International Academy of Family Lawyers

IAFL Family Law Symposium

Tuesday 29th May 2018
Room 507, 5th Floor, Building No.9
Waseda University, Tokyo

We warmly welcome you to the IAFL Family Law Symposium at Waseda University

早稲田大学**IAFL**家族法シンポジウムにお越しいただき、
誠にありがとうございます

WIFI DETAILS
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Security key (B): n8T4oaV6

International Academy of Family Lawyers

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IAFL Family Law Symposium
Education Program
Waseda University, Tokyo
Tuesday 29 May 2018

9:00-9:30:	**Registration**
9:30-9:45	**Welcoming Remarks** – Laura Dale (Texas, USA)
9:45-10:15	**The 1980 Hague Abduction Convention: An Introduction and Overview** Shuji Zushi, Director, Hague Convention Division, Ministry of Foreign Affairs of Japan
10:15-11:30	**Enforcement of Return Orders under The Hague Abduction Convention** Panel: Anne-Marie Hutchinson OBE QC (Hon) (England), Ian Kennedy AM (Australia), Jeremy Morley (New York, USA), Ayako Ikeda (Japan)
11:30-11:45	**Coffee**
11:45-13:15	**The Marital Estate: How to locate and divide foreign assets** Panel: John Spender (Australia), William Longrigg (England), Charlotte Butruille-Cardew (France)
13:00-14:00	**Lunch**
14:00-15:00	**Enforcement of Japanese divorce, custody and child support orders abroad: Case Studies by Jurisdiction** Panel: Sandra Verburgt (Netherlands), Susan Myres (Texas, USA), Makiko Mizuuchi (Japan),
15:00-15:15	**Coffee**
15:15-16:05	**International Relocation of Children: A comparative overview of child relocation cases** Panel: Carolina Marín Pedreño (England), Laura Dale (Texas, USA), Amanda Humphreys (Australia), Poonam Mirchandani (Singapore)
16:05-16:25	**Religious Courts: An overview of divorce and custody issues in non-secular judicial systems** Ed Freedman (Israel)
16:25-16:45	**Questions & Answers**
16:45-17:00	**Closing Remarks** – Laura Dale (Texas, USA)

SYMPOSIUM SPONSORS

IAFL are very grateful to the symposium sponsors for making this event both viable and accessible to International Family Lawyers from all around the world, especially the Japanese delegates for whom simultaneous translation has been arranged. The sponsors are:

[Daiichi Tokyo Bar Association]

[Daini Tokyo Bar Association]

[Tokyo Bar Association]

IAFL Family Law Symposium

SPEAKER PROFILES

CHARLOTTE BUTRUILLE CARDEW

Partner
CBBC Avocats

Paris, France

www.cbbc-avocats.com

Charlotte is partner and co-founder of the firm CBBC.

Before starting CBBC, Charlotte worked in London and Paris Business Law, then family law and heritage. She has particularly focused her work towards international affairs with complex financial issues in family law. She has developed a particular expertise in prenuptial agreements, international civil partnerships and the Board or the litigation involving wealth structuring.

Charlotte emphasizes teamwork as well as listening and talking in order to understand the specific needs of each client and to work in the best interests of everyone.

Accredited Practitioner and Trainer in collaborative law, alternative dispute resolution technique based on integrative negotiation, introduced in France in 2007, Charlotte has also developed a real expertise in such international negotiations, and thus can provide her clients with a tailored alternative, fast and discreet.

She works in both French and English.

She is a member of many international organizations, working closely with universities and also teaching.

LAURA DALE

Laura Dale & Associates PC

Houston, Texas, USA

www.dalefamilylaw.com

Laura Dale is Board Certified in Family Law by the Texas Board of Legal Specialization. Her practice is concentrated in the area of family law involving high conflict divorce, high net worth property division, both domestic and foreign, property valuation, custody cases, international child abduction brought under The Hague Convention and complex multijurisdictional family law disputes. Ms. Dale is a Fellow of the International Academy of Family Lawyers and a USA Delegate on the Board of Governors of the organization. She is fluent in French and provides support services in Spanish.

Laura is a certified mediator, a certified collaborative law attorney, and a certified parenting coordinator under the Texas parenting coordinator statute. She received her JD from South Texas College of Law and is licensed by the Texas Supreme Court, and admitted to practice in the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, the Tenth Circuit Court of Appeals, the Texas Eastern District Court, the Texas Northern District Court, the Texas Southern District/Bankruptcy Court, the Texas Western Bankruptcy Court, and the Texas Western District Court.

Areas of Practice:

- Complex family law litigation
- High net worth property division and valuation – domestic and international
- Foreign asset division – domestic and international
- Complex jurisdictional disputes in family law matters
- Child abduction suits under The Hague Convention in federal and state courts
- Appeals in state court involving family law issues and Hague issues in federal and state courts
- Complex premarital and marital agreements involving questions of jurisdiction and enforcement
- Probate matters involving family law issues (bifurcated property division issue in foreign courts and marital agreement enforceability issues.
-

EDWIN FREEDMAN

Tel Aviv, Israel

www.edfreedman.com

Graduated from Rutgers-Newark School of Law, 1973. Admitted to the Bar of New York and Israel.

Employed for three years in the New York City Family Courts as an Assistant Corporation Counsel of the City of New York.

Private practitioner in Tel Aviv, Israel since 1980.

Represented the Israel Bar Association in all legislative matters in the Knesset, 1998-2012.

Member of the International Academy of Family Lawyers, Board of Governors; Chair of the Amicus Brief Committee.

International correspondent of the journal: International Family Law Journal, Jordan Publishing, UK.

Participated in the 2nd-7th Special Commissions on the implementation of the Hague Convention on Child Abduction in The Hague.

Contributed the chapter on Israeli Law for the book; **Family Law: Jurisdictional Comparisons**, Thomson Reuters, UK, ed. James Stewart, second edition, 2013.

Contributed the chapter on Israeli Law for the book; **International Relocation of Children**, Thomson Reuters, UK, ed. Anna Worwood, 2016

Authored the article: Rights of Custody: State Law or Hague Law? Published in the book- **The 1980 Hague Abduction Convention: Comparative Aspects**, Wildy, Simmonds & Hill Publishing.

Appear as court appointed expert witness in many cases involving international family law issues.

AMANDA HUMPHREYS

Special Counsel and Accredited Family Law Specialist
MST Lawyers

Melbourne, Australia

www.mst.com.au

Amanda Humphreys is a Special Counsel lawyer with MST Lawyers, Melbourne, Australia and an accredited family law specialist. She is a fellow of the International Academy of Family Lawyers (IAFL), a member of the AFCC (Association of Family and Conciliation Courts) and a member of MiKK (supporting the mediation of cross border disputes).

Amanda has worked exclusively in the area of family law for more than 17 years, including in respect of complex parenting, property and financial matters. In addition to her work in domestic cases, she has worked extensively in the field of international family law, including in jurisdictional disputes, child abduction proceedings, international relocation and parenting cases, with the registration of overseas orders and the making of "mirror orders", international child support and maintenance issues and cross national property matters. In 2015, Amanda participated in cross border mediation training in Japan (as a lawyer, rather than a mediator) with a focus on the mediation of Japanese Australian family disputes and particularly child abduction cases, and an initiative to support the mediation of such disputes. Amanda has written and co authored a number of published articles in relation to international family law issues, was a contributor to the International Parental Child Abduction Legal Resource published by the Family Law Section of the Law Council of Australia in 2015, and regularly presents sessions on international family law issues in Australia and overseas.

ANNE-MARIE HUTCHINSON
OBE, QC (Hon)

Head of the Children Department
Dawson Cornwell

London, England

www.dawsoncornwell.com

Anne-Marie was admitted in 1985 and in 1988 joined Dawson Cornwell, one of the UK's leading family law firms, as Head of the Children Department. She is consistently named as one of the leading family lawyers in London in both Chambers and The Legal 500 and is singled out as a "star individual" in Chambers for cross-border disputes.

Anne-Marie specialises in all aspects of domestic and international family law and the international movement of children. She has expertise in divorce and jurisdictional disputes, with particular expertise in international custody disputes, child abduction (Hague and non-Hague), the EU Regulation on jurisdiction in family matters, relocations, children's law private and public, forced marriage and international adoption and surrogacy.

Anne-Marie is accredited by Resolution as a specialist family lawyer with specialisms in child abduction and children law, forced marriage and honour based violence. She was awarded the inaugural UNICEF Child Rights Lawyer award in 1999. She received an OBE for her services to international child abduction and adoption in the 2002 Queen's New Year's Honours List. In 2004 she was selected as Legal Aid Lawyer of the Year for her work with the victims of forced marriage. In 2010 she received the IBA Outstanding International Woman Lawyer Award. In 2011 she received a True Honour Award from IKWRO. In 2012 she was awarded an "Albert" by the Albert Kennedy Trust in recognition of her work on an international level in defending the human rights of young LGBT people. She was also presented by Jordans Family Law with the International Family Lawyer of the Year 2012 award and was awarded the prestigious IAFL President's Medal in 2014. Anne-Marie was appointed Queens Counsel honoris causa in 2016 and received an honorary doctorate of laws from the University of Leeds in 2016.

Anne-Marie is the Parliamentarian of the International Academy of Family Lawyers, chair of the Board of Trustees of Reunite: International Child Abduction Centre and past chair of the Women's Lawyers' Interest Group of the International Bar Association. She is a Founding Fellow of the International Surrogacy Forum, a Founding Member of the UK LGBT Family Law Institute, a Fellow of the American Academy of Assisted Reproduction Technology Attorneys and co-chair of the IAFL Surrogacy and ARTS Committee. She is a member of the National Commission on Forced Marriage at the House of Lords and an appointed panel member of the Government Review on Sharia Law in England and Wales. She is a member of numerous associations and committees and she is a member of the Central Authority Panel of Hague Lawyers.

She is a regular speaker and lecturer both within the United Kingdom and abroad and has made numerous television appearances. She is an international correspondent for "International Family Law" (Jordans) and she is joint author of the text book "International Parental Child Abduction". She sits on the Editorial Board of the Child and Family Law Quarterly (Jordans).

AYAKO IKEDA

Attorney-at-law Senior Counsel,
Mori Hamada & Matsumoto

Tokyo, Japan

www.mhmjapan.com/en/

Education
University of Tokyo (LL.B., 1982)
London University (LL.M., 1985)
with Steptoe & Johnson (1990-1992)
Georgetown University Law Center (LL.M., 1991)

Legal Practice
admitted in Japan, April 1984; New York, 1991
Professor at The Legal Training and Research Institute
(Affiliated to the Supreme Court of Japan, 2002-2005)
Deputy Secretary General of Japan Federation of Bar Associations (2006-2008)
Director of Public Relations Office of Daini Tokyo Bar Association (2009-2011)
Vice President of Daini Tokyo Bar Association (2015)
Member of Information Disclosure and Personal Information Protection Review Board, Ministry of Internal Affairs and Communications (April 2010 to date)
Fellow of International Academy of Matrimonial Lawyers

Major Practice Area
International Dispute Resolution
Family Law with International Aspects

INFORMATION ON INTERNATIONAL FAMILY LAW ISSUES
Member of Hague Convention Working Group of Japan Federation of Bar Associations
Member of Hague Convention Mediation Project Team of Japan Association of Arbitrators
Member of Committee on Family Law Legislation of Japan Federation of Bar Associations

Ayako Ikeda has been practicing family law for more than 33 years

IAN KENNEDY AM

Senior Partner
Kennedy Partners

Melbourne, Australia

www.kennedypartneslawyers.com.au

Membership of Professional Associations:

Fellow:	International Academy of Family Lawyers
Member:	Family Law Section, Law Council of Australia
	Family Law Section, Law Institute of Victoria
	LawAsia Family Law and Family Rights Section
	Medico-Legal Society of Victoria
Associate Member:	Family Law Section, New Zealand Law Society

Previous Positions

President:	International Academy of Matrimonial Lawyers (2008 -201 0) Chair: Family Law Section, Law Council of Australia (2005 -2008)
Foundation President:	Family Lawyers Association of Victoria (1977 -1984)
Executive Member:	Family Law Section, Law Council of Australia (1988-2016) International Bar Association Family Law Committee (2002 - 2005)
Director:	Australian Institute of Family Law Arbitrators & Mediators
Editor:	*Australian Family Lawyer*(1988 -2016) Family Law Notes, Australian Law News (1988 -1994)
Contributing Editor:	*Australian Superannuation Law Bulletin* (1990-1996)

Other

- Lectures widely on family law and related issues nationally and internationally; author of and contributor to numerous articles, papers and publications on legal and associated topics.
- Described in *Legal Profiles* as "very highly regarded by his fellow practitioners both in Australia and overseas" and "especially held in high esteem for handling difficult and complex matters." Recognised in *Doyle's Guide to the Australian Legal Profession* as "Pre-eminent", with his expertise as "Australia's best" on cross-border matters "widely noted".

