Department of Community Services} [2009] HCA 9, [29].
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
The High Court of Australia confirmed that the examination should still be centred upon the child-country connection.55 Their Honours determined that the children were habitually resident in Australia at the relevant time. The relevant time was when the father communicated his desire for the children’s return, without complying with the condition of reconciliation. This decision was reached on the basis that the mother had taken numerous tangible steps to establish Australia as the children’s permanent home.56 There was no shared parental intention to either abandon Israel or adopt Australia as the children’s home for settled purposes. Therefore the Court held that the children’s established connections in Australia were decisive.

Ultimately determinations of habitual residence made during Convention return proceedings are entrenched in the state-centric paradigm. A child’s stability is perceived as being a product of attachment (whether due to the parents’ intentions or the child’s established connections) to a physical jurisdiction. The High Court of Australia’s decision in LK v Director-General, Department of Community Services57 does not provide a solution. Rather it reveals the problems inherent in always attempting to find a child-country connection, so that the Convention’s applicability is assured. Chapter Four will examine how focusing on the child-country connection is becoming increasingly incompatible with the lives of families that experience international parental child abduction. It will be argued that when a family possesses a transnational quality, the best interests of the child should not be defined using state boundaries. Rather, the focus should be on the child-parent connection. This is because for transnational families the primary-carer parent-child relationship constitutes the child’s secure home environment, rather than a physical jurisdiction.

55 Ibid [44].
56 Ibid [49].
57 LK v Director-General, Department of Community Services [2009] HCA 9.
THE LEFT-BEHIND PARENT MUST POSSESS RIGHTS OF CUSTODY AND HAVE BEEN EXERCISING THEM IMMEDIATELY PRECEDING THE CHILD’S ABDUCTION.

The Convention defines the rights of custody that a left-behind applicant parent must have possessed, and have been exercising, immediately preceding the child’s abduction. Rights of custody include ‘rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.' In Australia the phrase has been interpreted broadly, so as to avoid a distinction between the primary-carer parent-child relationship and the non-primary-carer parent-child relationship. Section 111B(4) of the Family Law Act 1975 (Cth) provides that in Convention cases each parent should be regarded as having rights of custody in respect of a child. This is unless the parent has no parental responsibility for the child because of an existing court order. Accordingly, Australian courts have determined that a left-behind father who is not the child’s primary-carer possesses rights of custody for the Convention’s purposes.

The case of State Central Authority v Ayob illustrates the broad interpretation that Australian courts give to the phrase rights of custody. In this case the non-primary-carer father possessed the right to withhold consent for his child to be taken from the United States to Malaysia. This was considered a right to determine the child’s residence and therefore a right of custody for Convention purposes. In this case the

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58 The Convention’s principal threshold requirement is the wrongful removal or retention of a child. Article 3 defines a ‘wrongful removal or retention’ as one which is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the child’s habitual residence; See also Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 17.
60 This section only applies to Convention cases.
father’s right to veto a proposed relocation was provided for in a binding agreement entered into by the parents. In *MW v Director-General, Department of Community Services* the High Court of Australia questioned whether a right of veto amounts to a custodial right for Convention purposes, where that right exists within a private agreement between the parents. The majority commented that generally speaking a right of veto ‘may’ indicate a right of custody. This issue remains unsettled.

This interpretation of rights of custody illustrates the Australian judiciary’s approach of interpreting the threshold requirements broadly so as to increase the Convention’s applicability. The practical effect of is that custody and access rights are conferred the same level of protection under the Convention. The Convention’s Explanatory Report makes it clear that this is an undesirable and unintended consequence:

> A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.\(^{64}\)

When the Convention was drafted children were most often abducted internationally by their non-primary-carer father who was disgruntled with the prevailing custody arrangement in the child’s habitual residence.\(^{65}\) The Convention’s action of prompt return was a mechanism that protected the primary-carer mother’s rights of custody. Also, it intended to prevent the abducting father from establishing artificial

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\(^{62}\) The phrase has been interpreted in the same way by courts in the United Kingdom and New Zealand; See, eg, the English case *Re B (A Minor) (Abduction)* [1994] 2 FLR 249 and the New Zealand case *D v C* [1999] NZFLR 97.

\(^{63}\) [2008] HCA 12.


jurisdictional ties and seeking a favourable custody determination in a country of his choosing. Accordingly, prompt return was in the best interests of children generally because it restored children back into stability; the arms of their primary-carer. A broad interpretation of rights of custody is problematic because empirical research reveals that today the abducting parent is most often the child’s primary-carer mother. Consequently an order for a child’s return can presently be used to protect the domestic arrangements of time spent with the non-primary-carer parent. Chapter Four will discuss the “feminization” of international parental child abduction. The consequences of this phenomenon are examined in-depth in both Chapter Four and Chapter Five.

The Convention’s prompt return mechanism is triggered once the threshold requirements are established by the left-behind parent. This occurs unless the abducting parent can make out one of the defences to a child’s return. In addition, the judge must still elect to dismiss the return order application. This is because establishing a defence to return does not impose a judicial duty to refuse the return


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order application. It simply provides a discretionary power to do so.69

**THE DEFENCES TO A CHILD’S RETURN**

The Convention’s scope is largely determined by how the defences to return are interpreted, and whether or not judicial discretion to dismiss a return order application is exercised. The defences to return provide the Court with an opportunity to examine the individual child’s best interests. This opportunity can be circumscribed by a narrow interpretation of the defences which inevitably limits the child’s interests as a consideration. This approach becomes particularly problematic if the child’s best interests are also insufficiently examined in their habitual residence post-return.70

Australian case-law reveals differing views about the extent to which the defences to a child’s return should permit consideration of an individual child’s welfare. The Full Court of the Family Court of Australia frequently adopts a narrow approach to interpreting the defences to return.71 This means that the best interests of the individual child have been limited as a consideration. This narrow approach has been supported by dissenting minority judges of the High Court of Australia,72 on the basis ‘that the structure and purpose of the Convention ordinarily require[s] the return of the

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70 Chapter Five considers how children’s best interests are examined in substantive parenting dispute proceedings post-return to Australia under the Convention.

71 See, eg, *De Lewinski v Director-General, New South Wales Department of Community Services* (1996) FLC 92-674; *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243; *Wencelslas v Director-General, Department of Community Services* (2007) 37 Fam LR 271; *Kilah v Director-General, Department of Community Services* (2008) 39 Fam LR 431; *Garning v Director-General, Department of Communities (Child Safety Services)* [2012] Fam CAFC 35.

72 The terms ‘majority judges’ and ‘minority judges’ are used to distinguish between those judges whose opinion decided the case and those who dissented.
child. 73 Former Justice of the High Court of Australia, Hon. Michael Kirby, explains the minority judges’ reasoning by suggesting that ‘[a]n overbroad interpretation of the exceptions would tend to undermine the achievement of the Convention’s core purposes and defeat its underlying policy.’ 74 The principal underlying policy is the maintenance of comity and reciprocity. This policy is said to be in the best interests of children generally. 75 However, in the small number of Convention cases that have been heard by the High Court of Australia, the majority judges have consistently criticised the Family Court’s approach as being overly restrictive. 76

This debate will be illustrated in the following discussion of each of the defences to a child’s return that may be raised by an abducting parent.


74 Ibid.


76 De L v Director-General, NSW Department of Community Services [1996] HCA 5 (High Court of Australia). Appeal from De Lewinski v Director-General, New South Wales Department of Community Services (1996) FLC 92-674 (Full Court of the Family Court of Australia); DP v Commonwealth Central Authority and JLM v Director-General, NSW Department of Community Services (2001) 206 CLR 401 (High Court of Australia). Appeal from Director-General, NSW Department of Community Services v JLM (2001) 28 Fam LR 243 (Full Court of the Family Court of Australia); MW v Director-General of the Department of Community Services [2008] HCA 12 (High Court of Australia). Appeal from Wencelslas v Director-General, Department of Community Services (2007) 37 Fam LR 271 (Full Court of the Family Court of Australia); LK v Director-General, Department of Community Services [2009] HCA 9 (High Court of Australia). Appeal from Kilah v Director-General, Department of Community Services (2008) 39 Fam LR 431 (Full Court of the Family Court of Australia); RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest [2012] HCA 47 (High Court of Australia); Garning v Director-General, Department of Communities (Child Safety Services) [2012] FamCAFC 35 (Full Court of the Family Court of Australia). Note that this High Court of Australia decision was not an appeal of the Convention decision to return the children to Italy. Instead it was an application brought by the children’s maternal aunt claiming that there were exceptional circumstances to suggest that the Family Court should have ordered independent representation for the children under s 68L of the Family Law Act 1975 (Cth).
GRAVE RISK OF HARM TO THE CHILD

The first defence to a child’s return is that there exists a grave risk that the child’s return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation. To successfully plead this defence the abducting parent must present clear evidence that the child will face a grave risk of harm, or be otherwise placed in an intolerable situation, if returned to their habitual residence. The assessment relates specifically to the return of the child to their habitual residence, not the left-behind parent. The Convention does not define the gravity of risk required to successfully establish the defence. Courts have interpreted the degree of physical or psychological harm required as being restricted by the words ‘or otherwise place the child in an intolerable situation’.

Australian courts have protected the objective of prompt return by avoiding making determinations on the child’s best interests when interpreting the gravity of harm required. In Australia the judiciary’s consistent position prior to 2001 was that a grave risk to a child could be appropriately dealt with in the child’s habitual residence. This has been achieved with either an assumption that the child will be afforded protection by the authorities in the habitual residence post-return, or an undertaking

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78 The United States Court of Appeal in Friedrich v Friedrich 982 F 2d 1396 (22 January 1992) provided two frequently cited examples of circumstances which will qualify as grave risks of harm. The first is where the return will place the child in imminent danger, such as, returning the child to famine, disease or a war zone. The second is where the child will be subjected to serious neglect, abuse or extraordinary emotional dependence, and authorities in the child’s habitual residence are either incapable or unwilling to adequately protect the child; See also the Australian cases Director-General, Department of Families, Youth and Community Care v Bennett (2000) 26 Fam LR 71; Director-General, Department of Families, Youth and Community Care v Hobbs (2000) FLC 93-007.

79 The case-law will be discussed within this chapter.

80 See the High Court of Australia’s decisions in the concurrently heard cases DP v Commonwealth Central Authority and JLM v Director-General, NSW Department of Community Services (2001) 206 CLR 401; These cases are discussed below.
given by the left-behind parent. Undertakings that may be provided to the Court during return proceedings include; promising not to perpetrate acts of domestic violence or to provide the abducting parent and child with exclusive use of a residence.

In the 1998 case of *Gsponer v Johnstone*, the mother abducted her child from Switzerland to Australia. The mother submitted evidence that during the marriage she had been ‘subjected to significant episodes of violence by her husband’. She also claimed that ‘the child had also been assaulted and mistreated by the husband on a number of occasions.’ She argued that these circumstances constituted a grave risk of harm to the child. The Full Court of the Family Court of Australia stated that once the child had been returned ‘no doubt the appropriate court in that country [Switzerland] will make whatever orders are then thought to be suitable for the future custody and general welfare of that child, including any interim orders.’ The Court adopted the view that ‘courts should not assume that once a child is returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child’s welfare.’ Similarly, in the 1993 case of *Murray v Director of Family Services ACT*, the Full Court of the Family Court of Australia concluded that ‘it would be presumptuous and offensive in the extreme’ to assume that a country such as New Zealand [the child’s habitual residence] was unable to protect a child from a grave risk upon return. Nicholson and Fogarty JJ noted that ‘[t]he fact that issues relating to the welfare of the child are not relevant to a Hague Convention application

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82 Ibid 768.
83 Ibid.
84 Ibid.
85 Ibid.
87 Ibid [176].
is because such an application is concerned with where and in what court issues in relation to the welfare of the child are to be determined.\textsuperscript{88}

In the 1999 case of \textit{Director-General Department of Families, Youth and Community Care & Hobbs},\textsuperscript{89} the Family Court of Australia returned a five year old child to South Africa. The mother had raised the grave risk of harm defence during the Convention return proceedings. The mother abducted her child to Australia without the father’s consent. The mother had been granted custody and the father supervised access by the High Court of South Africa after their separation.\textsuperscript{90} The mother argued that the child would be at grave risk if returned to South Africa because she could not accompany them. Whilst in Australia the mother had a second child and she was breastfeeding. Her new partner would not permit his newborn to be taken to South Africa.\textsuperscript{91} The Family Court at first instance said that the mother found herself in an ‘uncomfortable dilemma’ but it was largely of her making.\textsuperscript{92} The father gave the Australian Court several undertakings which satisfied Lindenmayer J that the child’s welfare could be safeguarded upon return to South Africa.\textsuperscript{93} The father agreed not to institute criminal proceedings against the mother for her act of abduction.\textsuperscript{94} He undertook to pay for his child’s air ticket if the mother could not. He also agreed to permit the child to remain in the mother’s custody until a South African Court directed otherwise, if she returned with the child.\textsuperscript{95} Courts are construing the grave risk of harm defence narrowly when

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{88} Ibid [161].
\item \textsuperscript{89} [1999] Fam CA 2059.
\item \textsuperscript{90} There had been allegations of past family violence. However, this was not raised during the Convention return proceedings.
\item \textsuperscript{91} [1999] Fam CA 2059 [82].
\item \textsuperscript{92} Ibid [83].
\item \textsuperscript{93} Ibid [84]–[89].
\item \textsuperscript{94} The act of international parental child abduction is a criminal offence in South Africa.
\item \textsuperscript{95} [1999] FamCA 2059 [84]–[89].
\end{enumerate}
\end{footnotesize}
accepting an unenforceable undertaking given by the left-behind parent,\textsuperscript{96} or assuming that the authorities in the child’s habitual residence can protect the child post-return. This narrow interpretation demonstrates the significant value placed upon promoting comity between contracting states.

Following the High Court of Australia’s decision in \textit{DP v Commonwealth Central Authority and JLM v Director-General NSW Department of Community Services}\textsuperscript{97} in 2001, greater weight should be placed upon whether a grave risk exists in fact. Australian courts should assess the consequences of return when the grave risk of harm defence is raised.\textsuperscript{98} Potential consequences are a question of fact.\textsuperscript{99} In \textit{DP and JLM} the majority judges of the High Court overturned the Full Court of the Family Court’s preference for a narrow interpretation of the grave risk of harm defence.\textsuperscript{100} The Family Court had concluded that the fact that judicial proceedings may take place in the child’s habitual residence post-return, addressed the abducting parent’s contention of grave risk.\textsuperscript{101} This was because the grave risk could be considered in post-return proceedings.\textsuperscript{102} In \textit{DP}\textsuperscript{103} the abducting mother claimed that the child would be at grave risk if returned to Greece, because Greece lacked appropriate medical facilities to treat her son’s autism. In \textit{JLM}\textsuperscript{104} the abducting mother claimed that the child would be at grave risk if returned to Mexico, because she was suffering from a major depressive disorder. The child’s return could put her at serious risk of

\textsuperscript{96} The High Court of Australia’s views about the unenforceability of undertakings will be discussed later in this chapter.
\textsuperscript{97} (2001) 208 CLR 401; These cases were heard concurrently because they both concerned the interpretation of the grave risk of harm defence (hereafter “\textit{DP}” or “\textit{JLM}” or “\textit{DP and JLM}”).
\textsuperscript{98} (2001) 208 CLR 401 [41].
\textsuperscript{99} Ibid [58].
\textsuperscript{100} Ibid [44].
\textsuperscript{101} Director-General, NSW Department of Community Services v JLM (2001) 28 Fam LR 243; \textit{P v Commonwealth Central Authority} [2000] Fam CA 461.
\textsuperscript{102} Ibid.
\textsuperscript{103} \textit{P v Commonwealth Central Authority} [2000] Fam CA 461.
\textsuperscript{104} Director-General, NSW Department of Community Services v JLM (2001) 28 Fam LR 243.
committing suicide.