Honours and Awards

- Appointed a Member of the Order of Australia (AM) in the 2004 Australia Day Honours List for services to law, continuing legal education and national and international professional organisations.
- Received the inaugural Law Institute of Victoria President's Award in November 2004 for outstanding contributions by a practitioner in specialised practice which promote and advance the legal profession and benefit the community.
- Awarded Law Council of Australia President's Medal for 2015 for outstanding contributions to the development of family law and professional standards in both the Australian and international legal communities.
- Awarded International Academy of Family Lawyers Presidents' Medal 2016 honouring world-wide influence on family law practice.
- Life Membership, Family Law Society. Law Council of Australia 2016.

WILLIAM LONGRIGG

Partner
Charles Russell Speechlys

London, England

www.charlesrussellspeechlys.com

William specialises in divorce, financial relief (to include pre-nuptial and postnuptial agreements) and private law children cases. William is the former head of the family sector at Charles Russell Speechlys and specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children matters. He also lectures on a range of family law issues including trusts and matrimonial breakdown and is a joint author with Sarah Higgins of Family Breakdown and Trusts for Butterworths. He has wide experience of cases with an international element and is Immediate Past President of the International Academy of Family Lawyers. William was named 2014 International Family Lawyer of the Year at the prestigious Jordans Family Law Awards and Family Lawyer of the Year 2016 at the Spears Wealth awards. William is ranked as a "leading individual" by Chambers & Partners and listed in the Honours List of Leading Lawyers in the Family & Matrimonial category of the Citywealth Leaders List 2013. He was ranked in the top 10 London Family Law solicitors by Spears Wealth Magazine in 2015 and 2017.

Carolina Marín Pedreño

Partner
Dawson Cornwell

London, England

www.dawsoncornwell.com

A Spanish Abogado who cross-qualified as a Solicitor in October 2006 and is a Partner with Dawson Cornwell. Specialises in jurisdiction disputes (divorce and children), child abduction, registration and enforcement of foreign contact orders, applications for leave to remove the jurisdiction, applications for residence and contact and public law cases (specifically with cross borders issues with Spanish speaking countries). Has been involved in landmark decisions in the High Court, Court of Appeal and Supreme Court of United Kingdom. Also represents applicants before the European Court of Human Rights. Is a frequent lecturer.

POONAM MIRCHANDANI

Partner
Mirchandani & Partners

Singapore

www.mirchandani.com.sg

The precedent partner of Mirchandani & Partners, Poonam Mirchandani, is an advocate and solicitor who has been in private practice for over 30 years with a significant part of this being in the areas of cross-border multi-jurisdictional and domestic family law matters. Poonam specializes in acting for expatriate clients, be it divorce involving high net worth clients, child custody issues, relocation applications, international child abduction cases under the Hague Convention, etc. She has specialized knowledge of international child abduction cases and has appeared before the Court of Appeal in two recent Hague Convention cases.

Poonam is an accredited Family Mediator with the Singapore Mediation Centre (SMC) and is on the SMC Family Panel, a panel accredited by the Singapore Family Justice Courts and SMC. She is also a Cross-Border Family Mediator trained by Mediation bei Internationalen Kindschaftskonflikten (MiKK), Berlin, Germany. She is a Collaborative Family Practitioner, a Parenting Coordinator as well as a Child Representative at the Family Justice Courts. She is also a member of the Family Law Practice Committee of the Law Society of Singapore, a Fellow of the International Academy of Family Lawyers and a Vice President of its Asia-Pacific Chapter.

Poonam has written a number of published articles in relation to international family law issues and spoken at international conferences on international family law issues.

MAKIKO MIZUUCHI

Partner
Mimosa International Law Office

Tokyo, Japan

http://familylaw.mimoza-law-office.net/

Makiko is a partner in Mimosa International Law Office, Saitama Prefecture, Greater Tokyo Area, Japan. She is a member of the International Academy of Family Lawyers (IAFL). She is also a member of Hague Convention Working Group of Japan Federation of Bar Associations (JFBA), Family Law Committee of (JFBA), and a Chair of the Foreigners' Rights Committee of Saitama Bar Association (since 2016).

Makiko practices all aspects of family law, with particular specialism in international family law, divorce and financial settlement with an international dimension, international custody disputes, Hague Convention, international child support and maintenance issues, and international inheritance.

Makiko was invited to the International Visitor Leadership Program (IVLP) in 2016 sponsored by the Department of the States, U.S., the title of which is "International Parental Child Abduction".

Makiko obtained B.A. from Faculty of Law, University of Tokyo, Tokyo, and Master of Laws, from Graduate School of Law, Hitotsubashi University, Tokyo

JEREMY D MORLEY

New York, USA

www.international-divorce.com
www.internationalprenuptials.com
www.internationalfamilylawfirm.com

Jeremy Morley concentrates exclusively on international family law. He works with clients around the world from New York, always with local counsel as appropriate.

Jeremy is the author of the treatise, *The Hague Abduction Convention: Practical issues and Procedures for Family Lawyers*, published by the American Bar Association. He is also the author of the treatise *International Family Law Practice*, published annually by West.

He is the former co-chair of the International Family Law Committees of the International Law Section of the ABA and of the New York State Bar Association.

He was born in Manchester, England, has taught in law schools in the United States, Canada and England, and frequently lectures on international family law topics to the judiciary, bar associations and other organizations.

Jeremy frequently appears as an expert witness in courts throughout the United States and in several other countries on international child abduction prevention and recovery issues, specifically including matters concerning the United States and also concerning Brazil, Bulgaria, China, Colombia, Costa Rica, Czech Republic, England, Egypt, France, Germany, Ghana, India, Indonesia, Italy, Japan, Jordan, Korea, Kuwait, Lebanon, Malaysia, Mexico, Morocco, Nepal, Pakistan, the Philippines, Poland, Qatar, Russia, Saudi Arabia, Syria, Singapore, Taiwan, Turkey, Venezuela and the UAE.

He has been a frequent guest on television and radio shows on the topic of international child abduction and international divorce law and has been featured in the print media on numerous occasions.

SUSAN MYRES

Senior Partner
Myres & Associates, PLLC
Houston, Texas

www.thehoustondivorcefirm.com

Professional Experience

- Myres & Associates PLLC | Houston, Texas Owner, 2011-present
- Texas Board of Legal Specialization in Family Law | Texas, 1988
- Admitted to the State Bar | Texas, 1982
- Admitted to the United States District Courts:
  - The Northern District of Texas, The Southern District of Texas, U.S. Court of Appeals 5th Circuit, The Supreme Court of Texas

Education

- University of Houston Law Center | Houston, Texas J.D., 1982
- University of Kansas | Lawrence, Kansas B.S., 1979

Honors and Awards

- Selected as Texas Super Lawyer | 2006 - present
- David A. Gibson Award for Professionalism and Excellence in the Practice of Family Law, Presented by the Gulf Coast Family Law Specialists | 2016

Memberships

- American Academy of Matrimonial Lawyers | Fellow since 1998
  - Vice President 2012 – present, AAML Foundation Life Time Member – present
  - Other positions held: Secretary 2010 – 2012; National Test Committee Chair 2010 - 2011 Membership Chair 2005 – 2010; Board of Governors At-Large Member 2007 - 2010 President of Texas Chapter 2008 – 2009,
- International Academy of Matrimonial Lawyers | Fellow since 2005
  - USA Board of Managers 2012 – present
  - Other positions held: Secretary 2011 – 2012; Chapter Vice President 2006 - 2011
- Texas Board of Legal Specialization | Family Law Advisory Commission Other positions held: Member 2006 – 2011; Chair 2011
- Texas Academy of Family Law Specialists | Member since 1989
- Texas Bar Foundation | Member since 1990
- College of the State Bar | Member since 1993
- Houston Bar Association - Family Law Section | Member since 1983
  Other positions held: Chair 2000-2001
- Collaborative Family Lawyers of Houston | 2011 – present
- Gulf Coast Family Law Specialists | Board member 1999 - 2005 and 2011 - present; Member since 1989
- Burta Rhodes Raborn – Family Law - Inns of Court | Master since 1998
  Other positions held: Chair 2003
- Association of Women Attorneys | Member since 1982
  Other positions held: President – 1987
- Association of Women Attorneys Foundation | Founder
  Other positions held: Treasurer 1993-1999
- American and Texas Bar Associations – Family Law Sections | Members since 1983

Other

Presented numerous papers and lectures regarding family law, litigation, international family law matters; alternative family law issues; insurance, mediation, mental health issues; child abuse; and professional responsibility. Active in church community. Married, mother of a college student.

JOHN SPENDER

Principal
Kennedy Partners

Melbourne, Australia

www.kennedypartneslawyers.com.au

John Spender was admitted as a lawyer in New South Wales in 1992 and in Victoria in 1993, and has practised in family law ever since. He was accredited by the Law Institute of Victoria (LIV) as a specialist practitioner in family law in 2003. He joined the specialist family law practice, Kennedy Partners, in 2007, and became a partner of the firm in 2012. He has expertise in all aspects of family law, including parenting and financial matters, and has worked significantly in the area of international family law. He is an active member of committees of the Family Law Section of the LIV since 2003, including a member of the Executive Committee since 2011 and Chair of the Maintenance and Property Sub-Committee since 2011. John has written or co-authored a number of papers and has presented at continuing legal education seminars (both in Australia and overseas) since 2009. He has worked as a consultant editor for precedents with LexisNexis and has previously marked and taught within the Family Law and Practice elective of the Australian National University's Graduate Diploma in Legal Practice course. He is also a Fellow of the International Academy of Matrimonial Lawyers and, since 2016, has been recommended for his family law expertise by the Doyle's Guide to the Australian legal profession.

SANDRA VERBURGT

Partner
Delissen Martens

The Hague, Netherlands

www.delissenmartens.nl/en

Practice
Sandra is a partner at Delissen Martens. She is in charge of the private clients and international relationships team, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes mainly divorces, relocations and financial relief (maintenance, matrimonial settlements and advice on prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 Sandra also deals with cross border disputes. She advises her foreign colleagues frequently on Dutch Family Law issues. Further she has provided expert opinions in England and USA.

Delissen Martens
Delissen Martens advocaten belastingadviseurs mediation is a powerful, medium-sized law firm in The Hague/the Netherlands, that is able to provide private and corporate clients with legal services of the highest quality.

Publications/Lectures
Sandra is co-author of the chapter on Private International law and Maintenance law in the explanatory commentary "SDU Commentaar Relatierecht" (SDU, April 2014) and the online equivalent of Dutch Legal Publisher SDU since 2012.
Furthermore she has written several publications in Dutch and English law journals. Sandra is also a member of the editorial board of the IAFL Online News, in which E-journal she publishes frequently.
Sandra is a trainer of DM Academy, the training establishment of Delissen Martens, certified by the Dutch Bar Organisation.
Furthermore she frequently lectures during conferences of the IAFL.

Memberships
Sandra is an accredited family lawyer/mediator and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS), the Dutch Association of Collaborative Professionals (VvCP) and a fellow of the International Academy of Family Lawyers (IAFL), for which body she is serving as a Vice President of the Executive Committee and Vice President of the European Chapter.

SHUJI ZUSHI

Director of Hague Convention Division,
Ministry of Foreign Affairs of Japan

Tokyo, Japan

Mr. Shuji Zushi joined the Ministry of Foreign Affairs of Japan in 1995 after obtaining a law degree from the University of Tokyo. He has since served in various posts in the Ministry, among others in the Policy Planning Division, Economic Partnership Division, and Human Rights and Humanitarian Affairs Division. For overseas assignment, he has served in France and Canada. He has been the Director of Hague Convention Division since September 2017.

International Academy of Family Lawyers

IAFL

SESSION 1

The 1980 Hague Abduction Convention: An Introduction and Overview

1980年ハーグ条約
導入と概要

2018年5月29日

図師 執二
外務省ハーグ条約室長
（日本中央当局）

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日本のハーグ条約締結の背景
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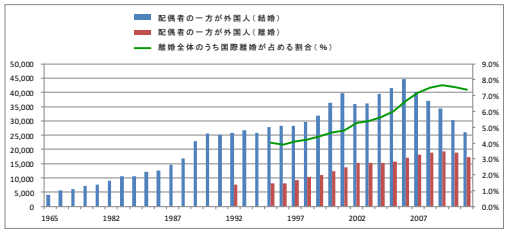
日本における国際結婚



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ハーグ条約締結に向けたプロセス

2011年1～4月　　ハーグ条約に関する副大臣会議（7回開催）

2011年5月　　条約締結に向けた準備を進める旨の閣議了解

中央当局の役割について

2011年7～12月
ハーグ条約の中央当局のあり方に関する懇談会（外務省）

返還手続について

2011年7月～2012年1月
法制審議会ハーグ条約部会（法務省）

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ハーグ条約締結に向けたプロセス（続き）

2012年3月及び2013年3月　条約及び条約実施法案を国会提出

条約締結についての承認

2013年4月　衆議院可決
2013年5月　参議院可決

条約実施法案

2013年5月　衆議院可決
2013年6月　参議院可決 → 公布

2014年1月　オランダ外務省に受諾書を寄託
2014年4月1日　日本についてハーグ条約が発効
→ 日本は91番目の締約国に（現在の締約国数は98ヶ国・地域）

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懸念と現実

ハーグ条約は日本の伝統や文化になじまないのではないか。

- 子の利益を最重要視するとの条約の理念は，いかなる伝統や文化とも親和的。
- 条約は子の監護権についての本案の決定を子の常居所地国で行うことを求めているが，監護権のあり方自体については何ら定めていない。

連れ去り親（TP）及び／又は子が家庭内暴力（DV）の被害者であっても，子を返還しなければならないのか。

- DVの事実が子の返還拒否事由（13条1項b）として認められれば，子の返還は命じられない。
- 子の常居所地国の在外公館は，DV被害者への支援体制を整備する等の対応を取っている。
- ハーグ条約実施法は，TPと子の所在地を残された親（LBP）に開示することを禁止している。

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条約締結のメリット

条約締結によって期待されること。

- 子の連れ去り・留置の予防。
- 国境を越えた子の監護に関する問題について，法の下で定められた手続に則った解決が可能となる。
- 話し合いによる友好的解決が促進される。
- 締約国間を一時的に移動する際の心理的・法的な障壁が取り除かれる。

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2 日本における条約の実施状況

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条約発効後の援助申請の状況

2018年4月1日現在

	返還援助申請	面会交流援助申請
日本に所在する子に関する申請（インカミング事案）	87 米 21, 仏 6, 独 6, 豪 5, 加 4, 英 4, 星 4	93 米 43, 英 6, 仏 5, 加 5, 豪 5
外国に所在する子に関する申請（アウトゴーイング事案）	71 米 11, 韓 6, タイ 6, 伯 6, 比 5	28 米 6, 露 3, 加 3, 独 2, ウクライナ 2, タイ 2, 韓 2
Total	158	121

- 返還援助申請数：ほぼ横ばいで推移。
  44件（2014年度），40件（2015年度），40件（2016年度），34件（2017年度）
- 面会交流援助申請数：初年度の申請数が多かった。その背景は，ハーグ条約発効以前の連れ去り等については，面会交流援助のみ申請が可能なため。
  69件（2014年度），29件（2015年度），15件（2016年度），8件（2017年度）

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これまでの実績：返還援助決定事案

2018年4月1日現在

外国返還援助決定事案	74件	
継続事案	13件	
子の返還が確定もしくは実現，または子の不返還が確定した事案	58件	
（内訳）	返還	不返還
1 話合い等による解決	11件 注1)	7件
2 裁判手続		
1）裁判内調停	10件 注2)	11件
2）和解	1件	1件
3）審判	10件 注3)	7件
その他（援助決定後取下げ等）	3件	

注1）うち1件は返還に向け手続中。
注2）うち1件は返還に向け手続中，うち1件は執行不能。
注3）うち1件は返還に向け手続中，うち3件は執行不能。

日本国返還援助決定事案	63件	
継続事案	18件	
子の返還が確定もしくは実現，または子の不返還が確定した事案	42件	
（内訳）	返還	不返還
1 話合い等による解決	11件	5件
2 裁判手続	14件 注4)	12件
その他（外国中央当局で却下等された事案）	3件	

注4）うち1件は返還に向け手続中。

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3 条約実施における日本中央当局の役割

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日本中央当局ーハーグ条約室ー

- 日本中央当局は，外務省領事局ハーグ条約室。
- 多様な分野について専門的知見を有する人材を外部から登用したチーム編成。
- 外務省職員のほか，弁護士，裁判官，家裁調査官，児童心理専門家，ＤＶ専門家，入国審査官など計１５名がケース・オフィサーとして個別事案に対応。
- 全員が英語対応可能。その他の外国語についても対応可能な職員がいる。

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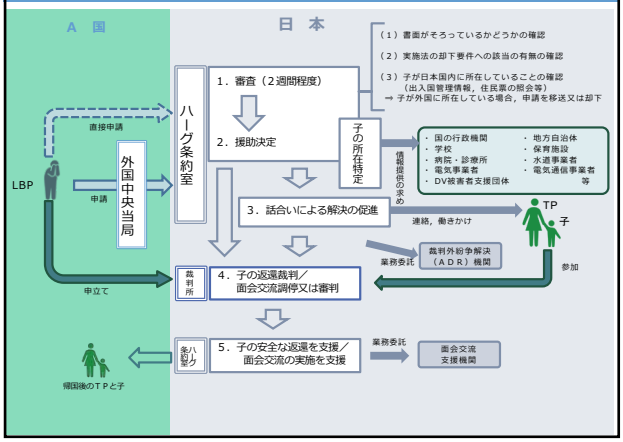
中央当局による支援～インカミング事案の場合～



中央当局による支援 ～ インカミング事案の場合

中央当局は，双方の当事者に対して援助を実施

申請受付

（直接申請の場合）所定様式の申請書，日本語又は英語，郵送 ※メール提出・在外公館受付は不可

話合いによる解決の促進

裁判外紛争解決（ＡＤＲ）機関によるあっせん
（４期日・一定の上限まで）

過去4年間で34事案についてADR機関への申立てが行われた。

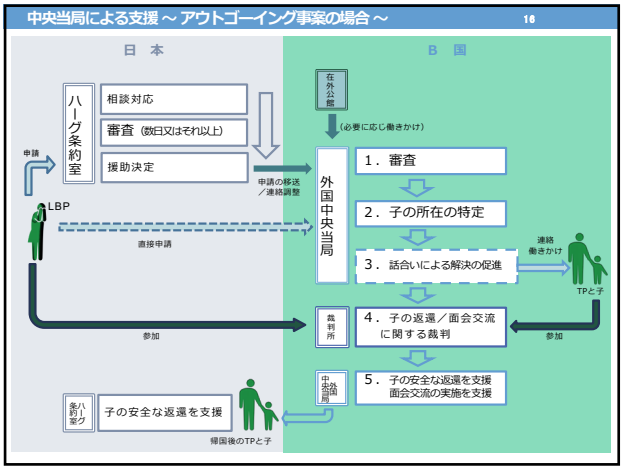
過去4年間で68件204名の弁護士を紹介。

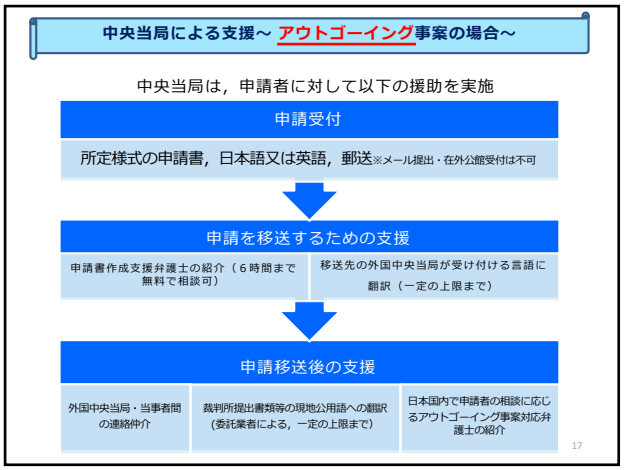
裁判手続を行うための支援

弁護士紹介制度	法テラスによる民事法律扶助制度	裁判所提出書類等の日本語への翻訳
（日弁連が実施，利用は１回）	（弁護士費用等の借入れ）	（委託業者による。一定の上限まで）

子の安全な返還/面会交流

代替執行への立会い	面会交流支援機関による支援	返還先の在外公館による支援
（中央当局職員（児童心理専門家））	（原則４回まで）	


中央当局による支援～アウトゴーイング事案の場合～
16
日 本
B 国
ハーグ条約室
相談対応
審査（数日又はそれ以上）
援助決定
申請
申請の移送／連絡調整
在外公館
（必要に応じ働きかけ）
外国中央当局
1．審査
2．子の所在の特定
3．話合いによる解決の促進
連絡働きかけ
TPと子
LBP
直接申請
参加
裁判所
4．子の返還／面会交流に関する裁判
参加
中央当局
5．子の安全な返還を支援面会交流の実施を支援
ハーグ条約室
子の安全な返還を支援
帰国後のTPと子


中央当局による支援～ アウトゴーイング事案の場合～
中央当局は，申請者に対して以下の援助を実施
申請受付
所定様式の申請書，日本語又は英語，郵送※メール提出・在外公館受付は不可
申請を移送するための支援
申請書作成支援弁護士の紹介（６時間まで無料で相談可）
移送先の外国中央当局が受け付ける言語に翻訳（一定の上限まで）
申請移送後の支援
外国中央当局・当事者間の連絡仲介
裁判所提出書類等の現地公用語への翻訳（委託業者による，一定の上限まで）
日本国内で申請者の相談に応じるアウトゴーイング事案対応弁護士の紹介
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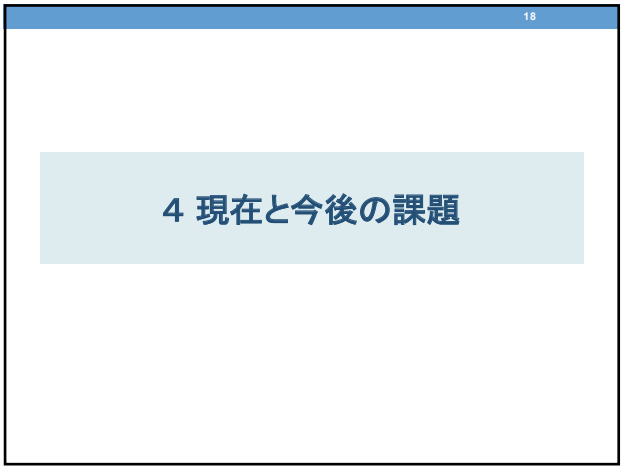
18
4 現在と今後の課題

19

A) 広報の強化

- 不法な子の連れ去りを予防するための啓発
  - ⇒ 2018年5月15日にパリにて在留邦人向けのハーグ条約セミナーを開催。
- 地方自治体，弁護士会，警察，入管等との連携
  - ⇒ 各団体と協力し，日本各地で多数のハーグ条約セミナーを開催。

B) アジアにおけるハーグ条約の普及

- 非締約国・新規締約国向けのセミナー開催
  - ⇒ アジア太平洋のためのハーグ条約に関する東京セミナー開催（次頁参照）

C) 子の安全な返還の更なる円滑化

- 子の任意の返還に向けたTPの説得努力
- 返還命令の執行に係る問題
  - ⇒ 国内の子の引渡し事案に適用される規律についての検討が継続中。
  - ⇒ 2018年3月15日，最高裁は人身保護請求事案において画期的な判決を行った。(https://www.incadat.com/en/case/1388)

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アジア太平洋のためのハーグ条約に関する東京セミナー


歓迎レセプションで挨拶する堀井外務政務官


開会挨拶するベルナスコーニHCCH事務局長


参加者全員の集合写真

- 日程： 2017年12月7，8日
- 場所： プリンスパークタワー東京
- 共催： 日本外務省・ハーグ国際私法会議（HCCH）
- 参加者： 以下の国・地域の裁判官および中央当局職員
  - ハーグ条約締約国・地域：韓国，豪州，ｼﾝｶﾞﾎﾟｰﾙ，ｽﾘﾗﾝｶ，ﾀｲ，香港，ﾏｶｵ，ﾊﾟｷｽﾀﾝ，ﾌｨﾘﾋﾟﾝ，米国，日本
  - 非締約国：ｲﾝﾄﾞﾈｼｱ，中国（本土），ﾍﾞﾄﾅﾑ
- 狙い： 我が国との間で潜在的子奪取事案が多いと思われるアジア諸国の政府関係者や裁判官を招聘し，ハーグ条約の実施に係る制度やプラクティスに関する情報を共有することで，これら諸国の条約加入および新規締約国の実施環境整備に向けた取組みを促進し，アジアにおけるハーグ条約の普及を図る。

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ご静聴ありがとうございました。

外務省領事局ハーグ条約室
haqueconventionjapan@mofa.go.jp

The 1980 Hague Abduction Convention

An Introduction and Overview

May 29, 2018

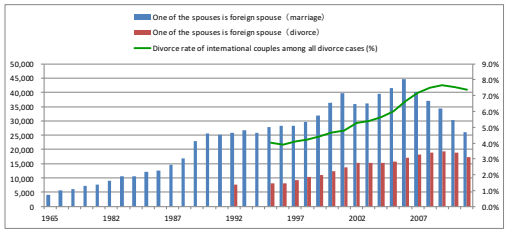
Shuji ZUSHI
Director, Hague Convention Division
Ministry of Foreign Affairs of Japan
(Central Authority of Japan)

Contents

1 Japan's experience in joining the Convention

Background of Japan's entry into the Convention - International Marriage -

International Marriage in Japan



Path to Japan's conclusion of the Convention

January – April 2011
State Minister-level meetings on the entry into the Convention (7 times)

May 2011
The Cabinet approved the conclusion of the Convention

On the role of the CA

July – December 2011
Round-table meetings conducted by the Ministry of Foreign Affairs

On the Court Procedures

July 2011 – January 2012
Subcommittee meetings of the Legislative Council conducted by the Ministry of Justice

Path to Japan's conclusion of the Convention - cont'd

March 2012 and March 2013
Submission and re-submission for approval of the Convention and its Implementation Bill to the National Diet

Convention

April 2013
Approved by Lower House

May 2013
Approved by Upper House

Implementation Bill

May 2013
Passage at Lower House

June 2013
Passage at Upper House

January 2014 Submission of the instrument of acceptance to the Foreign Ministry of the Netherlands

April 2014 Entry into force of the Convention for Japan

➡ Japan became the 91st member of the Convention.
(The number of its contracting states is 98 as of today.)