On appeal to the High Court of Australia, the majority judges determined that the fact that there would be judicial proceedings in the child’s habitual residence did not in itself address the assertion of a grave risk. Gaudron, Gummow and Hayne JJ stated:

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 [individual] child.

For example, in DP the High Court of Australia determined:

The risk to the child was…associated with the child's condition of autism, and the suggested unavailability of appropriate and accessible facilities for treatment of that condition in the event that the mother took him back to Greece. That issue, when raised, gave rise to subsidiary questions. One was a question of primary fact. What facilities are available in Greece, and, in particular, in the part of Greece to which the child would return, for the treatment of autistic children? There were other questions as well. As a practical matter, what would be the circumstances in which the child and the mother would live upon return to Greece? How accessible would any facilities for treatment be?

105 DP v Commonwealth Central Authority and JLM v Director-General NSW Department of Community Services (2001) 208 CLR 401 [66].
106 Ibid [44].
107 Ibid [10].
108 Ibid.
The High Court of Australia held that these questions should not be reserved for consideration post-return, but rather answered during Convention return proceedings. In *DP*\(^{109}\) the High Court overturned the Full Court of the Family Court’s decision to order the child’s return. The majority judges explained that if the central authority had wished to challenge the mother’s contention that there was a lack of medical facilities to treat her child’s autism, then the time to do this was at trial.\(^{110}\) The High Court refused to permit the central authority to present fresh evidence to answer these questions.

The High Court of Australia also considered whether undertakings given by the father were adequate to address the claim that there was a grave risk to the child if returned. The father undertook that he would not remove the child from the mother’s care until a court in Greece heard the custody matter again.\(^{111}\) He also agreed that he would not enforce a custody order that he had previously obtained from a Greek Court.\(^{112}\) Importantly the High Court questioned the adequacy and enforceability of undertakings explaining that:

> For our part we gravely doubt the efficacy of an undertaking in this form. If the undertakings to be given by the father about his future conduct in Greece were to be enforceable, it would seem to have been necessary to suspend the order for return until production of evidence to the Family Court of the giving of undertakings by the father which would be enforceable in Greece at the suit of the mother.\(^{113}\)

\(^{109}\) Ibid.

\(^{110}\) Ibid [67].

\(^{111}\) Ibid [55].

\(^{112}\) Ibid [55].

\(^{113}\) Ibid.
In *DP and JLM* Kirby J, one of the dissenting minority judges, agreed with the Full Court of the Family Court of Australia’s narrow interpretation of the grave risk of harm defence. His Honour warned against the dangers of interpreting the defences to a child’s return broadly. His Honour said that comity should be promoted as the principal objective. An examination of the individual child’s best interests detracts from this objective’s achievement. His Honour explained his rationale for this position by stating:

Unless Australian Courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country…To the extent that Australian Courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (a residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our Courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.115

The broad approach to interpreting the grave risk of harm defence, advocated by the majority judges of the High Court in *DP and JLM*, has not been applied consistently. This may simply reflect a tension between the Convention’s status as a public international law instrument, and the nature of its subject matter, transnational families; their lives fixed firmly in the private international law sphere.

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114 (2001) 208 CLR 401.
115 Ibid [155].
The defence’s interpretation in cases where family violence is claimed to constitute a risk to the child, illustrates the often preferred narrow approach to interpreting the defence. The grave risk of harm defence is particularly relevant to abducting primary-carer mothers. The Australian Study of Hague Child Abduction Convention Outcomes found that 45.5% of them are motivated to abduct by a perceived need to flee domestic violence and/or child abuse. Consequently, a more detailed examination of how courts interpret this defence in this context is provided below.

When the grave risk of harm concerns a history of incidences of family violence

Prior to DP v Commonwealth Central Authority and JLM v Director-General NSW Department of Community Services, the Family Court of Australia was consistent in its application of a narrow approach to interpreting what constituted a grave risk of harm. This was especially in cases where the risk concerned a history of family violence. In this context the defence has generally only been successful in extraordinary cases. Amidst mounting recognition of the increasing number of abducting primary-carer mothers, international parental child abduction cases characterized by family violence are anything but extraordinary.

In the 1994 case of *Bassi, DK and Director General of Community Services*\(^\text{121}\) the presence of family violence was insufficient to establish the grave risk of harm defence. This case concerned the abduction of two girls, aged 13 and six, from the United Kingdom to Australia by their primary-carer mother. There was a history of family violence, and the father had been convicted of assault on the mother only one and a half months before the abduction. The severity of the violence was such that there was ‘sufficient material for the court to reach the view that the husband engaged in violent, drunken, obsessional behaviour in the presence of the children and that he made threats to the life of their mother, the children and himself in their presence’.\(^\text{122}\)

The wife alleged that on two occasions the husband had threatened her with a kitchen knife, and one of the children had intervened in an attempt to protect her. This resulted in the child’s hand being cut by the knife.\(^\text{123}\) This incident was indicative of direct harm to the children. The wife regarded ‘the husband's threats to kill her as being not just a personal vendetta against her but also his cultural reaction [he was Indian] to a situation where he would consider it necessary to kill her to protect his own dignity and family name.’\(^\text{124}\) The Family Court of Australia exercised its discretion not to return the eldest child. However, the Court did this on the basis that the child objected to being returned and her maturity was such that her wishes should be considered.\(^\text{125}\) Discretion not to return was also exercised in relation to the youngest child. However, again not on the basis of a grave risk of family violence, but rather that she would be placed in an intolerable situation if returned to England.

\(^{121}\) *New York University Journal of International Law and Politics* 221.

\(^{122}\) Ibid [60].

\(^{123}\) Ibid [31].

\(^{124}\) Ibid [7].

\(^{125}\) This defence will be discussed later in this chapter.
without her sibling. In this case the grave risk of harm defence was interpreted narrowly.

In the 1996 case of *Laing v Central Authority*\(^\text{126}\) the Full Court of the Family Court of Australia returned the child to the United States. It did this on the basis that it was inconceivable that a Convention country’s judicial system would not be able to protect the child from the risk of harm associated with the return.\(^\text{127}\) Originally the mother had travelled from the United States to Australia with her child on return airplane tickets. She and the child then returned to the United States for the purpose of attempting to reconcile the relationship. During the couple’s six week reconciliation period the mother fell pregnant with their second child. The reconciliation failed and the pregnant mother again travelled with the eldest child back to Australia, this time without the father’s consent. The father initiated Convention return proceedings seeking the child’s return to the United States. At first instance the Family Court ordered the child’s return to the United States. On appeal to the Full Court of the Family Court the mother sought to present fresh evidence that alleged that the father had some years ago sexually molested the child of his sister-in-law.\(^\text{128}\) The witnesses who supported this allegation lived in the United States.\(^\text{129}\) They each provided their statements to the Court by way of affidavit. The Full Court sympathized with the mother and child\(^\text{130}\) but determined:

> The evidence which the wife has given in support of her application is untested and, in any event, it is inconceivable that the courts in Georgia having the relevant jurisdiction would not protect both the wife and the child, or otherwise act in a manner consistent with the child's

\(^{126}\) (1996) FLC 92-709.
\(^{127}\) Ibid [83512].
\(^{128}\) Ibid [83502].
\(^{129}\) Ibid [83504].
\(^{130}\) Ibid [83511].
The allegations of physical and psychological harm and sexual abuse which the appellant raises are not matters which could be conveniently dealt with in this country. The allegations are in respect of incidents said to have occurred within the State of Georgia. Therefore, in our opinion, the courts in that State are best equipped to hear and determine all those matters.

Even since the High Court of Australia’s 2001 decision in *DP and JLM* the Full Court of the Family Court of Australia has expressed that in cases characterised by family violence, the facts must be very compelling to warrant non-return. Post 2001 the Family Court has applied both the narrow and broad approach to interpreting the grave risk of harm defence.

In the 2003 case of *State Central Authority, Secretary to the Department of Human Services v Mander*, the parents’ relationship was characterised by a history of violence perpetrated in their children’s presence. The mother abducted the children from the United Kingdom to Australia. The Family Court of Australia at first instance held that the grave risk of harm defence was satisfied. The Court exercised judicial discretion and refused to order the children’s return. This was despite Kay J noting that ‘the English legal system provides ample legal protection, and the English police and social services provide excellent care for battered women.’ The Family

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131 Ibid [83513].
132 Ibid [83514].
134 See, eg, *HZ v State Central Authority* [2006] Fam CA 466.
136 The left-behind applicant father did not appeal this decision to the Full Court of the Family Court.
137 [2003] Fam CA 1128 [114].
Court applied *DP and JLM*\(^\text{138}\) whilst acknowledging its potential to produce outcomes that conflict with the Convention’s principle objectives. Kay J stated:

> Although I found it a difficult case to come to grips with in light of the very strong underlying message within the Convention, ultimately I am satisfied of the existence of a grave risk of harm in this case... There have been years of sporadic violence in the presence of the children. It has necessitated constant court proceedings, and regular invocation of criminal sanctions. The problem persisted until the mother left England. I am confident a return to England would most likely lead to a continuation of the problems that have dogged these children for all of their lives in England. It is beyond argument the exposure of children to violence between their parents cannot be seen to be in the children's interests. I feel... discomfort... in light of the strong underlying currents of the Convention and the need to overcome the scourge of wrongful removal. But the High Court has reminded us on several occasions that the Convention is to be read as a whole. It is a Convention with exceptions.\(^\text{139}\)

In 2008 in *State Central Authority v Papastavrou*\(^\text{140}\) the Full Court of the Family Court was satisfied that the primary-carer mother had suffered very serious physical abuse at the hands of the father over a prolonged period of time.\(^\text{141}\) The Court also accepted that this past behaviour constituted a serious and weighty risk for the children in the future.\(^\text{142}\) Despite this the Court held that the mother had not established the grave risk of harm defence.\(^\text{143}\) The Court stated:

> It may be that she had good cause to leave; it may be that she did not. It may be that there is no future in the marriage; it may be that there is. It may be that, if there is not, it is in the best interests of the children to live with the mother and, if so, it may be in Greece or it may be [ somewhere else]. All of those matters are for the court of the country which is that of the

\(^{138}\) (2001) 208 CLR 401.
\(^{139}\) [2003] Fam CA 1128 [111]–[112].
\(^{140}\) [2008] Fam CA 1120; See also *State Central Authority v Sigouras* [2007] Fam CA 250.
\(^{141}\) [2008] Fam CA 1120 [59], [125].
\(^{142}\) Ibid [125].
\(^{143}\) Ibid [130].
children's habitual residence, which is Greece.\textsuperscript{144}

The mother raised as a concern the ability of Greek authorities to respond appropriately to protect her and the children if there was another incident of family violence post-return.\textsuperscript{145} She presented ‘cogent evidence before the court which established a prima facie case’\textsuperscript{146} on this issue. The central authority had not ‘adduced evidence in response’.\textsuperscript{147} Despite this, the Full Court of the Family Court was satisfied by the father’s willingness to offer undertakings. He agreed to permit the mother and children to have exclusive occupation of a flat, and not enter the premises without her permission. He also undertook to pay expenses and not initiate criminal proceedings against her in Greece.\textsuperscript{148} Upon this basis the Court held that the mother had not established the grave risk of harm defence. This was even though the Court acknowledged that Greek Courts do not have a similar system providing for the enforcement of undertakings.\textsuperscript{149} The Court said:

\begin{quote}
Those undertakings are given to this court and I am prepared to rely on them. They seem to me to provide adequate safeguards for the mother and the children in the only period with which this court is concerned, that is to say until the Greek court of competent jurisdiction can be seized of the matter in a proper inter partes manner and resolve the issue which is for that court. The mother will be in a position to put before the Greek court those promises [made by the father] which have freely been made to this court.\textsuperscript{150}
\end{quote}

\begin{footnotes}
\item[144] Ibid.
\item[145] Ibid [77].
\item[146] Ibid [106]; The mother presented expert evidence explaining the inadequacies of Greece domestic violence protections [87]–[89].
\item[147] Ibid [106].
\item[148] In Greece the act of international parental child abduction is a criminal offence.
\item[149] Ibid.
\item[150] Ibid.
\end{footnotes}
Similarly in 2006 in *HZ v State Central Authority*\textsuperscript{151} the Full Court of the Family Court held that the grave risk of harm defence was not established in the context of family violence. Throughout the parties’ marriage they had lived with their children in the paternal grandparents’ home in Greece. At the end of a 10 week holiday in Australia the mother informed the father that she would not be returning with the children. It was accepted that the mother and children had been subjected to constant violent and inappropriate behaviour. However, at first instance and on appeal, the Family Court held that the grave risk of harm defence was not established. The Full Court of the Family Court determined:

> The purpose of the return under the regulations was to enable the courts of habitual residence to determine the parenting issues that had arisen in the case. It would by no means follow that the children would be required to permanently reside in Greece nor would it by any means follow that the Greek courts would require the children to be placed in circumstances that the Greek courts found placed the children at physical or emotional risk.\textsuperscript{152}

The Court went on to hold:

> Greece was clearly the appropriate forum for issues relating to the welfare of the children to be determined. In the circumstances, it was appropriate for the trial judge to place significant weight on the first of the objects of the Convention, namely the prompt return of the children who had been wrongfully retained in Australia.\textsuperscript{153}

The Full Court of the Family Court explored the international jurisprudence on cases with similar facts of family violence. The Court noted that non-return orders were only made when the facts were very compelling, and determined that there was no clear statement of principle.\textsuperscript{154} Despite *DP and JLM*,\textsuperscript{155} ultimately the fact that the

\textsuperscript{151} [2006] Fam CA 466.
\textsuperscript{152} Ibid [44].
\textsuperscript{153} Ibid [45].
\textsuperscript{154} Ibid [57].
\textsuperscript{155} (2001) 208 CLR 401.
children did not have to return to the grandparents’ home, and could in principle seek protection under Greek law, was determinative.