Concerns and Realities

Is the Convention compatible with Japanese tradition and culture?

- Putting the child's interest first can be compatible with any tradition and culture.
- The Convention only requires that the merit of custody be decided in the country of child's habitual residence, respecting culture and tradition there.

Is the Taking Parent (TP) forced to return the child even if the TP and/or the child are Domestic Violence (DV) victims?

- The Court will not order to return the child if the vulnerability is established at the Court as a "grave risk" for the child.
- Japanese consuls in the country of child's habitual residence may assist vulnerable parents.
- The Japanese Implementation Act does not allow the Central Authority to disclose the whereabouts of the TP and the child to the Left Behind Parent (LBP).

Benefits of joining the Convention

The Convention is expected to;

- prevent possible removal / retention.
- enable a rule-based solution by pointing to the legal forum where a cross-border parenting issue should be resolved.
- provide an opportunity for facilitated amicable solution.
- eliminate psychological and legal obstacles for temporary visits from one contracting state to another.

2 Implementation status of the Convention in Japan

Total number of applications for the child's return or access to the child

As of April 1, 2018

	Application for the Child's Return	Application for Access to the Child
Applications concerning children located in Japan	**87** USA 21, France 6, Germany 6, Australia 5, Canada 4, UK 4, Singapore 4	**93** USA 43, UK 6, France 5, Canada 5, Australia 5
Applications concerning children located abroad	**71** USA 11, ROK 6, Thailand 6, Brazil 6, the Philippines 5	**28** USA 6, Russia 3, Canada 3, Germany 2, Ukraine 2, Thailand 2, ROK 2
Total	**158**	**121**

- The number of applications for child's return remains mostly unchanged from one year to another.
  44 cases in FY2014, 40 cases in FY2015, 40 cases in FY2016, 34 cases in FY2017
- There were a large number of applications for access in the first year. This is because it is only possible to apply for access in cases where the removal or retention of a child occurred before the Hague Convention entered into force for Japan.
  69 cases in FY2014, 29 cases in FY2015, 15 cases in FY2016, 8 cases in FY2017

Achievements to date: cases granted assistance in the child's return

As of April 1, 2018

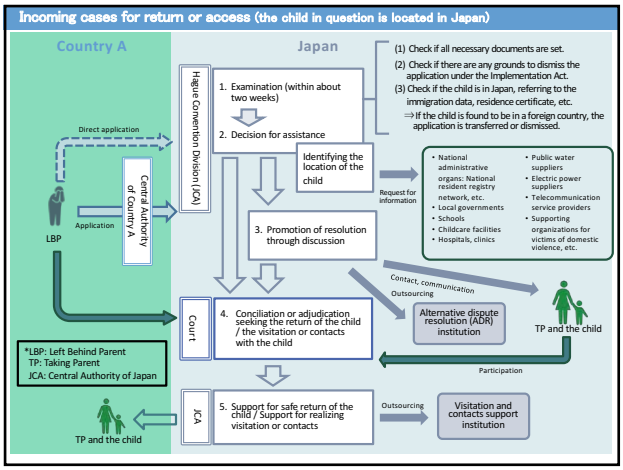
Cases of assistance in a child's return to a foreign state			Cases of assistance in a child's return to Japan		
	74			63	
Ongoing cases	13		Ongoing cases	18	
Cases concluded with the child's return being settled or carried out, or with the conclusion not to return the child	58		Cases concluded with the child's return being settled or carried out, or with the conclusion not to return the child	42	
(breakdown)	Return	Non-return	(breakdown)	Return	Non-return
1 Settlement through talks	11 (*1)	7	1 Settlement through talks	11	5
2 Court proceedings 1) Conciliation (in-court mediation)	10 (*2)	11	2 Court proceedings	14 (*4)	12
2) Amicable settlement	1	1	Other (cases dismissed by foreign Central Authorities)	3	
3) Court order	10 (*3)	7			
Other	3				

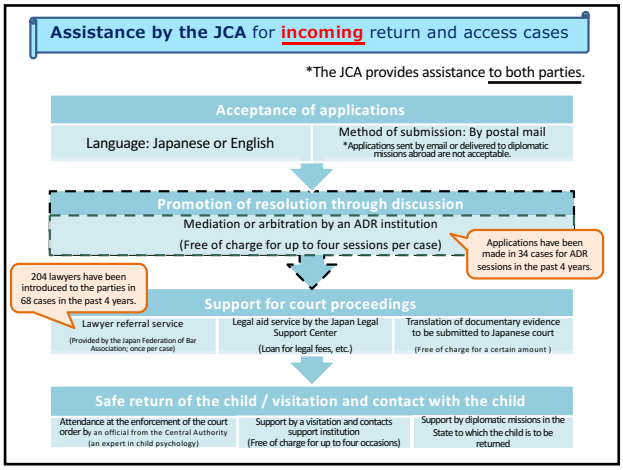
*1: Of which 1 case is currently in the process of realizing the return of the child.
*2: Of which 1 case is currently in the process of realizing the return of the child. Of which in 1 case the enforcement of the agreement failed.
*3: Of which 2 cases are currently in the process of realizing the return of the child. Of which in 2 cases the enforcement of the court order failed.
*4: Of which 1 is currently in the process of realizing the return of the child.

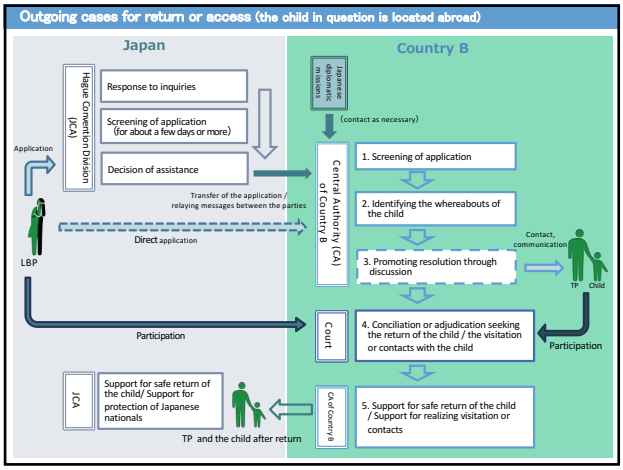
3 Role of the JCA in implementing the Convention

Central Authority of Japan - Hague Convention Division -

- The Hague Convention Division is a section of the Consular Affairs Bureau of the Ministry of Foreign Affairs of Japan.
- The officials of the Division include persons with expertise in various fields who come from outside the ministry.
- 15 officials in total are working as case officers, including Foreign Ministry officials, attorneys-at-law, a judge, a family court probation officer, experts in child psychology, a DV victims counselor, and an immigration inspector.
- Every one of them can handle the case in English. Some officials can cope with other foreign languages than English.







Assistance by the JCA for outgoing return and access cases

*The JCA provides assistance to the applicant.

Acceptance of applications

Language: Japanese or English	Method of submission: By postal mail *Applications sent by email or delivered to diplomatic missions abroad are not acceptable.

Support for the transfer of applications

Support service for filing applications and preparing required documents (Consultation with an attorney free of charge for up to 6 hours)	Translation of application form and attached documents into the language accepted by the requested state (Free of charge for a certain amount of documents)

Assistance after the transfer of applications

Relaying messages between the parties	Translation of documentary evidence to be submitted to foreign court (Free of charge for a certain amount)	Referral to Japanese lawyers who assist applicants in Japan

4 Present and future challenges for Japan

A) Enhancement of public relations

- Raising awareness to prevent future wrongful removal of children
  - ⇒ A seminar on international child abduction was held in Paris on 15 May 2018 for local Japanese residents.
- Outreach to local governments, bar associations, local police and immigration authorities
  - ⇒ Number of Hague Convention seminars have been organized all over Japan in cooperation with these local authorities.

B) Further spread of the Hague Convention in Asia

- Organizing seminars intended for non-contracting states and newly joined countries
  - ⇒ Tokyo Seminar on the1980 Hague Convention in Asia Pacific (see next page)

C) Further facilitation of safe return of the child

- Efforts to persuade the TP to voluntarily return the child
- Issues related to enforcement of return orders
  - ⇒ Discussions are ongoing about the rules to be applied to domestic cases of child's handover.
  - ⇒ The Supreme Court rendered a groundbreaking decision in a habeas corpus relief case on 15 March 2018. (https://www.incadat.com/en/case/1388)

Tokyo Seminar on the 1980 Hague Convention in Asia Pacific

Welcome remarks by Mr. Manabu HORII, Parliamentary Vice Minister for Foreign Affairs, at the welcome reception

Opening remarks by Dr. Christophe BERNASCONI, Secretary General of Hague Conference on Private International Law (HCCH)

Group photo of the participants

- Date: 7-8 December 2017 - Venue: Prince Park Tower Tokyo
- Co-hosts: Ministry of Foreign Affairs of Japan and HCCH
- Participants: judges and government officials from the countries/regions below;
  - Contracting states/regions: ROK, Australia, Singapore, Sri Lanka, Thailand, Hong Kong, Macao, Pakistan, the Philippines, USA, Japan
  - Non-contracting states: Indonesia, China, Viet Nam
- Objectives: 1) to provide participants from non-contracting and newly joined countries with an opportunity to acquire knowledge and expertise relating to the implementation of the 1980 Hague Convention, and thus 2) to promote the expansion of the Hague Convention in the Asia Pacific region.

Thank You!

Hague Convention Division
Consular Affairs Bureau
Ministry of Foreign Affairs
haqueconventionjapan@mofa.go.jp

International Academy of Family Lawyers

SESSION 2

Enforcement of Return Orders under The Hague Abduction Convention

IAFL –東京シンポジウム　2018 年 5 月 29 日

ケーススタディ　――　返還命令の執行

ジョンとシンシアは、ジョンの国にシンシアが親族と長期の旅行に来ているときに出会った。彼らは関係を持つようになり、シンシアは、旅行後帰国したとき、妊娠していることに気づいた。

事態は急速に進み、彼らは結婚することにした。シンシアの住む国で結婚し、シンシアは、ジョンの国に、配偶者、被扶養者としてのビザで入国した。彼らは賃貸アパートに住んだ。彼の仕事はＩＴのフリーランスである。シンシアは仕事をせず、知り合いも限られており、完全にジョンに頼っていた。最初の男の子がすぐに生まれ、そのあとすぐにまたシンシアは妊娠した。次の子が生まれ、そのころには、住んでいたアパートは手狭になった。シンシアは 2 人の子の世話をし、ジョンは、仕事があったりなかったりして、経済状況は逼迫した。シンシアは、ジョンが経済的にも彼女の行動についても支配的だと思うようになった。ジョンは、シンシアを２度ひっぱたいたが、シンシアはそのことを届け出ることはせず、医者にも見せなかった。ジョンは２人の子とうまくいかず、よく短気を起し、彼らに大声を出した。シンシアは孤立し、言葉もよくできず、子どもたちがいるので家の外にたくさん友だちをつくることもできなかった。シンシアはあらゆることについてジョンに依存していた。子どもたちの世話は、シンシアが主として行っていた。

下の子が 3 か月になったとき、ジョンは、シンシアが８週間、子どもをつれて里帰りすることに同意した。里帰りの間に、シンシアは家族に対し、住んでいるジョンの国での生活状況やジョンの自分に対する行動、そして孤立して孤独な気持ちについて話した。シンシアは、産後うつだと診断された。シンシアは、2 人の子を育て、下の子に母乳をやろうと必死だった。

８週間が過ぎたとき、シンシアはジョンに対し、もうジョンの国には戻らない、自分の国にいると告げた。離婚したい、と言った。ジョンの反応は、親からお金を借り、すぐに自国で離婚訴訟を起し、母親が子を不法に留置して奪取したとして監護権を求めた。シンシアは手続に関与せず、期日にも出席しなかった。すぐに命令が出され、シンシアは子どもたちをジョンの国に戻すよう命ぜられ、子どもたちの仮の監護権は父親であるジョンにあることとなった。

同時にジョンはシンシアの国で１９８０年ハーグ条約に基づく手続を開始し、シンシアの抗弁は、13 条（ｂ）に限られていた。そこで彼女は、次のように述べた。

(i)　ジョンの過去のＤＶと将来の暴力のおそれがあること
(ii)　もしジョンの国に戻ればシンシアの産後うつが悪化し、子どもたちの世話ができなくなること

(iii) シンシアは完全にジョンに依存してジョンの国に滞在することとなっていたが、ビザについてはジョンが異議を述べることで、ビザがなくなること。
(iv) 経済状況が苦しく子どもとシンシアが暮らしていくことができないこと。さらにシンシアは離婚や監護の裁判や、リロケーションの裁判で代理人の弁護士に支払をする余裕がないこと。
(v) 子どもたちは、シンシアが到着するやいなや、ジョンによる国内の監護命令に従って彼女のもとから連れ去られること。
(vi) 子の奪取により、ジョンがシンシアを逮捕させるおそれがあること。.