In *DP and JLM* \(^{156}\) the High Court of Australia held that the fact that there may be judicial proceedings post-return did not provide an answer to the contention of a grave risk. \(^{157}\) The majority judges recognised the reality of many returns by explaining:

> The content of th[e] exceptions must be understood against the other provisions of the Regulations which…make plain that there may be an order for return with no expectation that there will be any judicial process in the country to which the child will be returned in which any question about what is in the best interest of the child will be raised or addressed…the construction of the Regulations cannot proceed from a premise that they are designed to achieve return of children to the place of their habitual residence for the purpose of the courts of that jurisdiction conducting some hearing into what will be in that child’s best interests. \(^{158}\)

The High Court of Australia has challenged the assumption that the return of a child is return for the purpose of substantive parenting dispute (otherwise known as custody) proceedings in the child’s habitual residence. \(^{159}\) However, proponents of the narrow approach to interpreting the defences have used this assumption as a convincing rationale for the action of prompt return. The High Court has cautioned that the defences to return should not be construed narrowly so as to disregard the individual child’s best interests. This is demonstrated by the Court’s preparedness to examine the potential outcomes awaiting a child post-return. Failing to assess a child’s best interests during Convention return proceedings, coupled with an inadequate

\(^{156}\) Ibid.
\(^{157}\) Ibid [66].
\(^{158}\) Ibid [33].
\(^{159}\) This is demonstrated by the fact that the High Court of Australia has overturned the Full Court of the Family Court of Australia’s narrow reading of the Convention’s threshold requirements and defences to return in all five cases that have come before it.
examination of their best interests post-return, can produce problematic outcomes. It may result in the parenting dispute being determined without the child’s best interests, and their abducting primary-carer mother’s intrinsically intertwined circumstances, being sufficiently examined.\textsuperscript{160} This may result in the child and their primary-carer mother living in a precarious state post-return. Whether or not the Convention’s return mechanism is a conduit for outcomes in the best interest of children is explored in both Chapter Four and Chapter Five.

THE CHILD OBJECTS TO BEING RETURNED TO THEIR HABITUAL RESIDENCE

The second defence to a child’s return is that the child objects to being returned, and has attained an age and degree of maturity that makes it appropriate to take their views into account.\textsuperscript{161} This defence comprises a twofold test. First, the child must object to being returned specifically to their habitual residence. Second, they must have attained an age and possess a degree of maturity which makes it appropriate to take account of their views.\textsuperscript{162}

\textsuperscript{160} A child’s best interests may never be examined if domestic proceedings do not take place post-return. Also if the return is to Australia, the application of the equal shared parenting and care statutory criteria align children’s best interests with a parenting arrangement that is incompatible with the lives of transnational families. This argument will be discussed in Chapter Five.


In 1996 in *De Lewinski v Director-General, New South Wales Department of Community Services* the Full Court of the Family Court of Australia adopted a narrow approach to interpreting the child objects to being returned defence. The Court held that a child’s objection had to consist of more than a mere preference not to be returned to their habitual residence. The objection had to compare to strength of feeling that goes beyond the usual wishes of a child in a domestic parenting dispute. The mother in this case was an Australian citizen. She had moved to the United States to marry the father, an American. Their two daughters aged 12 and 10 at the time of Convention return proceedings enjoyed dual citizenship. When the parent’s relationship started to breakdown the mother travelled to Australia with the children. Then after four months they moved back to the United States temporarily. The parents did not reconcile but instead commenced negotiations regarding parenting arrangements. They were unable to reach an agreement. The mother then abducted the children back to Australia. The father commenced Convention return proceedings. The mother submitted that the children objected to being returned back to the United States, and that they had reached an age and level of maturity that made it appropriate to consider their views. The Full Court of the Family Court held that the children’s objections did not carry the strength required by the narrow test for interpreting the defence.

The mother appealed the decision on the basis that the Full Court of the Family Court of Australia had erred in its construction of the defence. On appeal to the High Court of Australia, the majority of judges rejected the Family Court’s approach adopting a

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164 Ibid [83027].  
165 *De L v Director-General, NSW Department of Community Services* [1996] HCA 5. [29].  
166 *De L v Director-General, NSW Department of Community Services* [1996] HCA 5.
broad interpretation of the word ‘objects’. The High Court explained that the policy of the Convention is not compromised by hearing what children have to say, and by taking a literal view of the term ‘objection’. That is because it remains for the Court to make the critical further assessments as to the child’s age and maturity. Also, the Court must determine whether in the circumstances of the case the discretion to refuse return should be exercised.

The High Court of Australia also held that at first instance the primary judge had given the Family Court counsellor an incorrect direction to ascertain the wishes of the children generally. The direction should have focused on ascertaining whether the children objected to being returned to the United States specifically. Their Honours determined that procedural fairness required that there be a rehearing of the matter in the Family Court. The Family Court needed to determine whether, in fact, the children objected to being returned to their habitual residence. In dissent Kirby J again championed the objectives of upholding reciprocity and comity by stating:

Any other construction [other than a narrow interpretation] would amount to a defiance of the clear intention of the Australian Parliament, reflected in the Regulations, whose constitutional validity has not been challenged. It would undermine the reciprocity upon which the Convention rests. And it would run the risk of returning this country to the unsatisfactory state of the law before the Convention was negotiated and came into force. Putting it quite bluntly, Australia cannot expect other contracting states to trust its courts to determine lawfully and fairly the best interests of abducted children, where such children are returned to Australia, if our courts do not accord a similar reciprocal respect to the courts of the other contracting states, exceptional cases aside.

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167 Ibid [35].
168 Ibid [40].
169 Ibid [5].
170 Ibid [50].
171 Ibid [141].
Upon rehearing, the Full Court of the Family Court\textsuperscript{172} held that ‘having regard to the whole of the evidence…the proper inference to be drawn from the evidence was that the children object to being returned’.\textsuperscript{173}

In response to the High Court of Australia’s interpretation of the child objects to being returned defence, the Australian Commonwealth Parliament endorsed the Family Court’s narrow interpretation of the defence. It did so by amending section 111B(1B) of the Family Law Act 1975 (Cth). This section now provides that a child’s objection under Australia law must carry strength of feeling beyond the mere expression of a preference or ordinary wishes.\textsuperscript{174} In doing this, the Australian Commonwealth Parliament clearly communicated its desire to protect the Convention’s principal objectives of comity and reciprocity. A narrow interpretation of the child objects defence safeguards the prompt nature of the Convention’s return mechanism. It limits the individual child’s best interests as a consideration during Convention return proceedings.

In 2011 in Department of Communities (Child Safety Services) v Garning\textsuperscript{175} the Family Court of Australia, and the High Court of Australia on appeal, were again required to interpret the child objects to being returned defence. The wife in this case had travelled from Australia to Italy when she was 16 years old, to study the Italian language. She stayed with a couple and fell in love with their son. She married him and they had five children. One of their children died very young. The father’s

\textsuperscript{172} De Lewinski v Director-General, New South Wales Department of Community Services (1997) FLC 92-737.
\textsuperscript{173} Ibid [83928].
\textsuperscript{174} See the Family Law Amendment Act (No 1) 1998 (Cth) No 89 1998; Note that this section applies specifically to Convention cases.
\textsuperscript{175} Department of Communities (Child Safety Services) v Garning [2011] Fam CA 485; RCB as Litigation Guardian of EKV, CEV, CIV and LRV v Hon Justice Colin James Forrest [2012] HCA 47.
Convention return application concerned the couple’s remaining four daughters. The primary-carer mother had abducted the children to Australia. She raised both the grave risk of harm defence and the child objects to being returned defence. However, she was unsuccessful.

The Family Court of Australia accepted the mother’s evidence that she had been subjected to emotional, verbal and physical violence prior to and leading up to separation.\textsuperscript{176} The couple’s separation had been hastened by a ‘serious incident of domestic violence.’\textsuperscript{177} The wife ‘left the family villa and took up residence in an apartment in the village…the four girls went with her, no doubt a reflection of the principal care that she had provided them with to that point in time.’\textsuperscript{178} However, the Court viewed the abuse as mostly historical. This was despite the mother claiming that the father had continued to harass her and make death threats post-separation.\textsuperscript{179} Forrest J found the mother’s evidence to be internally contradictory. This was because she had expressed that she was prepared to allow the children to spend holiday time with the father, if they were permitted to remain in Australia.\textsuperscript{180} Also, the Family Court considered it significant that prior to the abduction the mother had not amended the existing Italian agreement that the father have contact with the children.\textsuperscript{181} Upon this basis Forrest J held that despite concerns about the father’s overly authoritative parenting style, he could not find evidence before him that the girls faced a grave risk

\begin{flushleft}
\textsuperscript{176} Department of Communities (Child Safety Services) v Garning [2011] Fam CA 485, [89]. \\
\textsuperscript{177} Ibid [9]. \\
\textsuperscript{178} Ibid. \\
\textsuperscript{179} Ibid [86]–[87]. \\
\textsuperscript{180} Ibid [95]. \\
\textsuperscript{181} Ibid [100].
\end{flushleft}
of harm if returned.\textsuperscript{182} His Honour said that the parties’ ongoing parenting arrangements could be subject to further consideration in the courts of Italy.\textsuperscript{183}

The Family Court of Australia also held that the girls (aged 14, 12, nine and eight) had not reached an age and a degree of maturity that would make it appropriate to take account of their objections.\textsuperscript{184} Forrest J stated that he was not satisfied from the family consultant’s report, that the girls’ objections to being returned to Italy showed ‘strength of feeling beyond the mere expression of a preference or of ordinary wishes, as is the requirement in order to give rise to the defence.’\textsuperscript{185} The family consultant reported:

\begin{quote}
The children each identified missing aspects of their lives in Italy, including school, friends and family members…They each identified being happy in Australia, that they enjoyed their school and they were making friends. They reported that their mother is happier in Australia. [The family consultant] recorded her view that the basis for the girls’ objections to returning to Italy was predominantly related to their perception that their father had historically perpetrated violence against their mother, that he has subjected each of them to inappropriate physical disciplining and that in their opinion he was not an active or involved father. She reported also that each expressed a fear of potential repercussions of returning to Italy after disclosing negative sentiments about their father. Finally, in respect of this point, [the family consultant] reported that the girls had stated that if the court ordered their return to Italy for a decision about the parenting issue to be made in the Italian Courts that they did not want to live with their father in his villa and that they would accept returning to Italy if their mother accompanied them.\textsuperscript{186}
\end{quote}

\textsuperscript{182} Ibid \[101\].
\textsuperscript{183} Ibid.
\textsuperscript{184} Ibid \[118\].
\textsuperscript{185} Ibid \[116\].
\textsuperscript{186} Ibid \[117\].
On the basis of this report the Court determined that the girls’ objections did not satisfy the requisite narrow test found in section 111B(1B) of the *Family Law Act 1975* (Cth).\(^{187}\)

Over a year later this case was heard by the High Court of Australia as *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest*.\(^{188}\) This proceeding was not brought by the mother, but rather the girls’ maternal aunt as litigation guardian.\(^{189}\) In the time between the Family Court’s decision to return the children and the aunt’s application to the High Court, the mother and her family placed the children into hiding in Australia. The maternal aunt argued that under section 68L(3) of the *Family Law Act 1975* (Cth), the Family Court should have ordered separate legal representation for the children, as exceptional circumstances existed in the case.\(^{190}\) The High Court held that there was no evidence of exceptional circumstances. Hence the children were not denied procedural fairness in the making of the return order.\(^{191}\) Interestingly the mother did not elect to appeal the Family Court’s interpretation of the defences to return.

\[\text{THE LEFT-BEHIND PARENT WAS NOT EXERCISING THEIR RIGHTS OF CUSTODY, OR THEY CONSENTED TO, OR ACQUIESCED IN, THE CHILD’S REMOVAL OR RETENTION.}\]

The third defence to a child’s return is that the left-behind parent was not exercising their custody rights at the time of the child’s abduction.\(^{192}\) Alternatively, the left-

\(^{187}\) Ibid [118].  
\(^{188}\) [2012] HCA 47.  
\(^{189}\) Ibid [5].  
\(^{190}\) Ibid.  
\(^{191}\) Ibid.  
\(^{192}\) Recall that in Australia the phrase ‘rights of custody’ has been interpreted broadly. It does not reflect a distinction between the primary-carer parent-child relationship and the non-primary-carer
behind parent consented to, or acquiesced in, the child’s removal or retention. In 2005 in *Director-General, Department of Child Safety v Stratford* the Family Court of Australia endorsed the narrow interpretation of this defence adopted by the House of Lords in *Re H and Others (Minors) (Abduction: Acquiescence)*. In this English case Lord Browne-Wilkinson advocated a narrow test that takes into consideration the subjective intentions of the left-behind parent not to consent or acquiesce. This is the case even where their positive conduct signifies consent or acquiescence. In *Director-General, Department of Child Safety v Stratford* the abducting primary-carer mother voiced her intention to return to Australia with the children. Soon after the couple’s separation the husband stated that ‘it could not happen soon enough’. The Court placed the left-behind father’s subjective intention, in light of this active statement of consent, in the context of their relationship ending. His active statement was not viewed as constituting clear and unequivocal communication of consent.

In 2010 in *Department of Community Services v Parry* the Family Court of Australia again applied a narrow test for determining whether or not the left-behind parent had consented to the child’s removal. In this case an 11 year old child was removed from the United Kingdom to Australia by his mother. In 2009, a year before the child’s removal, the mother and father had both signed documents that would

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parent-child relationship. This means that the Convention’s return mechanism is protecting what has been traditionally referred to as the ‘access or contact rights’ of left-behind parents.  


194 [2005] Fam CA 1115.  
196 See also the English case *A v A (children) (Abduction: Acquiescence)* [2003] All ER 284. This case illustrates the importance of a left-behind parent’s subjective intention even if accompanied by active acquiescence. In this case the left-behind father outwardly consented to the children’s retention in England due to a fear that the children would be hidden if consent was not given.

197 [2005] Fam CA 1115.  
198 [2010] Fam CA 689; See also *Wencelslas v Director-General, Department of Community Services* (2007) 37 Fam LR 271.
permit the child to migrate to Australia. At that time the father had expressed that he would consent to the child’s removal if he had to serve a term of imprisonment. The father had pleaded guilty to fraud charges and was awaiting sentencing. He claimed that he was concerned that if he was imprisoned the mother and child would encounter difficult financial circumstances in the United Kingdom. In Australia they would be supported by the mother’s family. On the 21st of January 2010 the mother informed the father than she was taking their son to Australia permanently on the 4th of February. Both parties agreed that the father had communicated a revocation of his consent right before the mother made this statement. However, despite this the mother then left with the child on the 24th of January.

Ryan J held that as a matter of fact the father had revoked his consent prior to the child’s removal, and the mother was aware of the withdrawal of consent. The mother argued that she had purchased the child’s airline ticket before the father communicated his revocation, and at that point in time he could no longer revoke consent. His Honour emphasised that the time when consent could no longer be revoked was the moment of the child’s physical removal. Therefore, the father had not consented to his child’s removal. The above cases demonstrate that Australia courts have a tendency to adopt a narrow approach to interpreting the consented to and/or acquiesced in the child’s removal defence.

199 Department of Community Services v Parry [2010] Fam CA 689, [2].
200 Ibid.
201 Ibid [27].
202 Ibid.
203 Ibid.
204 Ibid [2].
205 Ibid [99].
206 Ibid [96]–[108].
THE CHILD’S RETURN WOULD OFFEND BASIC PRINCIPLES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

The forth defence to a child’s return is that the child’s return is not permitted on the basis of existing principles of human rights and fundamental freedoms in the Convention country to which the child was abducted.207 This defence is interpreted narrowly and rarely utilised. In Emmett and Perry and Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority and Attorney-General of the Commonwealth of Australia (Intervener)208 the defence was construed narrowly by the Family Court of Australia. This interpretation limits the individual child’s best interests as a consideration. The case concerned three girls who were aged 13, 12 and six at the time they were said to have been wrongfully retained by their mother. Under an order that both parent’s had consented to, the children lived with their father in the United States. During a contact visit in Australia the mother retained the children. She insisted that the father’s lifestyle as a Hare Krishna was indicative of religious fanaticism and obsessive, anti-social and domineering behaviour. The mother raised the human rights and fundamental freedoms defence. She claimed that there was a strong possibility that the father would move with the children to India and betroth them. The Court held:

[T]he matters raised by the wife [were] lifestyle issues. They involve[d] value judgments about different lifestyle choices and different cultural and religious beliefs. These matters may or may not be relevant to a contested application for custody ... [T]hey cannot be raised as a basis for refusing to apply the objects of the Convention.209


208 (1996) FLC 92-645; See also Director-General, Department of Families, Youth and Community Care v Bennett (2000) 26 Fam LR 71.