２日間の期日があり、ジョンは、たくさんの条項や約束、それはジョンの国で子らへの重大な危険がなくなり、堪えがたい状況という議論に十分に対応できるような命令が出せるようなものであるが、それらを提供した。

各国への質問

返還の際にどのようなタイプの命令が出されるか。どんなアンダーテイキング（約束）やセーフハーバー条項（その条項を遵守すれば違反にならないような条項）があるか。

執行

シンシアが１４日以内に子どもたちを返還するようにという命令が出た。ジョンは、シンシアと子どもたちに片道の飛行機の切符を用意した。シンシアはその飛行機に乗らず、子どもたちを返還しないと言った。シンシアは、すべての上訴を尽くし、返還命令が維持された。

i. （あなたの国では）シンシアが断固として子どもたちと一緒に行くことを拒否したとき、命令を執行するために、どのような手順がとられるか。何がどのようになされるか。

ii. もし子どもたちが１１歳と１３歳であとは同様の事情だったら（婚姻期間が長く、シンシアが居住する完全な権利があるところは異なる）上記の回答は異なるか。他にどのような要素が影響するか。

iii. 命令の執行のためのさまざまな試みがうまくいかず、なお命令に従わない状況が続いているときに、ジョンがとりうる手段はあるか。

IAFL – TOKYO SYMPOSIUM 29 MAY 2018

CASE STUDY – REGULATION NO 2 ENFORCEMENT OF RETURN ORDERS

John and Cynthia meet in his country of residence when she is visiting on a long holiday with relatives. They commence a relationship and she returns to her own country at the end of the holiday where she finds that she is pregnant.

Matters quickly move on they decide to marry. They marry in her country of residence and she joins him in his country as his spouse on a dependants visa. They live in rented accommodation. He works in IT as a freelance contractor. Cynthia does not work, has limited personal resources and is entirely dependant on him. The birth of their first child a boy is fairly quickly followed by a further pregnancy. That child is born. At the time the child is born they remain living in their rented accommodation which is small and cramped. Cynthia is the carer for both children. John is in and out of work and money is very tight. She finds John controlling both in terms of finances and of her movement. He has a short fuse and frequently loses his temper. He has thumped her on two occasions but she did not report the matter to the authorities or see a doctor. John finds two very young children difficult to cope with and is frequently short tempered with them and shouts at them. Cynthia feels isolated and lonely, her grasp of the language is limited and because of the children she has not made many friends outside of the home. She is entirely dependant on John for all her needs. Cynthia is the 'primary care giver'.

When the youngest child is 3 months old John agrees that she can go to her home country with the children for a long holiday which was to be of 8 weeks. During the course of that holiday she discloses to her family the living conditions that exist in the country of residence, of John's behaviour towards her and her feeling of isolation and loneliness. She is diagnosed with suffering from post-natal depressing. She is struggling to cope with two young children and breastfeeding the youngest.

At the end of 8 weeks she informs John that she is not returning with the children and will remain in her home country. She says that she wishes for a divorce. John's reaction is to borrow money from his parents. He speedily issues divorce proceedings in his country and makes an application for custody of the children on the basis that they have been abducted by way of a wrongful retention by their mother. Cynthia does not engage in the process and does not attend any of the hearings. Speedily an order is made that she should return the children and that the children should be in the interim custody of John their father.

Simultaneously he commences proceedings in Cynthia's home country under the 1980 Hague. Proceedings get underway and Cynthia's defence is limited to Article 13(b) wherein she pleads:-

(i) John's past domestic violence and fear of future violence;
(ii) her post-natal depression which will worsen if she returns making her incapable of caring for the children;

(iii) that her lack of visa and that she has only been present in that jurisdiction as a dependant of John's which he can veto at any time;

(iv) there is insufficient money to accommodate her and the children let alone pay child support and thus she will be penniless. Further she will not be able to afford to pay a lawyer to represent her in the divorce and custody proceedings or to apply to relocate; and

(v) that the children will be removed from her care immediately on her arrival because of John's domestic custody orders.

(vi) She fears that he will have her arrested for child abduction.

There is a 2 day hearing and John offers raft of provisions and undertakings which he says will allow the receiving state to make an order for return on the basis that there will be no grave risk of harm to the children and further that the argument that there will be intolerable situation is amply met.

Question for each State

What type of order on a return would be made and what would be the provisions in respect of undertakings/safe harbour provisions in your jurisdiction?

Enforcement

The Order provides that she should return the children within 14 days. John provides one way airline tickets for Cynthia and the children. Cynthia does not get on the flight and states she is refusing to return the children. She exhausts all appeals and the order for return is upheld.

i. What steps can be made in your jurisdiction to enforce the terms of the order in the event that she steadfastly refuses to accompany the children? What is the process and how will enforcement take place?

ii. If the children were in fact 11 and 13 on the same fact (save for a longer marriage and that she had full residence rights in the country) would your answer in respect of the enforcement provisions be any different? What other factors would be relevant?

iii. In the event that numerous attempts made to enforce the order fail and there is continued non-compliance would there be any other redress that John might have?

Enforcement of Hague Return Orders

Anne-Marie Hutchinson OBE, QC (Hon.)
Dawson Cornwell, London
amh@dawsoncornwell.com

IAFL Symposium
Tokyo, Japan
29th May 2018

Dawson Cornwell | the family law firm

Return Orders

Hague final orders in England and Wales are often detailed and complex, and can run to many pages with schedules and appendices. More often than not, they contain detailed provisions for the child's return. The main provision of this nature is generally drafted as:

> *"The child/ren, [insert name/s] shall be summarily returned to [insert state]* ***forthwith and by no later than 23.59pm on*** *[insert date], pursuant to article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980".*

Undertakings

Undertakings are very commonplace in Hague proceedings. Undertakings are legally-binding, solemn promises to the Court, made by parties themselves, which carry the force of a court order. They often include:

i. To purchase flights for the respondent and/or child to return;
ii. Not to intimidate, harass or pester the opposing party or child;
iii. Not to attend the airport upon the child's return;
iv. Not to issue (or indeed, to withdraw) any criminal proceedings in respect of the respondent for any alleged act of abduction;
v. Not to remove the child from the care and control of the respondent, save for any agreed or court-ordered contact;
vi. To issue on-notice proceedings in the country of origin upon return to determine issues of custody;
vii. To seek for the terms in the order to be mirrored or otherwise recognised or enforced ahead of the return of the child and/or respondent;
viii. To pay the agreed payments of maintenance, ensure provision for housing, or provision for the care of the child.

Enforcement proceedings: When a respondent refuses to return

The first port of call may be to apply for a collection order.

A collection order allows for a child to be retrieved from a named person or persons. It empowers the Tipstaff to remove the child from the person holding him or her, and directs him to deliver the child into the care of a nominated person.

In extreme cases, the Court can order that the child be removed from the respondent and placed into foster care, pending the collection of the child by the applicant.

Contempt of Court

A penal notice says:-

If you, [name] disobey this order you may be held in contempt of court and may be imprisoned, fined or have your assets seized.

If any other person who knows of this order and does anything which helps or permits you [name] to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

When a failure to enforce becomes a human rights issue

A further recent development has come in the form of litigation before the European Court of Human Rights in this area. A steady flow of cases from Strasbourg have indicated the need for expeditious execution and enforcement of child abduction return orders, and that a state can be held to be in violation of an applicant's rights to family life if the state fails to act with the required speed.

Tips for successful applicants

- Issuing and engaging in proceedings swiftly;
- Foreseeing any issues that could thwart a return;
- Securing a tight timeframe for return;
- Having very detailed prescriptive court orders;
- Remedying any failures to act;
- Ensuring applicants can spend time with the child ahead of a return;
- Taking specialist local advice as soon as possible.

Dawson Cornwell | the family law firm

Anne-Marie Hutchinson OBE, QC (Hon.)
www.dawsoncornwell.com

Dawson Cornwell | the family law firm

t: +44(0)207 242 2556
f: +44(0)207 831 0478
e: amh@dawsoncornwell.com

15 Red Lion Square, Holborn,
London WC1R 4QT
www.dawsoncornwell.com

IAFL SYMPOSIUM
TOKYO: MAY 2018

The enforcement of Hague Return Orders: perspectives from England and Wales

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Anne-Marie Hutchinson OBE, QC (Hon.)
IAFL Parliamentarian
Dawson Cornwell
15 Red Lion Square
London WC1R 4QT
amh@dawsoncornwell.com

Structure

I: Introduction

The Courts of England and Wales are seeing an ever-increasing number of Hague and non-Hague abduction applications. Centralised in the High Court in London, roughly a dozen specialist High Court judges determine abduction applications on a daily basis concerning children from all over the world.

Proceedings under the Hague Convention in particular are commonplace. However, enforcement proceedings remain far less routine. Failing to comply with a return order remains the exception, rather than the rule. That notwithstanding, the Courts of England and Wales hold a specialist arsenal of tools, deployed in exceptional circumstances, to ensure that children who should return home, are returned home.

II: Return Orders

Hague applications in England and Wales are determined following proceedings in the High Court, and are concluded by way of either:

i. Judicial determination, returning the child;
ii. Judicial determination, refusing to return the child;
iii. By agreement between the parties, returning the child;
iv. By agreement between the parties, permitting the applicant to withdraw their application and thereby allowing the child to remain in England and Wales.

When proceedings are concluded by way of agreement, a court order allowing for the child's future is almost always necessary. Mediation is strongly encouraged and indeed a recent change in practice has seen specialist mediators in court during Hague proceedings at the first directions hearing. Parties who come to an agreement by way of negotiation or mediation should be strongly advised to convert the terms of their agreement into a binding court order.

Hague final orders in England and Wales are often detailed and complex, and can run to many pages with schedules and appendicies. More often than not, they contain detailed provisions for the child's return. The main provision of this nature is generally drafted as:

> *"The child/ren, [insert name/s] shall be summarily returned to [insert state]* ***forthwith and by no later than 23.59pm on*** *[insert date], pursuant to article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980."*

It is best practice to ensure some time for the child's return. Returns should take place speedily but allow sufficient time for the arrangements for return to be put in place. Depending on the time of year and factors within the case, judges may permit children to be returned at the conclusion of a school term or half-term, or at any other suitable juncture.

In the event that the child's and/or respondent's passports have previously been seized by Police acting under the direction of the High Court Tipstaff, an order will be made permitting the release of the passports to the respondent at the point of departure. This role will usually be carried out by the applicant's solicitor, and it will be incumbent upon the respondent to rapidly identify flights for their return following the final hearing.

A Port Alert may have been put in place within the proceedings. This is a measure made by way of Court order, which places a 'marker' against a child's or respondent's name. If a passport, ID or document with a marked name is scanned by authorities at a port of exit

within the UK, the Police will be notified and the documents will be seized. They will therefore be prevented from travelling. Port alerts are invaluable tools during the currency of abduction proceedings, particularly where the risk of re-abduction is high. Within Hague proceedings, the final return order must make provision for the Port Alert to be discharged to prevent any hiccups at the airport.

In the event that the respondent confirms that they do not seek to return with the child following the making of a return order, the Court will look to ensure that the child is placed in the care of the applicant or a third party in good time for the return to take place. This will involve the child (and the child's passport) being handed over at a specified time, date and place for the return to occur. A child will only be placed into the care of a third party (generally a grandparent or other close relative) in limited circumstances, which most often arise if the applicant does not hold a visa to enter the UK to execute the child's return personally.