209 See also Director-General, Department of Families, Youth and Community Care v Bennett (2000) FLC 93-011.
The Family Court was of the view that comity should be maintained, and that such issues should be reserved for consideration post-return.

MORE THAN A YEAR HAS PASSED AND THE CHILD HAS BECOME SETTLED IN THEIR NEW ENVIRONMENT.

The fifth defence to a child’s return is that more than a year has passed since the left-behind parent’s application for a return order, and the child has become settled in their new environment.\(^{210}\) Initially the Full Court of the Family Court of Australia preferred a narrow approach to determining what constituted ‘settlement’.

In 1991 in \textit{Graziano v Daniels}\(^{211}\) the Full Court of the Family Court of Australia limited the defence’s application by requiring that the child have more than merely adjusted to their new surroundings. Settlement was said to have two distinct elements. First, settlement comprised being physically established in the new environment. The child's connections had to extend into their new environment and beyond what they were already familiar with prior to their abduction. This included continuity of care by their primary-carer.\(^{212}\) Second, settlement comprised an emotional adjustment evidenced by new security and stability. The passage of time was not in itself sufficient to establish emotional settlement.\(^{213}\) In this case the wife was Australian and the husband American. The couple had four children who were all born in the United States. After separation the wife took the children to Australia for a seven week holiday. She had given a Californian Court an undertaking to return with the children.


\(^{212}\) \textit{Graziano v Daniels} (1991) 14 Fam LR 697.

\(^{213}\) Ibid.
Despite this she remained in Australia with the children without the father’s consent. The mother then enrolled the two eldest children in school, and purchased a plot of land near her family and commenced building a home.\textsuperscript{214} Almost two years passed between the children’s unilateral retention and the appeal of the Family Court’s decision to return the children.\textsuperscript{215} A psychologist assessed the degree of the children’s settlement. They were of the view that the children were ‘functioning in as close to a normal manner as possible, being comfortable with their home environment, their school environment, [displaying an] ability to adjust and adapt to the area.’\textsuperscript{216} However, the psychologist also wrote in their family report that the two girls:

\begin{quote}
have not made local friends (as opposed to playmates) and…the home environment and their mother were of the greatest importance to them. So far as the boys were concerned, they did appear to have made local friends but still had problems of adjustment.\textsuperscript{217}
\end{quote}

The Court said that this assessment of the children’s settlement spoke principally to their home environment and relationship with their mother. What needed to be demonstrated was a settlement and adjustment beyond continuity of primary-care. What is required is more ‘exacting than that the child is happy, secure and adjusted to his surroundings.’\textsuperscript{218} The children’s bonds did not extend far enough beyond the already familiar primary-care environment provided by their mother.

The restrictive two element test applied in Graziano v Daniels\textsuperscript{219} was rejected by the majority of the High Court of Australia in 1996 in De L v Director-General.

\begin{itemize}
\item \textsuperscript{214} Ibid.
\item \textsuperscript{215} Ibid.
\item \textsuperscript{216} Ibid [17].
\item \textsuperscript{217} Ibid [18].
\item \textsuperscript{218} Ibid [20]
\item \textsuperscript{219} (1991) 14 Fam LR 697.
\end{itemize}
In this case the High Court advocated a broader more literal reading of what constituted settlement. The Court concluded that the previous two element test imposed an improper gloss on the wording of the Convention that should instead be given its ordinary meaning. The broad interpretation of this defence to return was subsequently followed by the Full Court of the Family Court of Australia in several cases including Director-General, Department of Community Services v M and C and Child Representative. In this case the children were retained by their grandmother in Australia. The children were born in Poland. They had lived their entire lives there until they were taken to Australia by their mother for a six month holiday. The trip had been on the advice of a psychologist, who had been treating the children whilst allegations of sexual abuse by their father were been investigated. The mother stayed with the children in Australia for three months; the period permitted by her visa. At the expiration of the six month period, the mother accepted the grandmother’s proposal that the children remain for a further three months. At the end of this period the mother requested the children’s return to Poland, but the grandmother refused. For the next two years the children remained with their grandmother. They were treated by a psychologist to assist with their recovery and the investigation of the allegations of sexual abuse. The mother finally obtained a visa to re-enter Australia, and the grandmother still refused to return the children. Then the mother instituted Convention return

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221 Ibid [32]; The High Court of Australia followed S v S (Child Abduction) (Child’s Views) [1992] 2 FLR 492, 499 per Balcombe LJ when stating that ‘no additional gloss should be supplied’.
222 (1998) FLC 92-829; M and C was confirmed by the Full Court of the Family Court in Townsend v Director-General, Department of Families, Youth and Community Care (1999) 24 Fam LR 495; See also Director-General, Department of Families, Youth and Community Care v Moore (1999) 24 Fam LR 475; Secretary Attorney-General’s Department v TS (2001) FLC 93-063; State Central Authority v CR [2005] Fam CA 1050.
224 Ibid [3].
225 Ibid.
At first instance the Family Court of Australia held that the children were settled in their new environment. The Australian central authority appealed this decision not to return the children, contending that the Court had incorrectly applied the test from Graziano v Daniels. On appeal the Full Court of the Family Court of Australia confirmed that the correct test was that applied by the High Court of Australia in De L v Director-General Department of Community Services (NSW). The Court stated:

[T]here was no warrant for reading more into the term “objects” appearing in the Regulations than its ordinary meaning. In our view similar considerations apply to the expression “settled” appearing in the Regulations. Graziano’s case was decided before De L and we doubt whether the statement relied upon by the appellant remains good law.

The children had lived in Australia with their grandmother in a settled, loving environment for nearly three years. Their English was excellent and they had excelled at school. The Full Court of the Family Court determined that the evidence showed that the children had made a remarkable adjustment to life in Australia sufficient to satisfy the broader test for determining ‘settlement’.

As it stands today it is easier to establish that a child is settled in their new environment. The test to be applied is a broad literal one; simply whether the child has

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226 Ibid.
227 Ibid [6].
228 Ibid.
229 (1991) 14 Fam LR 697; Director-General, Department of Community Services v M and C and Child Representative (1998) FLC 92-829, [51].
231 Director-General, Department of Community Services v M and C and Child Representative (1998) FLC 92-829, [52].
232 Ibid [60].
233 Ibid.
234 Ibid.
settled in their new environment. This interpretation is contrary to the approach advocated by Former Justice of the High Court of Australia, Hon. Michael Kirby: That comity should be promoted as the principal objective, and that an examination of the individual child’s best interests should be discouraged as it detracts from its achievement. However, the law is still unsettled regarding whether judicial discretion to order the child’s return is retained, even if the child objects defence is established. If a judge exercises discretion to return a child despite the defence being established, consideration of the best interests of the child is forgone to facilitate return and maintain comity between contracting states.

In 1997 in *State Central Authority v Ayob*235 the Family Court of Australia at first instance held that a finding of settlement extinguishes the Convention’s application. This approach is indicative of a broad interpretation of the defence and a preparedness to consider the best interests of the child. However, in 1999 in *Director-General of Department of Families, Youth and Community Care v Moore*236 the Full Court of the Family Court of Australia did not rule out the possibility of a continuing judicial discretion to return a child after a finding of settlement. Unfortunately in this case the abducting mother’s counsel did not argue the question of whether not such discretion exists. The Court said ‘[i]n these circumstances, given the very great importance of the question, we consider that it would be undesirable for us to express a concluded view on it without the benefit of full argument.’237 The High Court of Australia is yet to provide authoritative guidance on this unsettled question of law.

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236 (1999) FLC 92-841; See also *Director-General, Department of Community Services v M and C and the Child Representative* (1998) FLC 92-829.
237 (1999) FLC 92-841, [74].
Since Director-General of Department of Families, Youth and Community Care v Moore, the Family Court of Australia has followed the approach expressed in State Central Authority v Ayob that once there is a finding of settlement there is no residual discretion to still order the child’s return. Most recently in State Central Authority v Hajjar the Family Court stated more clearly that a finding of settlement extinguishes the application of the Convention. Bennett J expressed:

[I]t is suggested that within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment, then in my view there is no such room. In my view, the Convention and the Regulations have no further application in respect of such a child.

CONCLUSION: COMITY AT THE EXPENSE OF THE BEST INTERESTS OF CHILDREN

Arguably a broad interpretation of the threshold requirements and a narrow interpretation of the defences to a child’s return are simply an outward manifestation of the value placed upon facilitating comity. Protecting the child’s best interests during Convention return proceedings, and promoting comity between Convention countries, are largely incompatible aspirations. This incompatibility is most often resolved in favour of facilitating comity. This choice has been rationalised with the erroneous assumption that the child’s best interests are most appropriately reserved for consideration post-return in the child’s habitual residence. From a practical perspective accepting this assumption as accurate has been the easy solution. This is

238 (1999) FLC 92-841; See also State Central Authority v CR (2005) 34 Fam LR 354.
241 Ibid [176].
because ‘Hague Convention return proceedings are summary, [therefore] they are not ideally designed to determine contradicted issues of fact’.\textsuperscript{242} Contradicted issues of fact may include each party’s submissions concerning the child’s best interests and the merits of the parenting dispute.

This thesis suggests that the efficacy of the Convention’s prompt return mechanism cannot remain unchallenged on the basis that it achieves comity, functions as a deterrent, and is thus in the best interests of children generally. At the heart of the Convention’s objective of promptly re-establishing the status quo regarding a child’s habitual residence, is the assumption that the child’s best interests can be adequately assessed post-return. We must analyse this assumption rather than assume it is fact.

\textsuperscript{242} Schuz, above n 29, 104.
CHAPTER THREE

METHODOLOGICAL APPROACH AND PRELIMINARY RESEARCH

FINDINGS

INTRODUCTION

As outlined in the introductory chapter, this thesis examines the contestability of two fundamental assumptions. These assumptions operate in the context of Hague Child Abduction Convention\(^1\) (hereafter “the Convention”) returns to Australia, where the abduction is by the child’s primary-carer mother. This thesis hypothesises that the collective operation of these two assumptions can have a twofold effect: First, an abducting primary-carer mother may be compelled to reside and litigate the substantive parenting dispute in a jurisdiction where she and the child have few meaningful social, cultural, linguistic and economic connections. Second, the substantive parenting dispute may be determined without the individual child’s best interests, and the primary-carer mother’s intrinsically intertwined circumstances, being sufficiently examined. The unreliability of the fundamental assumptions and the accuracy of this hypothesis are established using a mixed methodological approach. As such there were three different methods.\(^2\) Each method is explained and justified in this chapter.


\(^2\) An empirical survey called *The Australian Study of Hague Child Abduction Convention Outcomes*; a literature review; and a case-law analysis.
The primary research used to support this thesis is: *A study of outcomes post-return to Australia under the Hague Child Abduction Convention for abducting primary-carer mothers and their children* (hereafter “The Australian Study of Hague Child Abduction Convention Outcomes”). This chapter provides an overview of the survey tool. It explains who the legal practitioner participants were. It justifies their inclusion and provides a rationale for the recruitment strategy employed. It outlines the study’s limitations, including difficulties encountered in measuring whether the participant sample was an accurate proportional representation of those family law practitioners with the requisite case experience. This chapter explains how the empirical study’s design facilitates an examination of the two fundamental assumptions presently used to support the Convention’s efficacy. It also clarifies how the survey’s format and questions test this thesis’ hypothesis given above. Finally, this chapter presents a preliminary analysis of the research findings. A more detailed analysis is then incorporated into Chapter Four and Chapter Five, where the data is used to support the substantive examination of the operation of the two fundamental assumptions.  

**RESEARCH METHODS**

**METHODS FOR CONTESTING THE FIRST FUNDAMENTAL ASSUMPTION**

The first fundamental assumption of the Convention is that prompt return to the child’s habitual residence is in the best interests of children generally. This

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3 Chapter Four examines the contestability of the first fundamental assumption. Chapter Five examines the contestability of the second fundamental assumption.
assumption is predicated on three contestable sub-assumptions. These sub-assumptions are:

1. That the child’s habitual residence immediately preceding their abduction provides the most appropriate moral and cultural framework in which to determine the substantive parenting dispute.
2. That the prompt return of a child to their habitual residence will restore the status quo.
3. That the substantive parenting dispute will be resolved upon return to the child’s habitual residence. This will include an adequate assessment of merit and the child’s best interests.

The following methods were adopted to assess their validity.

Testing the first sub-assumption that the child’s habitual residence provides the most appropriate framework in which to determine the substantive parenting dispute requires an examination of the quality of this jurisdiction. This necessitates consideration of emerging literature on the transnational family and changes in the gender dynamics underpinning international parental child abduction.

A literature review was undertaken of the sociology of transnational families in the context of international parental child abduction. This literature review questioned whether the lives of transnational families experiencing parental child abduction, can be appropriately regulated using the geographical limits imposed by judicial

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determinations of habitual residence. The Convention addresses the problem of international parental child abduction by compartmentalizing the lives of transnational families according to state boundaries. This paradigm may be ill-suited to manage these families’ social interactions. This thesis is the first work to consider this phenomenon in this context. A qualitative analysis of select Convention return proceeding cases concerning families living transnational lifestyles, was also used to corroborate the sociological literature review. The case examples presented were chosen on the basis that they involved families that possessed a transnational quality. This case-law analysis method was adopted to investigate whether the test for determining a child’s habitual residence, yields a jurisdiction in which the child possesses meaningful cultural, social and linguistic connections.5

The “feminization” of international parental child abduction, and its effect on the quality of the child’s habitual residence is examined using data from The Australian Study of Hague Child Abduction Convention Outcomes. This investigation assists to determine whether the Convention’s return mechanism restores the geographical status quo at the expense of the primary-care setting. For transnational families the primary-care setting can represent stability for the child. A qualitative analysis of select Convention return proceeding cases in which the abducting parent was the child’s primary-carer mother, also clarifies the effects of the “feminization” of international parental child abduction. This method achieves clarification by posing two questions. Does achieving geographical restoration at the expense of maintaining the primary-care setting, devalue a primary-carer mother’s role in her child’s

5 Returning children to a country with which they do not identify is contrary to the objective of prompt return expressed within the Convention’s Explanatory Report; Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426, 432 (1982); A discussion of this issue is provided in Chapter Four.
socialization and development of a cultural and moral identity? Is the role of the primary-carer mother integral to her child’s stability, especially in cases where a family is mobile, and where the child has minimal connections to their habitual residence?

Testing the second sub-assumption that the prompt return of a child to their habitual residence will restore the status quo, requires a comparative assessment of the status of cases and circumstances experienced by abducting primary-carer mothers and their children, pre-abduction and post-return to Australia.