In the event that the respondent does not confirm his or her position at Court when the return order is made, the order may be structured to give the respondent, say, 7 days to indicate if he or she will return with the child, failing which the child will be placed into a named person's care in advance of the return.

Return orders can otherwise specify the exact flight upon which a child should return, or the method of transport for this to occur. Depending on the facts of the case and wherever geographically possible, the Court can order for the child to be returned on direct flights to the country of origin. Extensive travel by way of road or rail is to be avoided to prevent respondents re-abducting en route. If connections through other countries are unavoidable, where appropriate the Court can also determine that any connecting flight take place via a state that is a signatory state to the Hague Convention.

The Court should only order the return to a particular jurisdiction, and not to a particular address or town/city unless agreed. In federations or multi-jurisdictional states such as the USA, Australia or Mexico, the Court should order the child's return to the exact state of habitual residence (eg, to the State of California or New South Wales, rather than to the USA or Australia).

III: A word on undertakings

Undertakings are very commonplace in Hague proceedings. Undertakings are legally-binding, solemn promises to the Court, made by parties themselves, which carry the force of a court order[1]. They often include:

i. To purchase flights for the respondent and/or child to return;
ii. Not to intimidate, harass or pester the opposing party or child;
iii. Not to attend the airport upon the child's return;
iv. Not to issue (or indeed, to withdraw) any criminal proceedings in respect of the respondent for any alleged act of abduction;
v. Not to remove the child from the care and control of the respondent, save for any agreed or court-ordered contact.

[1] S. 14, Contempt of Court Act 1981, supported by CPR 81

vi. To issue on-notice proceedings in the country of origin upon return to determine issues of custody;
vii. To seek for the terms of a return order to be mirrored or otherwise recognised or enforced ahead of the return of the child and/or respondent;
viii. To pay agreed payments of maintenance, ensure provision for housing, or provision for the care of the child.

Undertakings are generally time-limited, but can be put into force until the court of the country of origin holds its first inter parte hearing in any future in any custody dispute.

Whilst undertakings are native beings of Anglo-Saxon legal systems[2], specialist local advice must be sought ahead of any return to any other countries, in order to ensure that existing obligations and orders can be properly transposed across jurisdictions. In England and Wales, the Supreme Court has confirmed that *"judges in one country are entitled and bound to assume that the Courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a Court (of any jurisdiction)"*[3]. Practitioners however may have different experiences.

Breach of an undertaking is akin to breaching a court order, and can be the subject of serious enforcement proceedings of itself. A respondent who fails to return a child despite undertaking to do so will be in the same position as a respondent who has been ordered to return a child but has failed to do so.

IV: Appeals

Unlike other jurisdictions, there is no automatic right of appeal in Hague return cases in England and Wales. Any party who seeks to appeal the decision must first obtain permission to appeal.

Permission to appeal may be sought from the same judge who rendered the decision in question, at the very hearing where the decision is handed down. In effect, a party asks the same judge for permission to appeal their own decision, immediately upon judgment being handed down. As such, the granting of permission to appeal at this stage is generally highly unlikely, and may well be refused. It would then be open to the proposed appellant to seek permission from the Court of Appeal. This must be done within 21 days of the date of the decision[4]. Applications for permission to appeal out of time are far rarer and much more difficult to mount without good reason.

The proposed appellant would then have to convince the Court of Appeal that there was a real (as opposed to fanciful) prospect of success in their appeal[5]. If there is, permission to appeal may be granted on paper (or following a short oral hearing). The substantive appeal would then be heard in due course.

[2] As seen within an Australian Hague decision concerning undertakings within a German/Australian abduction: Cape v Cape [2013] Fam CAFC 114
[3] Re M (Child: Abduction Undertakings) [1995], Butler-Sloss LJ
[4] FPR 2010, Rule 30.4
[5] FPR 2010, Rule 30.3(7)

From an enforcement perspective, this is particularly relevant where the unsuccessful respondent to a Hague matter is making an application to permission to appeal. Within the application for permission to appeal, the proposed appellant must apply for a stay of execution. For example, if a respondent has been ordered to return a child within 14 days, they would be best advised to apply for permission to appeal as soon as possible within that timeframe and to seek a stay of execution from the Court of Appeal. If the Court of Appeal considers there to be a possibility of some merit within the application for permission to appeal, it will often stay the return order until the permission application has been fully determined.

If, however, the respondent above were to fail to return the child within the 14 day period and failed to apply for permission to appeal and a stay, he or she may well face enforcement proceedings as the court-ordered provisions for the child's return will have been breached. A judge may not look too kindly on a respondent who alleges some prospect of a spurious appeal in the future if it falls outside the timeframe for a permission application to be mounted.

In the event that any permission for appeal is unsuccessful, the conditions of the original return order will resume.

If permission for appeal is granted and thereafter, if the appellant is unsuccessful in their substantive appeal, the original return order will stand and will remain in force. Its terms will generally be amended to provide for the child's return within the same timeframe. If the original return order determined that the child should be returned within 14 days, the Court of Appeal may well amend the return order to read that the child should be returned within 14 days of the date of the decision of the Court of Appeal. All other directions and undertakings would be amended accordingly.

If permission for appeal is granted and thereafter, if the appellant is successful in their substantive appeal, it is open for the respondent to appeal this decision to the UK Supreme Court (albeit on a far more limited basis). In Hague and non-Hague abduction matters, there are cases in which applicants have won in the High Court, lost in the Court of Appeal, but thereafter won in the UK Supreme Court. In those circumstances the UK Supreme Court may either remit the matter to High Court for further directions (as in the matter of Re J[6]), or may well make its own return order with immediate effect (as in the matter of Re KL[7]).

V: The jurisdiction to set aside a return order

A relatively recent development within Hague proceedings is the (arguably disputed) jurisdiction of varying, amending or revoking return orders. This could occur when a return order has been made, but since the making of the return order, there has been a material or significant change of circumstances. This particular issue has been the subject of significant litigation in the High Court, and may well be an issue that the Court of Appeal will determine in greater detail in due course.

[6] *In the matter of J (a child)* [2015] UKSC 70
[7] *In the Matter of KL (A Child)* [2013] UKSC 75

Mr Justice Mostyn has previously phrased the test as being that where "*either non disclosure or a significant change of circumstances is demonstrated"*[8]. In a similar non-Hague abduction matter, Mr Justice Macdonald stated the test as being that the applicant is able "*to demonstrate a change of circumstances, or material non-disclosure, relevant to the evaluation of the welfare of the subject child such as to justify the setting aside of the order as being in the child's best interests"* [9].

This can occur firstly in cases where an adolescent subject child feels they cannot return, or refuses 'point blank' to return, following the making of a return order. Mature children on the upper echelons of the Hague age scale cannot be forced or frog-marched to return, and in cases where their views against a return are particularly entrenched, an application by them to set aside the original return order may well take place. This could be based on an intensification of a child's objections, or that a return could be harmful to the child. A failed attempt to return may have occurred; case law highlights examples of plans being made, only for a child to refuse, run away, or lock themselves in a bathroom thereby thwarting any attempt to return. When a child's firmly-held views are however deeply enmeshed with those of the respondent, the quandary faced by the Court will be even greater. The Court will have to tread carefully between upholding return orders which are the product of fully-contested and sound proceedings on the one hand, and the impasse caused of a competent, adolescent child who cannot or will not return on the other.

An application to set aside can also arise in cases where the mental health of the respondent has declined significantly since the making of the return order. That was the case in the matter of TF v PJ[10], which concerned the applicant's application for the return of the subject child to Italy. The Court had initially ordered the child's return, which was subject to an unsuccessful appeal. Following a significant deterioration in the respondent mother's mental health, she then sought to set aside the original return order. In this case, the "sea change" in the mother's mental well-being was extremely severe; it was said by professionals that "the obvious trigger for her current significant deterioration is her anxiety about having to return". She was therefore successful in setting aside the original return order.

In the matter of Re F[11], the mental health of a 14 year old child declined significantly following the making of a return order. In that particular matter, the High Court initially determined that the subject child and her siblings should be returned to Hungary. The respondent mother and 14 year old child then sought to appeal the decision, which was dismissed in due course some months later. The child and Mother then sought to set aside the decision, alleging that there had been a significant change in circumstances when the child stated she could not fathom a return. This in due course was granted, and the original return order was set aside. The effluxion of time between the making of the return order and the attempts of actual return occasioned by a lengthy appeal process may well have been a factor in this matter, highlighting the need for successful applicants to ensure that any orders should be executed as speedily as possible and that any appeal is determined forthwith.

The very question as to whether a High Court judge has the jurisdiction to set aside or revoke another High Court judge's order is one that is subject to much debate. Those who oppose it

[8] *In re F* [2015] 1 WLR 4375
[9] *N v J (Power to set aside return order)* [2017] EWHC 2752 (Fam)
[10] *TF v PJ* [2014] EWHC 1780 (Fam)
[11] *Re F (A Child)(Return Order: Power to Revoke)* [2015] 1 WLR 4375

cite that solely a higher court can interfere with a first-instance decision. It may well be that future appellate guidance has an impact on the scope, if any, of the power to set aside or revoke return orders.

VI: Enforcement proceedings: When a respondent refuses to return

In circumstances where an applicant has not only been successful in obtaining a return order, but has also overcome the possible hurdles of a set aside application or an appeal, when then can he or she do to ensure the child is returned if the respondent refuses?

The first port of call may be to apply for a collection order.

A collection order allows for a child to be retrieved from a named person or persons. It empowers the Tipstaff to remove the child from the person holding him or her, and directs him to deliver the child into the care of a nominated person.

If the child is found, the child will be placed in the custody of a named person. The order permits the Tipstaff to enter premises to retrieve the child and to arrest anyone whom he has reasonable cause to believe has disobeyed or obstructed the order; anyone so arrested must be brought before the court as soon as practicable but in any event no later than the working day immediately after arrest. The Tipstaff works in conjunction with local social services and/or Police to ensure that a child will be removed from the care of one person and placed into another.

In extreme cases, the Court can order that the child be removed from the respondent and placed into foster care, pending the collection of the child by the applicant.

It is technically possible for such orders to be obtained without notice to the other party. However, the Court will seldom grant them in this manner without good reason; one example would be if there is evidence of the respondent 'going to ground' or otherwise absconding with the child, and that the welfare of the child necessitates immediate intervention without notice to the respondent.

The Tipstaff plays a central role in any enforcement proceedings. The Tipstaff has a vast range of court-appointed powers, and he is the enforcement officer for all orders made in the High Court. He holds jurisdiction throughout England and Wales. Every applicable order made in the High Court is addressed to the Tipstaff in children and family matters (eg 'The Court hereby directs the Tipstaff of the High Court of Justice, whether acting by himself or his assistants or a police officer as follows…')[12]. The Tipstaff may effect an arrest and then inform the police. Sometimes the local bailiff or police will detain a person in custody until the Tipstaff arrives to collect that person or give further directions as to the disposal of the matter. The Tipstaff may also make a forced entry although there will generally be a uniformed police officer standing by to make sure there is no breach of the peace.

Collection orders are draconian measures and are made in the rarest of cases. Before attempting this, a Judge may seek to explore all other alternatives ahead of a return. A judge may either make a collection order with a view to there being a further urgent hearing, or

[12] FPR PD12D, 7.4

make a collection order to apply with immediate effect for the child to be placed in the care of the applicant.

A collection order for a further hearing would be structured as follows:

IT IS ORDERED THAT:

12. The child AA must be [placed into the care of the applicant] / [provided with accommodation by the appropriate local authority] on a temporary basis, namely until a further hearing of the court which must take place within three clear working days after [the applicant's care of the child] / [the provision of such accommodation] begins.

13. If the respondent and/or any other person served with this order is in a position to do so, he or she must each deliver the child into the charge of the Tipstaff.

14. If the respondent or any other person served with this order is not in a position to deliver the child into the charge of the Tipstaff, they must each:-

(a) inform the Tipstaff of the whereabouts of the child, and of the place at which the child resides within England and Wales if such is known to them; and

(b) also in any event inform the Tipstaff of all matters within their knowledge or understanding which might reasonably assist him in locating the child, and

(c) if it is requested by the Tipstaff, the address at which that person will be living in England and Wales and (if practicable) a telephone number and email address at which that person can be contacted.

15. The respondent and/or any other person served with this order must not (i) remove or (ii) knowingly permit the removal of the child from the jurisdiction of England and Wales.

16. The respondent and any other person served with this order must each hand over to the Tipstaff (for safe-keeping until the court makes a further order) as many of the following documents as are in his or her possession or control:-

(a) every passport relating to the child, including an adult's passport by which the child is also permitted to travel, and every identity card, ticket, travel warrant or other document which would enable the child to leave England and Wales; and

(b) every passport relating to the respondent and every identity card, ticket, travel warrant or other document which would enable the respondent to leave England and Wales.