The contestability of this second sub-assumption is examined using data from *The Australian Study of Hague Child Abduction Convention Outcomes*. The study’s family law practitioner participants were asked to provide information regarding the status of cases they had acted in pre-abduction and post-return to Australia. The operative question was, ‘Do Australian courts censure abducting primary-carer mothers when determining parenting disputes post-return under the Convention?’ Genuine restoration of the status quo upon return to Australia requires the preservation of each party’s position as they enter into proceedings concerning the parenting dispute. If the legal and factual status quo⁶ is automatically altered upon return, due to a censuring of the mother for her act of abduction, then prompt return restores the status quo merely in a geographical sense.

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⁶ Legal status quo means the existing parenting arrangement prior to the act of abduction. For example, the care arrangement concerning the time the child will spend with each parent. Factual status quo means the life circumstances experienced by the primary-carer mother and child prior to the act of abduction. For example, financial circumstances, visa eligibility circumstances, social circumstances.
If The Australian Study of Hague Child Abduction Convention Outcomes reveals a censuring of primary-carer mothers for their act of abduction, then it is appropriate to consider the consequences. Censuring may indicate a failure to comprehensively consider a primary-carer mother’s and child’s circumstances and wellbeing pre-abduction; and how these circumstances relate to the child’s welfare and best interests. Ignoring these issues may place a mother and her child in a precarious state. This may be exacerbated if the substantive parenting dispute is not resolved post-return.

Testing the third sub-assumption that the parenting dispute will be litigated or mediated post-return, and this will include an adequate assessment of merit and the child’s best interests, requires an examination of how parenting disputes are resolved post-return to Australia.

This examination is achieved with reference to data from The Australian Study of Hague Child Abduction Convention Outcomes. In its current form the Convention does not ensure the parenting dispute’s resolution post-return. There are no guarantees that the parenting dispute will be either litigated or mediated, in an attempt to reach a resolution in the child’s best interests. Consequently, post-return to Australia there are three possible conditions concerning the parenting dispute: It remains dormant, it is litigated in court, or mediated to agreement. The empirical study’s examination of these circumstances led to the identification of a second fundamental assumption that operates when the child is returned to Australia under the Convention. This is discussed next.
METHODS FOR CONTESTING THE SECOND FUNDAMENTAL ASSUMPTION

The second fundamental assumption that operates when a child is returned to Australia is that equal shared parental responsibility and shared care is in the best interests of the child. This thesis hypothesises that this assumption limits the assessment of the child’s best interests if the parenting dispute is litigated in court, or mediated to agreement, post-return to Australia. The hypothesis is tested by two measures.

First, this assumption’s contestability is evaluated by examining how the equal shared parental responsibility and shared care statutory criteria are applied, to formulate parenting arrangements for families that possess similar characteristics to those that experience international parental child abduction i.e. family violence, high levels of inter-parental conflict, and where one parent wishes to relocate with their child. Existing empirical research from the field of psychology is used to determine whether equal shared parental responsibility and shared care arrangements are a source of significant psychological stress for the children of these families.

Second, the assumption’s contestability is established by considering its effect on families that have experienced international parental child abduction. This is achieved by examining the impact of equal shared parental responsibility and shared care, on families that litigated or mediated their parenting dispute post-return to Australia. The Australian Study of Hague Child Abduction Convention Outcomes does this. The question that was asked to test the hypothesis was, on the basis of the study’s

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7 ‘Equal shared parental responsibility and shared care’ is defined in the terminology section in Chapter One.
CONCLUSION

This chapter has described and justified each method adopted in this thesis to examine the contestability of the two fundamental assumptions. These assumptions operate in the context of Convention returns to Australia, where the abduction is by the child’s primary-carer mother. The vulnerability of these fundamental assumptions, and the strength of this thesis’ hypothesis, is established using a mixed methodological approach. This chapter has provided an overview of the primary research supporting this thesis: *The Australian Study of Hague Child Abduction Convention Outcomes*. Although the primary evidence in this thesis comes from this empirical research, it has been supplemented by a legal literature review comprising a case-law analysis and secondary sources, and an interdisciplinary literature review with a focus on sociology and psychological studies.

Next, Chapter Four will examine the contestability of the first fundamental assumption: That prompt return to the child’s habitual residence is in the best interests of children generally. Chapter Five will then examine the contestability of the second fundamental assumption that operates post-return to Australia: That equal shared parental responsibility and shared care accommodates the unique circumstances and needs of transnational families that experience international parental child abduction.
CHAPTER FOUR

RE-EXAMINING HABITUAL RESIDENCE AS THE SOLE CONNECTING FACTOR IN HAGUE CHILD ABDUCTION CONVENTION CASES

INTRODUCTION

As outlined in the introductory chapter, this thesis explores the collective operation of two fundamental assumptions. It argues that their unreliability means that the operation of the Hague Child Abduction Convention\(^1\) (hereafter “the Convention”) together with Australian family law post-return, may place children and their abducting primary-carer mothers in a precarious state.

This chapter will examine the first fundamental assumption. It is assumed that the Convention operates in the best interests of children generally by promptly returning them to their habitual residence immediately preceding their abduction.\(^2\) Chapter Five will then critique the second fundamental assumption that operates post-return to Australia. It is assumed that equal shared parental responsibility and shared care accommodates the unique circumstances and needs of transnational families that experience international parental child abduction. Together these chapters will propose that both of these assumptions are contestable. Their operation in


\(^2\) A significant portion of Chapter Four of this thesis has been published as Danielle Bozin-Odhiambo, ‘Re-examining habitual residence as the sole connecting factor in Hague Child Abduction Convention cases’ (2012) 3(1) Family Law Review 4.
international parental child abduction cases may have a twofold effect. Firstly, an abducting primary-carer mother may be compelled to litigate the Part VII substantive parenting dispute in a jurisdiction where she and the child have few meaningful social, cultural, linguistic and economic connections. Secondly, the parenting dispute may be determined without the child’s best interests, and their primary-carer mother’s intrinsically intertwined circumstances, being sufficiently assessed.

The first fundamental assumption is predicated on the following three sub-assumptions:

1. That the child’s habitual residence immediately preceding their abduction provides the most appropriate moral and cultural framework in which to determine the substantive parenting dispute.
2. That the prompt return of the child to their habitual residence will restore the status quo.
3. That the substantive parenting dispute will be resolved upon return, and this will include an adequate assessment of merit and the individual child’s best interests.

The validity of each of these three sub-assumptions will be considered sequentially within this chapter.

Two challenges have emerged to threaten the validity of these assumptions: A change in the gender dynamics underpinning international parental child abduction, and the “transnational family” phenomenon. Chapters Four and Chapter Five comprise an

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3 Part VII under the *Family Law Act 1975* (Cth); ‘Part VII substantive parenting dispute cases’ is defined in the terminology section in Chapter One.
DOES THE PROMPT RETURN OF A CHILD TO THEIR HABITUAL RESIDENCE RESTORE THE STATUS QUO?

The fundamental assumption that prompt return to the child’s habitual residence is in the best interest of children generally, has been supported by the sub-assumption: That the child’s return to their habitual residence will restore the status quo.\(^95\) The Convention’s efficacy is dependent on the legitimacy of this notion. The Convention has been rationalised on the basis that prompt return re-establishes the status quo both legally and factually in the child’s habitual residence. The Convention’s Explanatory Report provides that ‘[t]he Convention…places at the head of its objectives the restoration of the status quo, by means of ‘the prompt return of children wrongfully removed or retained in any Contracting State’.\(^96\) Status quo has been defined as an ‘absence of change, conservation of the same situation, equilibrium, maintenance of regularity, things as they are’.\(^97\)

This part examines the legitimacy of the sub-assumption that return to the child’s habitual residence restores the legal and factual status quo. This is achieved using data from *The Australian Study of Hague Child Abduction Convention Outcomes*.\(^98\) The study’s family law practitioner participants provided information concerning the legal outcome\(^99\) of cases in which they had acted, and the factual outcomes\(^100\) for families post-return to Australia. This data indicates that prompt return restores the status quo

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\(^95\) ‘Re-establishing the status quo’ is defined in the terminology section in Chapter One.


\(^98\) A comprehensive discussion of this study is provided in Chapter Three.

\(^99\) Legal outcome means the parenting arrangement post-return to Australia. For example, the care arrangement concerning the time the child will spend with each parent.

\(^100\) Factual outcomes mean the life circumstances experienced by the primary-carer mother and child post-return to Australia. For example, financial circumstances, visa eligibility circumstances, social circumstances.
merely in a geographical sense. The legal and factual status quo may be automatically altered upon the child’s return. This prevents genuine restoration of the status quo.

When there is a failure to restore the status quo the consequences are particularly problematic when the abducting parent is the child’s primary-carer. This is because the consequences are experienced by both the child and the parent who provides them with constant stability; their best interests are intrinsically intertwined. Restoration of both the legal and factual status quo, for the primary-carer mother and child post-return, is particularly important in cases where they have minimal connections to the habitual residence. The strain of being compelled to exist in such an environment can be compounded by the disturbance of the primary-care setting’s stability. This can occur for three reasons. First, Australian courts appear to apply a censuring approach when determining the parenting dispute post-return to Australia. Second, there may be the imposition of visa re-entry obstacles for a primary-carer mother wishing to accompany her child subject to a return order. Third, there may be a lack of economic, social and emotional support post-return for the primary-carer mother and child. This can occur when the mother and child were largely dependent on the father pre-separation and pre-abduction.102

101 These issues are discussed in detail in Chapter Five.
102 A left-behind parent may give an undertaking to the Court. An undertaking may be in the form of promising to support the child and primary-carer mother financially upon return, usually whilst the parenting dispute is being resolved. Undertakings are however difficult to enforce; For a discussion of this issue see, The Delegation from the Commonwealth of Australia, ‘Issues Surrounding Safe Return of the Child (and the Custodial Parent)’ (paper presented at the International Child Custody a Common Law Judicial Conference, Washington DC, September 18-21); See also Silberman, above n 58, 229–230.
THE APPLICATION OF A CENSURING APPROACH WHEN THE PARENTING DISPUTE IS DETERMINED POST-RETURN TO AUSTRALIA.

The family law practitioners who participated in *The Australian Study of Hague Child Abduction Convention Outcomes* said that the act of abduction can have an impact on an abducting primary-carer mother’s prospects of retaining her primary-carer status in post-return litigation or mediation. The data reveals that the act of abduction can be perceived by Australian courts as demonstrating a lack of parenting ability, and disregard for the father’s rights and child’s welfare. Australian courts have a tendency to apply a censuring approach when determining the parenting dispute post-return to Australia. Twenty-eight participants said that they had acted in a combined total of 103 Part V11 substantive parenting dispute cases post-return to Australia that had a final order outcome. These participants were asked whether they believed that the primary-carer mother’s act of abduction affected the Court’s decision when formulating the post-return final order. Sixty-four per cent of the participants said yes. When asked how the prior act of abduction affected the Court’s decision participants provided the following responses.

1. *The attitude taken by the court in most circumstances was one of condemnation for the removal followed by punishment demonstrated by a change of residence for the child.* – participant number 41

2. *In the case where the primary carer returned to her country of origin without the child, the court was concerned that her actions in leaving the country impacted on her parenting capacity.* – participant number 40

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103 ‘Final order’ is defined in the terminology section in Chapter One; Appendix Two, question 12 of the survey.
104 Question 14 of the survey.
105 Ibid.
3. Because depending on the length of time spent abroad and the age of the child it sometimes meant that return to Australia was not always in the child’s best interests. – participant number 37

4. 1. The length of time the child was removed from any contact with the other parent.
   2. The likelihood of reoffending by the removing parent. – participant number 36

5. Impact on the Court's view of the intention of the taking parent to promote and facilitate relationship with the other parent. – participant number 34

6. Because the mother in all 3 cases was perceived as unsupportive of father’s time the court ordered more to safeguard his time [sic] with the children. It was viewed unlikely the mother would be flexible [sic] with arrangements. – participant number 32

7. parent did not respect other parents role in child’s life – participant number 30

8. Settlement by [sic] consent, but so much time had passed the child had been alienated by the removing parent. – participant number 29

9. Findings on credit
   Findings on attitude by the carer towards the other parent
   Findings on carer's understanding of need for child to spend realistic time with the other parent – participant number 27

10. In 4 of the 5 cases the fact of the taking parent unilateraly [sic] taking the child overseas without the consent of the left-behind parent was a significant factor in the court's assessment of the parents respective parenting capacity. In general it weighed against the taking parent - being seen as a negative aspect of their parent capacity. - participant number 22
11. This is an important factor affecting child welfare issue [sic] – participant 17

12. There appeared to be a bias towards the left behind parent's rights as against the taking parent's circumstances - at least in the initial stages of the hearings – participant number 13

13. Mother's action of taking the child out of Australia demonstrated the Mother's lack of insight as to the important relationship between the child and father – participant number 9

14. the unilateral removal was taken to demonstrate a poor attitude of the removing parent, and that was reflected [sic] in the order, either for more time with the other parent, or change of living arrangements – participant number 6

15. Viwed [sic] as a negative [sic] and always needing to justify decision and comfort court in regard to future risk of flight. – participant number 4

Genuine restoration of the legal status quo requires the preservation of each party’s position as they enter into post-return judicial proceedings concerning the parenting dispute. An approach that censures a mother for her act of abduction is undesirable without considering her and the child’s social, emotional, linguistic and economic circumstances prior to the abduction. The mother’s motivations for the act and how these circumstances relate to the child’s welfare and best interests should be considered. Failure to comprehensively consider these issues during post-return parenting dispute proceedings may result in the finding of habitual residence being determinative of the parenting dispute. The child will ultimately reside in this particular jurisdiction. This was never the Convention’s intended function. Such an outcome is problematic given the prompt nature of Convention return proceedings.
The risk of this occurring is especially high if there is an emphasis on both censuring the mother for her act of abduction and promoting equal shared parental responsibility and shared care post-return.

The final order outcomes in the cases reported by participants also suggest that Australian courts apply a censuring approach when determining the parenting dispute post-return to Australia. Of the post-return final order cases reported 29.3% resulted in a 50% shared care arrangement, or a change in the primary-care status. In 60.3% of the final order cases the abducting primary-carer mother’s time with her child was decreased in some way. The specific details of the final order outcomes in the case sample reported are provided in Chapter Three. A more detailed discussion of the censuring approach and its implications is provided in Chapter Five.

*The Australian Study of Hague Child Abduction Convention Outcomes* also examined how Australian courts resolve parenting dispute cases, where the prior unilateral removal of the child was domestic and >500km within Australia. Are the legal outcomes in these cases any different to those where the prior abduction was international and handled under the Convention? This comparative assessment determines whether Australian courts accommodate the unique needs of transnational families that experience international parental child abduction by the child’s primary-carer mother.

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106 These final order outcomes are reported in Chapter Three and analyzed in detail in Chapter Five.
107 See Appendix Two, Question 13 of the survey; As reported in Chapter Three it is important to note that a portion of this sample of final order outcomes were before the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* and its equal shared parental responsibility and shared care approach; The survey data was collected in late 2009. Because of the study’s close proximity to the introduction of equal shared parental responsibility and shared care it examined both pre and post 2006 cases. Therefore, in all likelihood this data does not truly reflect the full impact of the equal shared parental responsibility and shared care amendments.
108 Question 13 of the survey.
109 Part C of the survey.
Thirty-one participants reported that they had acted in a total of 229 cases, where there was a prior domestic child removal that had a final order outcome.\textsuperscript{110} The final order outcomes in these domestic cases reveal that these parenting disputes are treated differently to those where the prior abduction was handled under the Convention.\textsuperscript{111} As previously specified in 29.3\% of the post-return final order cases where the prior abduction was handled under the Convention, there was a 50\% shared care order or a change in the primary-care status.\textsuperscript{112} This can be compared with 6.5\% of the final order cases where the prior unilateral removal was domestic.\textsuperscript{113} As already reported in 60.3\% of the final order cases where the prior abduction was handled under the Convention, the primary-carer mother’s time with her child was decreased in some way.\textsuperscript{114} This can be compared with 14.4\% of the final order cases where the prior unilateral removal was domestic.\textsuperscript{115}

This data suggests a different judicial approach towards parenting dispute cases where the prior unilateral child removal was domestic compared to international. In the study’s case samples the mothers who abducted their child internationally were less likely to retain primary-care of their child in post-return parenting dispute proceedings. This demonstrates a censuring of the abducting primary-carer mother for her act of international parental child abduction. Clearly a consequence of censuring a mother for her act of abduction, without adequate consideration of her motivations and circumstances, can be a change in the primary-carer setting. This can be problematic, especially if a child dispossessed of the stability of their primary-care

\textsuperscript{110} Question 22 of the survey.  
\textsuperscript{111} Question 23 of the survey.  
\textsuperscript{112} Question 13 of the survey.  
\textsuperscript{113} Question 23 of the survey.  
\textsuperscript{114} Question 13 of the survey.  
\textsuperscript{115} Question 23 of the survey.
setting, must also adapt to a habitual residence where they have few connections. Chapter Five will discuss these issues further.

VISA OBSTACLES FOR ABDUCTING PRIMARY-CARER MOTHERS WISHING TO ACCOMPANY THEIR CHILD SUBJECT TO A CONVENTION RETURN ORDER.

A lack of genuine restoration of the legal and factual status quo can occur when an abducting primary-carer mother, wishing to return with her child, encounters visa obstacles. The Convention’s return mechanism’s ability to restore the status quo is impaired when the abducting primary-carer mother’s presence in Australia is dependent on the child’s father pre-separation and pre-abduction. Where a family is cross-cultural and transnational in character, the primary-carer mother and father may enjoy disparate visa statuses and associated substantive rights in Australia.

Prior to the abduction the primary-carer abducting mother’s visa status in Australia may have been dependent on her ongoing domestic relationship with the child’s father. For example, the father may enjoy Australian citizenship or permanent residency, whilst the mother may hold a partner visa awaiting permanent residency. Upon separation and departure from Australia when abducting her child, the primary-carer mother’s partner visa eligibility is lost. This problem was acknowledged by the Australian Central Authority in its response to the Permanent Bureau’s 2006 Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The

117 Permanent Bureau Hague Conference on Private International Law, Responses to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of
Australian Commonwealth Central Authority provided the following illustration of the problem that involved the return of a child to Australia under the Convention:

In a recent case, both parents and the child were not Australian citizens but were living in Australia. The mother abducted the child to England. The English Court ordered the return of the child on the basis that the child’s habitual residence was Australia. The mother and child returned to Australia. The father is the main visa applicant in Australia. The mother has also been advised that she cannot become a permanent resident as she is no longer the partner of the father. The mother is now only on a temporary visa, which does not entitle her to any social security or welfare.\(^\text{118}\)

There is one narrow exception to this visa re-entry restriction. A primary-carer mother’s application for permanent residency can continue despite her relationship’s end, if she can establish that she is the victim of family violence by her partner. The Australian Commonwealth Department of Immigration and Citizenship website states:

The Family Violence Provisions (FVP) of Australia’s migration program allow certain people applying for permanent residence in Australia to continue with their application after the breakdown of their married or de facto relationship, if they or a member of their family unit have experienced family violence by their partner. The FVP were introduced in response to community concerns that some partners might remain in an abusive relationship because they believe they may be forced to leave Australia if they end the relationship…If the applicant’s relationship breaks down after they have applied for permanent residence, and they can provide acceptable evidence under the Migration Regulations that they or their dependants

have been the victim of family violence committed by their Australian partner, the applicant can still be considered for permanent residence.\footnote{Australian Commonwealth Government, \textit{Fact Sheet 38 Family Violence Provisions} (2013) Department of Immigration and Citizenship <http://www.immi.gov.au/media/fact-sheets/38domestic.htm>.
\footnote{For, eg, a Sponsored Family Visitor Visa (subclass 679).}
\footnote{Due to application fee costs; For example the application fee for a Parent (Permanent) Visa (Subclass 103) is currently $3855AUD.}
\footnote{Question 11 of the survey.}

If a primary-carer mother is unable to establish family violence she will have no option but to apply for a visitor visa,\footnote{For, eg, a Sponsored Family Visitor Visa (subclass 679).} if she wishes to accompany her child back to Australia temporarily. She will then need to consider applying for one of the parent visa options. These visa options require significant economic resources.\footnote{Due to application fee costs; For example the application fee for a Parent (Permanent) Visa (Subclass 103) is currently $3855AUD.} They necessitate a period of separation from the child if the visa is processed whilst offshore. They also preclude access to social security and medical benefits for a period of time. These restrictions seriously impinge on the child’s wellbeing post-return to Australia, given their impact on the stability of the primary-care setting.

Twenty-eight participants in \textit{The Australian Study of Hague Child Abduction Convention Outcomes} had acted in post-return Part VII substantive parenting dispute cases where the prior abduction was handled under the Convention. They were asked about the immigration status of the abducting primary-carer mothers in their cases.\footnote{Question 11 of the survey.} These participants provided an answer for 113 of 115 cases they had acted in. In 53 cases (46.9\%) the abducting primary-carer abducting was an Australian citizen. In 40 cases (35.4\%) they were an Australian permanent resident. In eight cases (7.1\%) they were on an Australian visa classed as temporary, and in 12 cases (10.6\%) the participant was unsure. Consequently 17.7\% of the primary-carer mothers in the cases reported did not enjoy the certainty of a permanent visa and its accompanying...
substantive rights. Participants in the study who had acted in Convention return proceedings were also asked about the immigration status of the abducting primary-carer mothers in their cases.\textsuperscript{123} In 11 cases (37.9\%) the abducting primary-carer mother was an Australian citizen. In 14 cases (48.3\%) they were an Australian permanent resident. In four (13.8\%) they were on an Australian visa classed as temporary.\textsuperscript{124} Consequently, in this case sample 13.8\% of the primary-carer mothers, whose children were returned to Australia, did not enjoy the certainty of a permanent visa and its accompanying substantive rights. In all likelihood their visa status in Australia pre-abduction was contingent on their ongoing relationship with the child’s father.

A change in visa eligibility demonstrates a lack of genuine restoration of the factual status quo post-return to Australia under the Convention. The Convention’s prompt return mechanism merely restores the geographical status quo for the child. It is arguable that this is not sufficient to ensure the protection of the best interests of children. It is imperative that we consider the role that the continued presence and welfare of the child’s primary-care plays in maintaining the status quo regarding the child’s stability and wellbeing post-return to Australia. This role should be protected and supported at least until the parenting dispute is resolved. When an abducting mother is divested of her partner visa and eligibility to continue making progress towards permanent residency, there are no guarantees that she will be entitled to re-

\textsuperscript{123} Question 32 of the survey; 13 participants answered this question with reference to 29 cases.
\textsuperscript{124} Despite participants reporting that they had acted in 37 cases in question 31, they only answered question 32 in relation to 29 cases. This discrepancy is understandable given that the study’s participants may not have been aware of, or recalled, the immigration status of all of the primary-carer mothers in their cases. Their involvement may have been drafting affidavits for overseas Convention return proceedings for the left-behind parent. Participant number 11 provided the immigration status for three instead of four cases, participant number 27 for five instead of seven cases, participant number 28 for one instead of two cases, and participant number 41 for six instead of nine cases. Also participant number 12 did not provide an answer for question 32 for the one case they reported in question 31.
enter Australia on a different class of visa. If she is fortunate enough to re-enter on a temporary visa, the uncertainty of altered economic, social and emotional circumstances post-return may await both her and her child.

LACK OF ECONOMIC, SOCIAL AND EMOTIONAL SUPPORT FOR PRIMARY-CARER MOTHERS AND THEIR CHILDREN POST-RETURN TO AUSTRALIA UNDER THE CONVENTION

A change in the circumstances that await an abducting primary-carer mother and her child upon return, suggests a lack of restoration of the factual status quo. Pre-abduction a primary-carer mother may have been dependent on the child’s father for economic and social support. Upon return a primary-carer mother, now separated from the child’s father, may be required to establish herself in an environment where she has few connections and poor prospects. She may be unable to provide for herself and her child financially, as her visa status may exclude her from working or studying for a period of time. In addition, her visa status may mean that she is denied access to social security and public health benefits, along with legal aid representation for Part VII substantive parenting dispute proceedings. Although deprived of these substantive rights, if she wishes to remain with her child she is forced to live in a specific geographical space close to the father.

There are no guarantees that the parenting dispute will be resolved with a final order or private agreement post-return to Australia. This means that these altered factual circumstances may become a long term condition for the primary-carer mother and her child. What is the cost of failing to accommodate the circumstances

125 Although she may receive child support payments from the child’s father.
126 ‘Final order’ and ‘private agreement’ are defined in the terminology section in Chapter One.
127 This issue will be discussed in detail in Chapter Five.
potentially awaiting these families upon return to Australia? There will be a negative effect on the child’s wellbeing. This issue will be explored in greater detail in Chapter Five. More broadly Chapter Five will evaluate the validity of the second fundamental assumption that operates once the child has been returned to Australia: That the equal shared parental responsibility and shared care approach, found in Part VII of the *Family Law Act 1975* (Cth), accommodates transnational families’ unique circumstances and needs.

**WILL THE PARENTING DISPUTE BE RESOLVED UPON RETURN, AND WILL THIS INCLUDE AN ADEQUATE ASSESSMENT OF MERIT AND THE CHILD’S BEST INTERESTS?**

The fundamental assumption that prompt return to the child’s habitual residence is in the best interest of children generally, has been supported by the sub-assumption: That the parenting dispute will be resolved upon return, and this will include an adequate assessment of merit and the child’s best interests. The Convention’s efficacy is dependent on the legitimacy of this notion.

The Convention’s efficacy has been left largely unchallenged. This has occurred on the basis that it focuses implicitly on re-establishing the status quo in the child’s habitual residence. This is so that the parenting dispute can be determined in accordance with the habitual residence’s domestic laws. As expressed in the Convention’s Explanatory Report, ‘the Convention rests implicitly upon the principle that any debate on the merits of the question…of custody rights, should take place before the…authorities in the state where the child had its habitual residence prior to
its removal.\(^{128}\) A return order is merely procedural. The Convention does not resolve the substantive parenting dispute. It facilitates its resolution in the jurisdiction deemed most appropriate, by procedurally accomplishing the prompt return of the child. This approach is only in the best interests of children generally if the individual child’s best interests are assessed post-return. If a child’s best interests are not examined post-return and the parenting dispute remains unresolved, the finding of habitual residence will determine where the child resides. Such a result is undesirable especially in cases where the abducting primary-carer mother and child do not have meaningful connections in the habitual residence.

There are no guarantees that the parenting dispute will be litigated in court, or mediated to agreement, in an attempt to reach a resolution in the child’s best interests. Consequently post-return to Australia there are three possible conditions concerning the substantive parenting dispute: It remains dormant, it is litigated in court, or it is mediated to agreement.

Empirical research has not shed any light on the circumstances of abducting primary-carer mothers and their children whose parenting disputes remains dormant post-return. These families have no or fleeting contact with the Australian legal system post-return. This means that their experiences are extremely difficult to study.\(^{129}\) We


\(^{129}\) The Australian Commonwealth Central Authority’s records only contain the contact details of these families at the time of the Convention return process. Given these families mobility these details can become out-dated quickly. An empirical study of families whose parenting dispute remained dormant post-return to Australia would necessitate a recruitment strategy which required them to self-identify. Participants in *The Australian Study of Hague Child Abduction Convention Outcomes* were family law practitioners who had acted for families post-return to Australia. Consequently this study could only examine those families which had received legal advice or legal representation from one of the practitioner participants.
do know that the number of returns to Australia significantly outweigh the number of reported post-return Part VII substantive parenting dispute cases. Therefore it is possible that in a significant portion of Convention return cases the parenting dispute simply remains dormant post-return to Australia. In such cases the finding that Australia is the child’s habitual residence has determined where the child will live. This has occurred without an assessment of the individual child’s best interests, or their primary-carer’s mother’s intrinsically intertwined wellbeing and needs.

Why does this group of abducting primary-carer mothers choose not to formally resolve the parenting dispute post-return to Australia? The Australian Study of Hague Child Abduction Convention Outcomes did ask its participants, ‘If in any of post-return substantive parenting dispute cases (with either final order or private agreement outcomes) the abducting primary-carer mother did not seek to relocate back overseas with her child/ren why, in your view, didn’t they?’ A mother’s reasons for not seeking to relocate may also reflect why some mothers decide not to resolve the parenting dispute post-return. The study’s participants said that 27.8% of the mothers in their cases did not seek an agreement or order allowing relocation due to emotional fatigue. In 55% of cases the participants reported that the financial cost impacted on the mother’s decision not to seek a relocation order or agreement post-return. In 33.3% of cases the mother feared losing residence of her child/ren if she made a relocation application. In 22.2% of cases the mother had a fear that the court would deny her relocation application, and increase the father’s contact with the child/ren. Participants also reported that 50% of the primary-carer mothers in their cases did not seek relocation post-return because of a belief that they would be unsuccessful

130 Question 19 of the survey; 18 legal practitioner participants responded to this question.
because of their prior abduction. This perception appears to be well founded given the censuring approach Australian courts tend to apply. Another participant said ‘fear of the father’ prevented the primary-carer mother from seeking relocation post-return.\(^{131}\)

Post-return either the abducting primary-carer mother or the left-behind father may choose to initiate the parenting dispute’s resolution. If this occurs the dispute may be litigated in court, or mediated to agreement, in accordance with Australia’s family laws. The *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced significant reforms to Part VII of the *Family Law Act 1975* (Cth). Most importantly, it introduced a rebuttable presumption of equal shared parental responsibility. Where the presumption applies the amendments require the Family Court, or parties who are mediating, to consider an equal time or substantial and significant time parenting arrangement. This approach creates a second fundamental assumption that operates post-return to Australia. It is assumed that equal shared parental responsibility and shared care accommodates the unique circumstances of families that experience international parental child abduction. Chapter Five of this thesis will critique the validity of this assumption. It will contend that these pro-father amendments have aligned Australia’s family laws, with the prescriptive exercise of discretion underpinning the Convention’s prompt return process.\(^{132}\)

The collective operation of Convention return proceedings and Australia’s family laws post-return may produce problematic outcomes. First, an abducting primary-

\(^{131}\) Participant number 33.