17. The respondent and/or any person served with this order must not (a) make any application for, (b) obtain, seek to obtain, or (c) knowingly permit, encourage or support any steps being taken to apply for, or obtain any

passport, identity card, ticket, travel warrant or other document which would enable either (a) the child, or (b) the respondent to leave England and Wales.

18. *The respondent and any other person served with this order must, as soon as is practicable after it comes to his or her knowledge inform the Tipstaff of any information referred to in paragraph 14(a) and (b) above.*

19. *The respondent and any other person served with this order must, if practicable before any such change takes place and in any event as soon as is practicable inform the Tipstaff of any changes in the information provided by that person pursuant to paragraphs 14 and 18 above.*

20. *This order or a faxed or scanned copy of it must be personally served upon the respondent and upon any other person whom it is proposed to make liable under it, but if the respondent or any other person refuses or evades or seeks to evade personal service, the court will consider that he or she has been validly served if the effect of the order has been brought to his or her attention.*

21. *The obligations under paragraphs 12 – 14 above will continue until the Tipstaff locates the child and the obligations under paragraphs 15 – 19 inclusive will continue until the court by further order provides otherwise, but if the Tipstaff has not located the child by [the date 6 months after the making of the order] this order shall lapse in its entirety.*

For an immediate collection order, the order would be structured as follows:

The Tipstaff of the High Court of Justice, whether acting by himself or his deputy or an assistant or a police officer, shall:

(a) As soon as practicable take charge of the child/children AA, BB and CC and then [to place the children / child into the care of the applicant] or [into the control of the appropriate local authority];;

(b) enter, if necessary by force, and search any premises in which he has reasonable cause to suspect that [either / any] of the [children / child], and/or the respondent to be present and which, after taking all reasonable steps to do so, he remains unable to secure permission to enter;

(c) whilst one or more of the entries referred to in sub-paragraph (f) hereof remains operative, arrest any person whom he has reasonable cause to believe has been served with the Collection Order and has disobeyed any of the obligations imposed by paragraphs 13 – 16 of it, and shall explain to that person the ground for the arrest and shall bring him or her before the court as soon as practicable and in any event no later than the working day immediately following the arrest;

(d) cause any person arrested pursuant to sub-paragraph (c) above to be detained until he or she is brought before the court and, as soon as practicable during any such period of detention, give to that person the opportunity to seek legal advice;

(e) keep safely, until further direction of the court, any document handed over to him pursuant to paragraph 16 of the Collection Order;

(f) *initiate in respect of this direction and the Collection Order entries of a Port Alert and on the PNC and WICU systems that are to remain operative until further order of the court or until the Tipstaff is satisfied that he has fully executed his primary duties under the Collection Order whereupon he may cancel or amend the entries on the expiration of at least two business days from the date upon which he notifies the applicant either personally or through solicitors in writing of his intention to do so; and*

(g) *inform the National Ports Office and the police of the powers conferred by this direction on the Tipstaff acting by a police officer.*

Alternatively, the Judge may otherwise wish to make a further return order or make further directions with a tight timeframe, with a view to suspending the collection order until a further attempt to return takes place. This should provide the respondent with sufficient impetus to ensure the child's return. It may be structured as:

1. *The applicant's application for a collection order is granted, but shall be stayed to permit the respondent to return or cause the return of the child [name] to the jurisdiction of [state] by 23.59pm on [date].*

2. *In event that the Respondent fails to return the child pursuant to paragraph 1 above, the matter shall be listed on [date] for further directions in relation to the collection order.*

The return date may be listed within 48 hours of the date by which the child is to return.

VII Contempt of Court

Where a party fails to comply with a court order, or breaches an order, provided that the procedural rules are followed, it is possible for an application to be made for the party in breach to show cause why they should not be held in contempt of court. It is necessary to show that there is a wilful non-compliance with the terms of the order.

In Hague Convention return orders it is good practice to attach a penal notice to the relevant parts of the Order that prescribe the steps that the party should take to comply with the order. A penal notice says:-

> **If you, [name] disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.**
>
> **If any other person who knows of this order and does anything which helps or permits you [name]to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.**

Procedural steps have to be taken to ensure that the penal notice is personally served upon that party. The application for a contempt also has to be served on that party. If a party is found in contempt of court the Court holds a wide range of powers in order to punish the contempt.

These can include fines and unpaid work obligations, but what are more likely in the terms of a Hague Convention breach is a term of imprisonment. A term of imprisonment can be up to 12

months. In the case of wilful breach, if the party with whom the child is in the UK is held in contempt of court and imprisoned, then, in the normal course, the left-behind parent will be invited during to come to England and Wales to collect the child. As an immediate remedy the child would normally be placed in the care of the local authority (social services) pending the arrival of the other parent.

VIII: When a failure to enforce becomes a human rights issue

A further recent development has come in the form of litigation before the European Court of Human Rights in this area. A steady flow of cases from Strasbourg have indicated the need for expeditious execution and enforcement of child abduction return orders, and that a state can be held to be in violation of an applicant's rights to family life if the state fails to act with the required speed.

The European Court has repeatedly highlighted the need for children proceedings to be determined with speed, and states are required to balance the rights of abducted children and applicants on the one hand with the rights to a fair trial on the other.

This was seen previously in GN v Poland[13]. In this case, the Court came down firmly against the state and its lax approach to enforcement.

Most recently, the case of Oller Kaminska v Poland[14] highlighted the real pitfalls of enforcement, here relating to an abduction from Ireland to Poland.

The Court firstly reaffirmed that the norms set down in Brussels II bis and in the Hague Convention are all based on the overriding principle that in all decisions concerning children, their best interest must be paramount (as per X v Latvia[15]). It went on to highlight that all states were under a positive obligation to take all measures that could reasonably be expected of them to enforce the decision ordering the child's return, and the Polish Government themselves conceded that non-enforcement of the Return Orders had constituted an interference with the applicant mother's right to respect for her private and family life.

When approaching the question of whether the Polish Authorities have taken all measures that they could reasonably have been expected to take in order to ensure that the mother's family rights were recognised, the Court squarely came to the conclusion that Poland had failed. In this matter, the proceedings for the enforcement lasted some nine months, which directly contributed to the length of the stayed enforcement proceedings. Furthermore, the enforcement proceedings suffered yet another long delay, owing to the appeal lodged with the Supreme Court. As such, the enforcement of a first return order did not finish until February 2012, notwithstanding having been issued in October 2009.

The Court therefore concluded that there was no enforcement of the second Return Order for seven months, and that it effectively took the Polish Authorities over a year to decide that an Irish Return Order was enforceable. During this time, the mother had absolutely no contact with the child. Although there was some acknowledgement of the complexity of this matter,

[13] (2171-14) [2016] ECHR 667
[14] Oller Kaminska v. Poland - 28481-12 (Judgment - Right to respect for private and family life) [2018] ECHR 70
[15] X v Latvia (App No 27853/09)

the Court was not impressed with an argument mounted by the Polish Government that this contributed as a factor in the delay.

In actual fact, in relation to enforcement, it seems the applicant mother took matters into her own hands. She travelled over to Poland, and when spending time with the child, the mother effected a return to Ireland herself, in the midst of exhausting levels of litigation.

The Court went on to unanimously hold the state of Poland responsible for a violation of Article 8 of the Convention, and furthermore, awarded the Mother €15,000 in relation to damages, and a further €10,000 in relation to costs and expenses incurred by this application. The question that does remain however is whether the child would have ever been returned to Ireland, if the mother had not returned the child herself. Whilst the judgment of the Strasbourg Court is understandably less detailed on that issue, the question does arise.

IX: Tips for successful applicants

In the light of the above, a number of issues of best practice arise in relation to the preparation of cases with return orders, and indeed in relation to case management of Hague proceedings as a whole. Some may include:

a. Issuing and engaging in proceedings swiftly: As with all children and child abduction proceedings, being quick off the mark is vital. Securing a return order in weeks rather than months or even years has obvious beneficial effects on the relationship between the abducted child and the left behind parent. Enforcement orders follow in the same vein.

b. Foreseeing any issues that could thwart a return: Great care should be taken to ensure that all passports are valid and in date, well in advance of any return. If not, urgent interim directions for the renewal of a passport must follow. Some countries furthermore require six months' validity on a passport before permitting entry. Visas may also be an issue, not only for the child, but for anyone accompanying the child upon return. This may well be an issue within proceedings as a whole; many foreign nationals can find that applying for a visa to enter the UK is a long and expensive process, which can hamper their ability to take part in proceedings, give live oral evidence, or effect a child's return. This should be identified as a possible issue as soon as possible. Judges have been known at directions hearings to make respectful requests of the British authorities to permit an applicant to enter the UK for the purposes of attending a final hearing where required.

c. Securing a tight timeframe for return: Once successful, applicants and their solicitors should be keen to ensure that all is in place for the child to return. At the final hearing, applicants are best advised to come armed with provisional return flights within a workable but robust timetable. Ensure that arrangements are made for any port alerts to be lifted and for passports to be returned appropriately and in good time for the date of return.

d. Having very detailed prescriptive court orders: leave no 'wiggle room'; ensure all orders are scripted to the letter in as much as is possible. Recite the provisional flights or method of transport for a return, along with identified dates. Highlight who is to return the child, and by what time.

e. Remedying any failures to act: in the event that a respondent fails to do what he or she has been ordered to do, ensure that this is immediately brought to the attention of the Court and/or remedied as soon as possible.

f. Ensuring applicants can spend time with the child ahead of a return: where timeframes and budgets permit, applicants are best advised to spend time with children ahead of any return, particularly when the children are older. This may involve attending the final hearing, or before where possible. Having ongoing and positive interim contact with a child can prove to be the factor that ensures an older child feels comfortable boarding a plane home.

g. Taking specialist local advice as soon as possible: this is vital to ensure that any undertakings or orders will be appropriately followed and enforced across jurisdictions. Only specialist local legal advice can help with this, to ensure that return orders are obtained swiftly and enforced appropriately.

***

Anne-Marie Hutchinson OBE, QC (Hon.)
James Netto
Dawson Cornwell
May 2018

April 2018

Enforcement of Return Order in Japan

Ayako Ikeda

Where a child is taken to Japan from a foreign country by one parent without the consent of the other parent, the left behind parent ("LBP") may want to file a petition (a "Hague return case") for an order to return the child (a "Hague return order") under the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") in a Japanese court. Japan joined the Hague Convention effective April 2014. If the foreign country of the habitual residence of the child is one of the signatories to the Hague Convention, the LBP can effectively file such an application.

Pursuant to the Hague Convention and its implementing law in Japan ("Hague implementing law"), LBPs often successfully receive a Hague return order by which the court orders the taking parent ("TP") to return the child to the country of the habitual residence of the child.

1 No contempt of court

In Japan, some TPs voluntarily return the child before or after receiving the Hague return order. In many Hague return cases, the parties go through mediation, which is sometimes successful: the TP returns the child on a certain date pursuant to an agreement entered in the course of the mediation.

Where mediation is not possible and a Hague return order is rendered, the TP might not voluntarily return the child. In this case, since Japan does not hold persons in contempt of court, there is no penalty even if the TP does not comply with the Hague return order.

2 Enforcement of Hague return order

Enforcement is necessary in case of non-compliance with a Hague return order. The Hague implementing law has provisions for enforcement by (a) indirect compulsory execution and (b) direct enforcement by court execution officer.

a. Indirect compulsory execution

Initially, a petition for indirect compulsory execution should be filed by the LBP. Indirect compulsory execution is an order to pay a certain amount of

money during the time the TP does not return the child. If the TP does not have sufficient funds, this remedy is not effective.

In many cases, the TP appeals the indirect compusory execution order and it takes a long time for the indirect compusory execution order to become final and binding.

After the order of indirect compulsory execution becomes final and binding, the LBP must wait for two weeks before filing for direct enforcement of the Hague return order.

b. Direct enforcement by court execution officer

Once the petition for direct enforcement is filed and the order is made, a court enforcement officer will go to the TP's house and take the child to the LBP so that the child can go to his or her country of habitual residence. However, the court enforcement officer cannot use force on the child. For example, if the TP embraces the child and does not let the child go, enforcement would not be successful. There is no penalty.

Of the Hague return cases to date, no direct enforcement was successful (out of six cases as of March 2018).

3 Habeas Corpus

We have a statute for *habeas corpus*, in which a person will be released from illegal detention by emergency court proceedings. This is an extraordinary measure but these proceedings are used when enforcement of the Hague implementing lawdoes not work.

The TP is called to the court in these proceedings, and if the TP does not comply, the TP may be detained. Therefore, *habeas corpus* is effective.