\(^{132}\) Judicial discretion may be exercised during Convention return proceedings in narrow circumstances, i.e. whether to refuse to return a child based on a narrowly interpreted defence to return. This issue was discussed in Chapter Two; Similarly, the equal shared parental responsibility and shared care provisions contained in Part VII of the *Family Law Act 1975* (Cth) guide the exercise of discretion to determine a child’s best interests, towards an outcome which is incompatible with the lives of transnational families.
carer mother may be compelled to resolve the parenting dispute and reside in a jurisdiction where she and the child have few ties. Second, the parenting dispute may be determined without the child’s best interests, and primary-carer mother’s intrinsically intertwined circumstances, being sufficiently assessed. Neither of these detrimental outcomes were foreseen or intended by the Convention’s drafter.
CHAPTER FIVE

EQUAL SHARED PARENTAL RESPONSIBILITY AND SHARED CARE
POST-RETURN TO AUSTRALIA UNDER THE HAGUE CHILD
ABDUCTION CONVENTION.

INTRODUCTION

Chapter Four of this thesis established the unreliability of the first fundamental assumption. This assumption is that the Hague Child Abduction Convention\(^1\) (hereafter “the Convention”) operates in the best interests of children generally, by promptly returning them to their habitual residence. This jurisdiction no longer necessarily possesses the quality of the child’s home environment. It does not automatically represent the most appropriate moral and cultural framework in which to construct the child’s best interests. This chapter examines how the effects of a child’s return to Australia when they and their primary-carer lack meaningful connections to the jurisdiction, can be exacerbated by aligning their best interests with equal shared parental responsibility and shared care.\(^2\)

The second fundamental assumption that equal shared parental responsibility and shared care accommodates transnational families’ unique circumstances, is considered and contested in this chapter in two parts. The shared parental responsibility and

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\(^2\) ‘Equal shared parental responsibility and shared care’ is defined in the terminology section in Chapter One.
shared care statutory criteria are found in Part VII of the *Family Law Act 1975* (Cth). First, this chapter considers how these statutory criteria are applied to formulate parenting arrangements for families that possess similar characteristics to those that experience international parental child abduction. Studies have shown that shared care arrangements are a source of psychological stress for children of families characterised by family violence, high levels of inter-parental conflict, and where one parent wishes to relocate. Because the approach has been aligned with the best interests of children, equal or substantial and significant time care arrangements have increased for these families since 2006. Second, this chapter will explore the implications of this for transnational families that attempt to resolve their parenting dispute post-return to Australia under the Convention.

This discussion will be informed by the findings of the primary research supporting this thesis: *A study of outcomes post-return to Australia under the Hague Child Abduction Convention for abducting primary-carer mothers and their children* (hereafter “*The Australian Study of Hague Child Abduction Convention Outcomes*”). Arguably the equal shared parental responsibility and shared care approach guides the exercise of discretion to determine a child’s best interests, towards an outcome that is incompatible with the lives of transnational families. Primary-carer mothers play an integral role in their child’s socialization and development of a cultural and moral identity. Arguably the primary-care setting is the most important source of stability for children of transnational families. Its preservation is recommended as the most appropriate solution.

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3 See ss 60B, 60CA, 60CC, 61B, 61C, 61D, 61DA, 65DAA, 65DAC; These sections are discussed in this chapter.
4 The equal shared parental responsibility and shared care approach was introduced into Part VII of the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.
5 See Chapter Three for a detailed discussion of this study’s design.
socialization, and development of a cultural and moral identity. This is especially so when the family unit is transnational in character.

CONCLUSION

Chapter Four established the unreliability of the first fundamental assumption that the Convention operates in the best interests of children generally by promptly returning them to their habitual residence. The environment in which a child’s identity and security is constructed has been defined using state boundaries. This approach is becoming increasingly problematic because judicial determinations of habitual residence are entrenched in a state-centric paradigm. This paradigm is incompatible with the notion of transnational mothering and the lives of families that experience international parental child abduction. Arguably the framework in which a child’s identity is best constructed and defined is the primary-care setting. This is an alternative approach to viewing this framework as a particular jurisdiction or state. This approach may be particularly useful when the family is transnational. Preservation of this home environment is recommended as a solution to ensure that children’s best interests and stability are protected.

This chapter contested the second fundamental assumption that equal shared parental responsibility and shared care accommodates transnational families’ unique needs post-return to Australia. The Australian Study of Hague Child Abduction Convention Outcomes examined the impact of equal shared parental responsibility and shared care on families that seek to resolve their parenting dispute post-return. On the basis of this study’s findings, arguably the approach guides the exercise of judicial discretion to determine a child’s best interests, towards a parenting arrangement that is
incompatible with the lifestyle lead by transnational families. Despite this incompatibility equal shared parental responsibility and equal or substantial time care arrangements have increased for these families since the approaches’ introduction in 2006.
CHAPTER SIX

CONCLUDING REMARKS

The Hague Child Abduction Convention’s\(^1\) (hereafter “the Convention”) efficacy should not remain unchallenged on the basis that it achieves comity, functions as a deterrent, and is thus in the best interests of children generally. Arguably it is no longer judicious to deem the Convention’s operation successful based simply on it accomplishing the prompt return of children to their habitual residence. This thesis suggests that a holistic critique of the Convention requires an examination of whether or not it produces outcomes aligned with the original rationale for the prompt return of children.\(^2\) This official rationale is said to be to return children to stability, back into the arms of the parent charged with their upbringing, and the environment in which their life has developed.\(^3\) This thesis critiques the Convention by examining outcomes produced by its operation for abducting primary-carer mothers and their children post-return to Australia.

If a child is returned to the Convention country deemed to be their habitual residence, this action results in the family unit having to submit to the domestic laws of that jurisdiction to resolve the parenting dispute. A true measure of the Convention’s success is the outcomes it produces as part of the entire system designed to address

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\(^{3}\) Ibid 432.
the contemporary problem of international parental child abduction. In the Australian context this includes the operation of Australian family law post-return. Convention return proceedings, and Part VII proceedings under the Family Law Act 1975 (Cth), are not distinct stages operating in isolation. Viewing them as such is a purely theoretical exercise divorced from the reality of the lives of transnational families. These families are required to manoeuvre through the complex dilemma of where the parents and their children should live post-separation.

This thesis uses a mixed research methodology that incorporates a survey, case-law analysis, and a review of the relevant interdisciplinary literature. These methods are used to critically assess two fundamental assumptions underpinning Convention returns to Australia where the abduction is by the child’s primary-carer mother. Whether or not these assumptions are given proper effect by the Convention is a moot point. However, their legitimacy has been left largely unquestioned. This thesis identifies two challenges threatening the validity of these assumptions: A change in the gender dynamics underpinning international parental child abduction, and the “transnational family” phenomenon. This thesis comprises an examination of these challenges and their effect on the continued validity of the assumptions that have been used to support the Convention’s efficacy. The fundamental assumptions are situated at the heart of the Convention’s objective of promptly re-establishing the status quo regarding the child’s habitual residence. This thesis argues that the unreliability of these assumptions means that the Convention’s prompt return mechanism, together with Australian family law post-return, may place children and their abducting primary-carer mothers in a precarious state.
The first fundamental assumption was that the Convention operates in the best interests of children generally by promptly returning them to their habitual residence. The impact of habitual residence as the sole connecting factor in Convention cases was assessed. This was achieved by examining the quality of this jurisdiction in light of changes in the gender dynamics underpinning international parental child abduction and the “transnational family” phenomenon. A literature review was undertaken of the sociology of transnational families in the context of international parental child abduction. A qualitative analysis of select Convention cases, where the family was transnational and the abduction was by the primary-carer mother, was also used to corroborate the sociological literature review. This demonstrates an emerging incompatibility between the quality of a child’s habitual residence and the achievement of the Convention’s original goals. Arguably this incompatibility means that we need to rethink the connecting factor’s appropriateness in those cases where its use does not achieve the Convention’s objectives.

In short, the test for determining a child’s habitual residence does not necessarily yield a jurisdiction that represents the child’s home environment. That is, an environment where they possess meaningful social, cultural and linguistic connections. The child’s habitual residence as a home environment of the nature anticipated by the Convention’s drafters is an increasingly out-dated construct. This is due to an increase in both the number of abducting primary-carer mothers, and their families’ growing mobility, as evidenced by the Australian Study of Hague Child Abduction Convention Outcomes. If the habitual residence does not provide the most

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appropriate moral and cultural framework for constructing the child’s best interests, then the action of sending them back there is misguided.\(^5\) This is especially the case if the child’s best interests are insufficiently examined post-return in the habitual residence. *The Australian Study of Hague Child Abduction Convention Outcomes* examines how the child’s best interests are examined post-return to Australia as the child’s habitual residence.

The Convention does not regulate the substantive parenting dispute. This is because of the belief that this dispute should be resolved within ‘the moral framework of a particular culture’.\(^6\) The Convention’s drafters perceived the existence of a link between the construction of a child’s identity, and the environment within their habitual residence immediately preceding their abduction.\(^7\) A determination of habitual residence is a pronouncement of which moral and cultural framework of best interests should apply to the child. It is intended to represent a decision about the jurisdiction in which the child’s identity predominately developed.

Arguably when a family leads a transnational lifestyle, examining their child’s connections to a physical state or jurisdiction can be a futile exercise. This thesis ultimately suggests an alternative approach. We can view the framework in which a child’s identity is constructed as the primary-care setting rather than a particular geographical space. Preservation of this home environment is of principal importance.

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\(^7\) Ibid.
to ensure a child’s stability; at minimum whilst the substantive parenting dispute is being resolved.

The second fundamental assumption was that the child’s best interests will be adequately assessed post-return to Australia. This assumption was tested by examining how the Australian equal shared parental responsibility and shared care statutory criteria\(^8\) are presently applied to formulate parenting arrangements for families whose experience fits with the phenomenon of international parental child abduction i.e. family violence, high levels of inter-parental conflict, and where one parent wishes to relocate. Existing research from the field of psychology was used to determine whether equal shared parental responsibility and shared care arrangements are a source of psychological stress for the children of families possessing these characteristics. *The Australian Study of Hague Child Abduction Convention Outcomes* also establishes the contestability of this assumption by considering its effect on families that have experienced international parental child abduction. This was achieved by an empirical examination of the impact of equal shared parental responsibility and shared care, on families that resolve their parenting dispute post-return to Australia under the Convention.

*The Australian Study of Hague Child Abduction Convention Outcomes* demonstrates that the equal shared parental responsibility and shared care statutory criteria guide the exercise of judicial discretion to determine a child’s best interests, towards a parenting arrangement that is incompatible with the lifestyle lead by transnational families. The notion of equal shared parental responsibility and shared care urges

\(^8\) Contained in Part VII of the *Family Law Act 1975* (Cth).
outcomes that are incompatible with the lives of families that have experienced international parental child abduction. Participants in the *Australian Study of Hague Child Abduction Convention Outcomes* revealed that the level of inter-parental conflict in the cases they had acted was sufficiently high in 103 of 115 cases to require a final order to determine the parenting arrangement. These parenting disputes are complex, generally requiring a final order outcome due to the presence of entrenched inter-parental conflict. The potential for these cases to be resolved with a private agreement appears minimal. Post-return to Australia abducting primary-carer mothers are censured for their act of abduction. *The Australian Study of Hague Child Abduction Convention Outcomes* showed that 28.3% of post-return Part VII final order cases resulted in 50% shared care or a change in the primary-care status. Whilst in 60.6% of the final order cases the abducting primary-carer mother’s contact with the child was decreased to some extent.

*The Australian Study of Hague Child Abduction Convention Outcomes* identified some of the circumstances experienced by abducting primary-carer mothers and their children post-return to Australia. The study’s participants acting in post-return Part VII cases said that 53.1% of the abducting primary-carer mothers did not possess the substantive rights associated with Australian citizenship. Similarly participants who had acted in Convention return proceedings reported that 62.1% of the abducting primary-carer mothers did not hold Australian citizenship. The effect of an absence of these rights post-return is exacerbated by the fact that equal shared parental responsibility and shared care may mean that they were compelled to reside in Australia under this status if they wished to be with their child.
The Australian Study of Hague Child Abduction Convention Outcomes also showed that primary-carer mothers have very specific motivations for abduction. The study’s participants who had acted in Convention return proceedings reported that these mothers abduct because of: a desire to return to their homeland (72.7%); a desire to regain a family and/or social support network (63.6%); a desire to escape domestic violence (45.5%); and a desire to improve their economic situation (36.4%). These women are placed in a precarious position if they are compelled to remain in Australia post-return, due to the application of equal shared parental responsibility and shared care. Although deprived of substantive rights, the application of equal shared parental responsibility and shared care may mean that they are compelled to live in a specific geographical place: the jurisdiction that happened to be the child’s habitual residence immediately preceding the abduction.

In conclusion the Convention’s prompt return process and the application of equal shared parental responsibility and shared care post-return, can create artificial jurisdictional links and living arrangements, rather than prevent them. The application of equal shared parental responsibility and shared care, in cases where the abducting parent is the child’s primary-carer mother, may alter the pre-existing primary-care arrangement. It may also restrict freedom of movement. This compels the primary-carer mother and child to live in one geographical space, even if they have few meaningful connections there. This is because the father has elected to reside in this jurisdiction. It is important to recognise that this conclusion applies equally to cases where the father is the child’s primary-carer and the left-behind mother has elected to reside in Australia.
In cases where the family has been leading a transnational lifestyle prior to the child’s abduction, the formulation of an equal shared parental responsibility and shared care arrangement fails to value the pre-existing primary-care setting. Arguably this setting is integral to the child’s continued stability, development and general wellbeing. Equal shared parental responsibility and shared care does not accommodate transnational families’ unique circumstances and needs post-return to Australia. The Convention operating together with equal shared parental responsibility and shared care, combat the problem of international parental child abduction by compartmentalizing the lives of transnational families using state boundaries. This paradigm is ill-suited to managing these families’ social interactions.
APPENDIX ONE

INVITATION EMAIL AND INFORMATION SHEET

We are inviting you to take part in a survey of Australian family law practitioners who have acted in Part VII case/s where there was a history of international or domestic unilateral parental child removal. We are also seeking your views if you have experience in Hague Convention on Civil Aspects of International Child Abduction return order cases.

The nature of unilateral parental child removal presents distinct challenges for Australian law makers. This survey will examine parenting arrangements post return from a unilateral parental child removal. How often do parties litigate their dispute in Part VII proceedings post return? How do primary carer taking parents fare in post return Part VII final orders or parenting agreements? What informal parenting arrangements exist post return? These are some of the difficult and timely questions this survey will answer.

We have identified you as a Family Law Barrister/Solicitor whose experiences and views we are particularly interested in. We expect the survey to take you approximately 10 to 20 minutes depending on your experiences. You will access this survey anonymously.

We invite you to click on the below link to access this study’s Information Sheet and the online survey.


Thank you in advance for your time and participation.

Yours faithfully

Danielle Odhiambo
WHO IS DOING THIS RESEARCH?

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WHY IS THIS RESEARCH IMPORTANT?

With a growth in cross cultural and bi-national spousal relationships and ease of movement across both international and interstate borders, comes an increase in the incidence of unilateral parental child removal. Post separation primary carers may unilaterally remove their child/ren because of a desire to re-establish a social support network, pursue employment opportunities, or develop a new relationship. Hinging on the ultimate outcome of these parenting disputes is the child/ren’s best interests and each party has so much to lose.

The complex nature of international and interstate parental child removal presents distinct challenges for our law makers. The parenting disputes our courts are called upon to adjudicate, and the private parenting agreements parties may reach post return from a unilateral removal, are inherently complicated.

This survey seeks to determine what happens to parenting arrangements post return from a unilateral parental child removal.

How often do parties litigate their dispute in Part VII proceedings post return? How do primary carer taking parents fare in post return Part VII final orders or parenting agreements? What informal parenting arrangements exist post return? These are some of the difficult and timely questions this survey will answer.

WHO ARE WE ASKING TO PARTICIPATE?

We are inviting you to take part in a survey of family law practitioners if you have acted in a Part VII case/s where there was a history of either international or domestic unilateral parental child removal. We are also seeking your views if you have experience in Hague Convention on Civil Aspects of International Child Abduction.
WHAT YOU WILL BE ASKED TO DO

Participating in this study involves clicking on the "next" button at the bottom of this page and completing the online survey. We expect the survey to take you approximately 10 to 20 minutes depending on your experiences.

Although this survey is a number of pages long you will not be required to complete every page. The online survey will automatically skip over questions that are not relevant to you depending on your answers.

You do not have to take part in this survey if you do not want to and you can change your mind at any time before you submit your completed survey.

PROTECTING YOUR CONFIDENTIALITY

We have identified you online as a family law practitioner whose experiences and views we are interested in due to your membership to a Legal Practitioners' Association.

You will access this survey anonymously. If you choose to complete this survey we will not be able to identify you unless you complete the last two questions which are optional.

If you complete the last two questions which ask whether you would like us to send you the study's findings and if you are happy for us to contact you for further discussions, the contact details you voluntarily provide will be stored in a locked filing cabinet at the Griffith University Socio-Legal Research Centre and destroyed after a 5 year period.

The PhD researcher's thesis and any publication of the study's findings will not identify participants either directly or by inference. The survey itself does not ask you for information which identifies your clients.

DO YOU HAVE ANY QUESTIONS?

We are happy to answer any questions you may have. Please do not hesitate to contact the PhD researcher Danielle Odhiambo at Griffith University's Socio-Legal Research Centre on 07 3735 4480 or d.odhiambo@griffith.edu.au. You may also contact the chief investigators listed at the top of this information sheet.

IF YOU HAVE A COMPLAINT

Griffith University carries out research in line with the National Statement on Ethical Conduct in Research Involving Humans. If you have any concerns or complaints
about the ethical conduct of this study you should contact the Manager, Research Ethics on (07) 3735 5585 or research-ethics@griffith.edu.au.

FEEDBACK TO YOU

This online survey will close in 6 weeks and the study's results will be completed by January 2010. If you would like us to email you the findings please provide us with your email address in the space provided at the end of the survey.

BY CLICKING ON THE "NEXT" BUTTON AT THE BOTTOM OF THIS PAGE AND COMPLETING THIS SURVEY I AM AGREEING TO TAKE PART.

BY COMPLETING THIS SURVEY I AM SAYING THAT:

1. I understand that the aim of this study is to explore the experiences of family law practitioners in order to determine what happens to parenting arrangements post return from a unilateral parental child removal.

2. I have read the above information titled 'Information Sheet' and understand that if I have any questions at any time I can contact the PhD researcher or the chief investigators.

3. I have read the section in the information sheet titled 'protecting your confidentiality' and have had any questions answered to my satisfaction.

4. I understand that I do not have to take part in this study if I do not want to and that I can change my mind at any time before submitting the completed survey without giving a reason.

5. I understand that I can contact the Manager, Research Ethics, at Griffith University Human Research Ethics Committee on (07) 3735 5585 or research-ethics@griffith.edu.au if I have any concerns about the ethical conduct of the project.

This study is being conducted by the PhD researcher as part of her Doctor of Philosophy Degree at the Griffith University Socio-Legal Research Centre. The chief investigators are supervising her PhD program.
APPENDIX TWO

A STUDY OF OUTCOMES POST-RETURN TO AUSTRALIA UNDER THE HAGUE CHILD ABDUCTION CONVENTION FOR ABDUCTING PRIMARY-CARER MOTHERS AND THEIR CHILDREN

PART A

1. What is your gender?
   Tick one:
   - Female
   - Male

2. For how many years have you been practising family law?
   - 1 – 2 years
   - 3 – 5 years
   - 6 - 9 years
   - 10 or above

3. What percentage of your work is family law?
   - 1 – 25%
   - 26% - 50%
   - 51% - 75%
   - 76% or above

4. Are you an accredited family law specialist?
   - Yes
   - No

5. Are you a solicitor or barrister?
   - Solicitor
   - Barrister
6. How many legal practitioners work in your firm?
   - 1
   - 2 - 5
   - 6 - 14
   - 15 and over

7. Where is your firm located?
   - in a rural area
   - in a regional centre
   - in a capital city

This survey is divided into 3 parts.

You will only be directed to complete the parts that are relevant to your experiences.

Part B is about Part VII cases where the prior unilateral child removal was handled under the Hague Child Abduction Convention.

Part C is about Part VII cases where the prior unilateral child removal was >500kms within Australia.

Part D contains questions for those who have acted in Hague Child Abduction Convention return order proceedings.

IMPORTANT - We are only interested in cases where the unilateral child removal was by the child/ren’s PRIMARY CARER MOTHER.

8. Have you acted in Part VII case/s where there was a history of unilateral parental child removal?
   - Yes
   - No

9. In any of these cases was the child/ren’s return from the unilateral removal (prior to the Part VII case you acted in) handled under the Hague Child Abduction Convention?

Please include cases where a return order was granted OR where the left-behind parent initiated a return order application but the parties then negotiated return without the order being made.

   - Yes
   - No
PART B

We will now ask you about Part VII cases where the prior unilateral removal was handled under the Hague Child Abduction Convention. Here we are considering cases where, prior to the Part VII case you acted in, the child/ren was/were removed from, and then returned to, Australia. We know that this is a situation where you almost certainly would not have acted in the Hague Child Abduction Convention matter, but you acted in the Part VII case post return.

REMEMBER we are only interested in cases where the prior unilateral removal was by the child/ren’s primary carer mother.

10. How many of these cases have you acted in?

11. We would like to know the immigration status of primary carer taking parents post return to Australia.

In your cases how many taking parents fell into the categories listed below?

For example: 3
Australian citizen
Australian permanent resident
On a temporary Australian visa
Could not re-enter Australia as had no valid visa
Unsure

12. How many of your post Hague return Part VII cases resulted in a final court order (do not include registered parenting agreements)?

13. Listed below are a number of possible final Part VII court orders. Please specify how many cases fell into each category.

For example: 3
The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same as before the unilateral removal.
The child/ren continued to live with the primary carer taking parent and the other parent’s contact increased.
The child/ren continued to live with the primary carer taking parent and the other parent’s contact decreased.
A 50% shared time order was made.
The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.
The child/ren changed to living with the left-behind parent and the once primary carer taking parent did not have contact.
The primary carer taking parent was able to relocate back overseas with the child/ren by consent.
The primary carer taking parent was able to relocate back overseas with the child/ren by court order.
Other

14. In any of these cases, do you believe the prior unilateral removal affected the court’s decision?
☐ Yes
☐ No

If yes, how did it affect the decision/s?

15. In how many cases did the primary carer taking parent make a relocation application in the post-return Part VII proceedings?

16. If in any of your cases the court refused the primary carer taking parent’s relocation application in the post-return Part VII proceedings, why in your opinion did they?
☐ Relocation overseas would adversely affect the child/ren’s ability to maintain a meaningful relationship with the left-behind parent.
☐ The prior unilateral removal indicated an unwillingness on the taking parents part to encourage a meaningful relationship between the child/ren and the left-behind parent.
☐ Other (please explain)

17. How many of your cases resulted in a registered or unregistered parenting agreement about who the child/ren would live with and where, post return to Australia?

18. Listed below are a number of possible parenting agreements. Please specify how many cases fell into each category.

For example: 3
The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same as before the
unilateral removal.

The child/ren continued to live with the primary carer taking parent and the other parent’s contact increased.

The child/ren continued to live with the primary carer taking parent and the other parent’s contact decreased.

A 50% shared time agreement was reached.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent did not have contact.

The primary carer taking parent was able to relocate back overseas with the child/ren.

Other

19. If in any of your cases the primary carer taking parent DID NOT seek to relocate back overseas with the child/ren post return to Australia why, in your view, didn’t they?

☐ emotional fatigue

☐ a belief that they would be unsuccessful because of their previous unilateral removal

☐ the financial cost

☐ a fear of losing residence of the child/ren if they made a relocation application

☐ a fear that the court would deny their relocation application and increase the other party’s contact with the child/ren

☐ a lack of awareness that they could make a relocation application

☐ Other (please explain)

PART C

We will now ask you about Part VII cases where the prior unilateral parental child removal was within Australia (>500km).

REMEMBER we are only interested in cases where the prior unilateral removal was by the child/ren’s PRIMARY CARER MOTHER.

20. Have you acted in Part VII case/s where there was a history of unilateral parental child removal within Australia (>500km)?

☐ Yes

☐ No
21. How many of these cases have you acted in?

22. How many of these Part VII cases resulted in a final court order (do not include registered parenting agreements)?

23. Listed below are a number of possible final Part VII court orders. Please specify how many cases fell into each category.

For example: 3
THE PRIMARY CARER TAKING PARENT WAS ABLE TO RELOCATE WITH THE CHILD/REN AND: The non-primary carer parent’s contact became less frequent for longer periods and/or provided for contact other than face to face.

The non-primary carer parent’s contact ceased.

THE PRIMARY CARER TAKING PARENT WAS NOT ABLE TO RELOCATE WITH THE CHILD/REN AND: The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same as before the unilateral removal.

The child/ren continued to live with the primary carer taking parent with an increase in the other parent’s contact.

The child/ren continued to live with the primary carer taking parent with a decrease in the other parent’s contact.

A 50% shared time order was made.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had no contact.

24. In any of these cases, do you believe the prior unilateral removal affected the court’s decision?

Yes

No

If yes, how did it effect the decision/s?

We are still looking at the Part VII cases you have acted in where the prior unilateral parental child removal was within Australia (>500km).

25. How many of your cases resulted in a registered or unregistered parenting agreement about who the child/ren would live with and where?
26. Listed below are a number of possible parenting agreements. Please specify how many cases fell into each category.

For example: 3  
THE PRIMARY CARER TAKING PARENT WAS ABLE TO RELocate WITH THE CHILD/REN AND: The non-primary carer parent’s contact became less frequent for longer periods and/or provided for contact other than face to face.  
The non primary carer parent’s contact ceased.

THE PRIMARY CARER TAKING PARENT WAS NOT ABLE TO RELOCATE WITH THE CHILD/REN AND: The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same as before the unilateral removal.  
The child/ren continued to live with the primary carer taking parent with an increase in the other parent’s contact.

The child/ren continued to live with the primary carer taking parent with a decrease in the other parent’s contact.

A 50% shared time order was made.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had no contact.

PART D

We will now ask you about Hague Child Abduction Convention return order applications and proceedings.

Please include cases where;
1. A return order was granted.
2. The left-behind parent initiated a return order application but the parties then negotiated return without the order being made.
3. The left-behind parent initiated a return order application but it was then withdrawn.

27. Have you acted in a Hague Child Abduction Convention return order case? Please include cases where the child/ren was/were removed FROM or TO Australia.

☐ Yes
☐ No

28. How many Hague Child Abduction Convention return order cases have you acted in?

255
29. In your experience what are the main reasons why primary carer parents unilaterally remove their child/ren?

- [ ] a desire to return to their homeland
- [ ] a desire to improve their economic situation
- [ ] a desire to regain a family and/or social support network
- [ ] a desire to deprive the left-behind parent of contact with the child/ren
- [ ] a desire to escape domestic violence
- [ ] Other (please explain)

30. In the Hague Child Abduction Convention case/s you have acted in, approximately what percentage of the taking parents were primary carer mothers?

- [ ] 1 to 25%
- [ ] 26 to 50%
- [ ] 51 to 75%
- [ ] 76 to 100%

31. How many Hague Child Abduction Convention return order cases have you acted in where the child/ren was/were returned TO Australia?

We realize that your involvement was most likely advising a left-behind parent. Please include cases where a return order was granted OR where the left-behind parent initiated a return order application but the parties then negotiated return without the order being made.

32. We would like to know the immigration status of primary carer taking parents post return to Australia. In your cases how many taking parents fell into the categories listed below?

For example: 3

- Australian citizen
- Australian permanent resident
- On a temporary Australian visa
- Could not re-enter Australia as had no valid visa

33. To your knowledge how many of your Hague return cases resulted in a final Part VII court order post-return to Australia (do not include registered parenting agreements)?
34. Listed below are a number of possible post return final Part VII court orders. Please specify how many cases fell into each category.

For example: 3
THE PRIMARY CARER TAKING PARENT WAS ABLE TO RELOCATE BACK OVERSEAS AGAIN WITH THE CHILD/REN AND: The non-primary carer parent’s contact became less frequent for longer periods and/or provided for contact other than face to face.

The non-primary carer parent’s contact ceased.

THE PRIMARY CARER TAKING PARENT DID NOT RELOCATE BACK OVERSEAS AGAIN WITH THE CHILD/REN AND: The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same as before the unilateral removal.

The child/ren continued to live with the primary carer taking parent with an increase in the other parent’s contact.

The child/ren continued to live with the primary carer taking parent with a decrease in the other parent’s contact.

A 50% shared time order was made.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent had no contact.

35. To your knowledge how many of your Hague return cases resulted in a registered or unregistered parenting agreement about who the child/ren would live with and where, post return to Australia?

36. Listed below are a number of possible parenting agreements. Please specify how many cases fell into each category.

For example: 3
THE PRIMARY CARER TAKING PARENT RELOCATED BACK OVERSEAS AGAIN WITH THE CHILD/REN AND: The non-primary carer parent’s contact became less frequent for longer periods and/or provided for contact other than face to face.

The non primary carer parent’s contact ceased.

THE PRIMARY CARER TAKING PARENT DID NOT RELOCATE BACK OVERSEAS AGAIN WITH THE CHILD/REN AND: The child/ren continued to live with the primary carer taking parent and the other parent’s contact remained the same.
as before the unilateral removal.

The child/ren continued to live with the primary carer taking parent with an increase in the other parent’s contact.

The child/ren continued to live with the primary carer taking parent with a decrease in the other parent’s contact.

A 50% shared time agreement was made.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent now had contact.

The child/ren changed to living with the left-behind parent and the once primary carer taking parent had no contact.

37. If in any of your cases the primary carer taking parent DID NOT seek to relocate back overseas with the child/ren post return to Australia why, in your view, didn’t they?

☐ emotional fatigue

☐ a belief that they would be unsuccessful because of their previous unilateral removal

☐ the financial cost

☐ a fear of losing residence of the child/ren if they made a relocation application

☐ a fear that the court would deny their relocation application and increase the other party’s contact with the child/ren

☐ a lack of awareness that they could make a relocation application

☐ Other (please explain)

38. Do you think that the Hague Child Abduction Convention’s return mechanism works in the best interests of child?

39. Are you happy for us to contact you to further discuss your answers and views?

☐ Yes

☐ No

If yes, please provide the most appropriate email address or phone number for us to contact you on
40. If you would like us to email you our findings when the study is completed at the start of 2010 please provide your email address below.

Thank you for sharing your experiences with us.
We greatly appreciate your time and participation.
The survey is now complete.
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