We have one Supreme Court case where enforcement of a Hague return order was not successful and a writ of *habeas corpus* was denied on account of the child's objection in a lower court. The child was 13 years old. The Supreme Court reversed the lower court's decision and remanded the case. The Supreme Court examined the case and concluded that the child's objection cannot be considered valid, as the child was isolated while living with the TP, so the information given to the child was quite limited. The Supreme Court also stated, where a Hague return order was not complied with, it is, in principle, "conspicuously illegal." (Supreme Court judgement dated March 15, 2018).

http://www.courts.go.jp/app/hanrei_jp/detail2?id=87572

4 Domestic cases

There are no clear rules for domestic cases (that is, a child was abducted in Japan), if the child has to be returned by one parent to the other. The need for rules on this matter is currently being discussed at the Legislation Council for the Minister of Justice. As a matter of practice, a court enforcement officer will visit the TP's house and take the child from the TP. Currently, no indirect compulsory execution is required before direct enforcement. But otherwise, it is very similar to enforcement under the Hague implementing law. It is sometimes unsuccessful and a writ of *habeas corpus* is sought in these cases.

http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ia=03&x=0&y=0&ky=%E5%9B%BD%E9%9A%9B%E7%9A%84%E3%81%AA%E5%AD%90%E3%81%AE&page=1

Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (Tentative translation)
Act No. 48 of June 19, 2013

Chapter IV Special Provisions of Civil Execution Act relating to Execution Procedure for Return of Child
(Compulsory Execution of Return of Child)
Article 134 Compulsory execution of the return of child shall be carried out by the method in which the execution court issues an order to have a third party implement the return of child pursuant to the provision of Article 171 (1) of the Civil Execution Act (Act No. 4 of 1979) or by the method prescribed in Article 172 (2) of said Act.
(2) Compulsory execution set forth in the preceding paragraph shall be implemented on the basis of an authenticated copy of the final order to order the return of child which has become final and binding (including those having the same effect as the final order to order the return of child which has become final and binding).
(Limitation of Compulsory Execution due to Age of Child)
Article 135 Where the child has attained the age of 16, the compulsory execution under the provision of Article 171 (1) of the Civil Execution Act (including the implementation of the return of child based on the order under the provision of said paragraph; hereinafter referred to as the "execution by substitute of the return of child") may not be carried out.
(2) The execution court, in the proceedings of the compulsory execution of the return of child by the method prescribed in Article 172 (1) of the Civil Execution Act, shall not order a payment of money under the provision of said paragraph for the reason that the child is not returned after the date following the day on which the child attains the age of 16.
(Preposition of Indirect Compulsory Execution)
Article 136 A petition for the execution by substitute of the return of child may not be filed until two weeks have elapsed from the day on which the order under the provision of Article 172 (1) of the Civil Execution Act became final and binding (where the

elapse of a certain period to perform the obligations specified by said order comes after the elapse of said two weeks, until the elapse of said period).

(Petition for Execution by Substitute of Return of Child)

Article 137 A petition for the execution by substitute of the return of child shall be filed by specifying a person who is to return the child to the state of habitual residence on behalf of the obligor (hereinafter referred to as the "return implementer").

(Order to Have Return of Child Implemented)

Article 138 An order set forth in Article 134 (1) shall be issued by designating a court execution officer as a person who carries out necessary acts for releasing the child from the care of the obligor and by designating the return implementer.

(Dismissal of Petition for Execution by Substitute of Return of Child)

Article 139 The execution court, where it finds it inappropriate in light of the interests of the child to designate the person who is to be a return implementer set forth in Article 137 pursuant to the provision of the preceding Article, shall dismiss the petition set forth in Article 137 without prejudice.

(Authority of Court Execution Officer)

Article 140 A court execution officer may carry out the following acts, in addition to persuading the obligor, in the residence of the obligor or any other place possessed by the obligor, as necessary acts for releasing the child from the care of the obligor:

(i) To enter the residence of the obligor or any other place possessed by the obligor and to search for the child at such place, in which case, if it is necessary, to take a necessary disposition to open a closed door;

(ii) To have the return implementer meet the child or to have the return implementer meet the obligor;

(iii) To have the return implementer enter the residence of the obligor or any other place possessed by the obligor.

(2) A court execution officer, in any place other than those prescribed in the preceding paragraph, when he/she finds it appropriate while taking into consideration the impact on the physical and psychological conditions of the child, the situation of said place and the surroundings thereof, and any other circumstances, may carry out the acts listed in each of the items of said paragraph, as necessary acts for releasing the child form the care of the obligor, with the consent of the person who possesses said place, in addition to persuading the obligor.

(3) Necessary acts for releasing the child from the care of the obligor under the provisions of the preceding two paragraphs may be carried out only when the child is with the obligor.

(4) A court execution officer, if he/she faces resistance when carrying out necessary acts for releasing the child from the care under the provision of paragraph (1) or (2), may use force or request police assistance in order to eliminate such resistance.
(5) A court execution officer, notwithstanding the provision of the preceding paragraph, shall not use force against the child. Where there is a risk that use of force against persons other than the child would cause physical or psychological harm to the child, the same shall apply to said persons.
(6) A court execution officer, in carrying out necessary acts for releasing the child from the care under the provision of paragraph (1) or (2), may give necessary instructions to the return implementer.
(Authority of Return Implementer)
Article 141 A return implementer may carry out necessary acts, such as providing care for the child, in order to return the child to the state of habitual residence.
(2) The provision of Article 171 (6) of the Civil Execution Act shall not apply to the proceedings of the execution by substitute of the return of child.
(Cooperation by Minister for Foreign Affairs)
Article 142 The Minister for Foreign Affairs may provide necessary cooperation, such as attendance, with regard to the execution by substitute of the return of child.
(Inspection of Record of Execution Case, etc.)
Article 143 The provisions of Article 62 shall apply mutatis mutandis to the request of inspection, copying or reproduction of the record of the case pertaining to the compulsory execution of the return of child, issuance of an authenticated copy, transcript, or extract thereof, or issuance of a certificate of matters concerning said case.

Kennedy Partners
LAWYERS

IAFL SYMPOSIUM
TOKYO: 16 MAY 2018

ENFORCEMENT OF RETURN ORDERS UNDER THE HAGUE ABDUCTION CONVENTION – THE AUSTRALIAN APPROACH

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In Australia the need to enforce return orders is the exception rather than the rule.

There is an extremely high rate of compliance when return orders are made.

According to the Attorney-General's Department (which acts as the Australian Central Authority), this is in large part due to the detailed drafting of practical arrangements and well-considered proposals to facilitate the return of the child, including clearly articulated conditions and undertakings to ensure the prompt and "safe harbour" or "soft landing" return of the child and taking parent.

This paper is in four parts. Part A gives an overview of the Australian legislative framework in relation to *The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, ("**the Convention**").[1] Part B discusses the approaches that have been used and which have contributed to a greater compliance with return orders and a minimisation of the need for enforcement proceedings. It will outline the practical ways in which the Australian Courts and practitioners facilitate the return of the child. Part C presents an overview of the range of enforcement measures parties can engage to seek redress for non-compliance of orders. Finally, Part D touches on the implications for Japan and provides a short summary of how to prepare for proceedings.

A: THE AUSTRALIAN PERSPECTIVE

A.1 Brief overview

On 29 October 1986 Australia ratified the Convention, which entered into force on 1 January 1987. The Convention is currently in force between Australia and 83 States, including Japan.

The fundamental role of a court exercising jurisdiction under the Convention is not to determine issues of custody or parental rights – it is to determine an application for return of a child removed from their home State or retained in

[1] 1343 UNTS 89

Australia in breach of rights of custody of a parent in their home State, to enable the courts of that State to determine custodial and other rights in accordance with its domestic laws.

Ensuring the safe and prompt return of the child to the place of habitual residence is accordingly fundamental to the work of the Australian courts and the Central Authority.

A survey conducted by Professor Nigel Lowe and Victoria Stephens[2] to inform discussions at the Seventh Meeting of the Special Commission shows that in 2015 Australia had 45 incoming return applications and 63 outgoing return applications. Approximately 22 percent of these were judicially determined. Seventy-seven percent of the overall Hague applications involved taking mothers. In comparison, Japan had 21 incoming return applications and 24 outgoing return applications – and 17 percent of the overall return applications were judicial returns. Ninety percent of the applications involved a taking mother.

A.2 Statutory framework

The overarching Australian legislation governing the affairs of couples on relationship breakdown is the *Family Law Act 1975* (Cth) ("**the Act**").

The Convention has been incorporated into Australian law through the Act pursuant to Section 111B. The *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("**the Regulations**") give effect to the Act and include "necessary and convenient" provisions to facilitate Australia's performance of its obligations under the Convention (Section 111B(1)) .

Regulation 1A(2)(c) stipulates that the Regulations are intended to be construed: "recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of Convention countries."

The Regulations provide for the making of a "return order" under Part 3 of the Regulations for the return, under the Convention, of a child who has been removed to, or retained in, Australia.

In line with Article 12 of the Convention, the Court must "order the return of the child forthwith".

[2] Nigel Lowe and Victoria Stephens, *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report* (provisional edition, pending the completion of the French version), 2017.

The exceptions to return (or defences) outlined in Articles 13 and 20 of the Convention, have been incorporated into the Regulations and are as follows:

- The requesting parent was not exercising rights of custody: reg 16(3(a)(i)
- The requesting parent consented to or acquiesced in the removal or retention of the child: reg 16(3(a)(ii)
- There is a grave risk that the return would expose the child to physical or psychological harm or place the child in an intolerable situation: reg 16(3(b)
- The child strongly objects to the return and is of an age and degree of maturity where it is appropriate to take their views into account: reg 16(3(c)(i)-(iii); and
- The return would not be permitted by Australia's fundamental principles relating to the protection of human rights and fundamental freedoms: reg 16(3(d).

Establishing one of these defences enlivens the Court's powers to refuse to order a return. This is a discretionary power, with the best interests of the child as the fundamental consideration in the exercise of the discretion.

Under the laws governing the Convention, if Hague-related proceedings have commenced within a year of the removal or retention of a child, and one of the defences is not made out, it is mandatory to return the child to his or her State of habitual residence.

The Court has the power to impose conditions, or undertakings, for the return of the child.

An order for return may be also be discharged,– and a circumstance may arise which makes the order for the return of the child no longer relevant.

An order discharging a return order, or part of a return order, may be made only if the Court is satisfied that:-

- All parties consent to the discharge;
- Circumstances have arisen since the return order was made which make it impractical for it to be carried out;
- Exceptional circumstances exist justifying the order being discharged; or
- The discharge application was filed more than a year after the return order was made or any appeal against the return order determined.

If the Court makes a return order, an application for it to be discharged (pursuant to Regulation 19A) may be made by the Central Authority or other person, institution or body that has instituted the application, or by the respondent.

A.3: The role of the Central Authority

Hague Convention applications are initially dealt with by the Australian Central Authority ("**Central Authority**") who delegates its powers to the State Central Authority ("**SCA**") in each of the six States and two Territories.

The Central Authority, through the SCA, prosecutes return proceedings.

Section 111B of the Act provides that:

> (1C) A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the Convention, with an appropriate person, institution or other body to secure the child's welfare until a Court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.
>
> (1D) A Central Authority may do so despite any orders made by a court before the child's return to Australia.

Regulation 5(c) requires the Central Authority "to do everything that is necessary or appropriate to give effect to the Convention in relation to the welfare of a child on the return of the child to Australia".

If a child is removed from or retained in Australia, the Central Authority may apply for a range of orders including "any other order that [it] considers appropriate to give effect to the Convention": (reg 14(1)(a)(iv)).

B: PRACTICAL APPLICATION

There are a number of ways practitioners, in conjunction with the judiciary, can facilitate the safe return of a child. These include developing conditions for return, agreeing to undertakings and/or garnering the assistance of the International Hague Network Judges.

B.1 Conditions to return

The Court has the power to impose conditions for the return of the child. If the Court decides to order for the child's return, it may elect to apply conditions that are considered necessary to facilitate that and to protect the child on return. They are often referred to as "safe harbour" or "soft landing" arrangements.

In an application where a child has been removed to Australia, the Court is able to make "any other order that [it] considers to be appropriate to give effect to the Convention" (reg 15(1)(b)). Further, under reg 15(1)(b), a Court may include in such order "a condition that [it] thinks appropriate to give effect to the Convention".

Regardless of whether the grave risk exception under Article 13(b) is being relied upon by the taking parent, conditions to return can be imposed.

Primarily, conditions to return are a delicate balance between maintaining the role of the Court in the jurisdiction that the child is returned to, and ensuring that safeguards are put in place for the child and the taking parent on the return. Certain jurisdictions, including the USA, take a different view on conditions precedent in relation to the support they may provide to the returning (abducting) parent.

In ***State Central Authority & Daker*** [2008] FamCA 1271 ("***Daker***") her Honour Justice Bennett considered the precondition to return the child to Israel (in the context of Article 13(b) grave risk of harm exception). Citing Lord Donaldson of Lymington MR in ***C v C*** *(Abduction Rights of Custody)* [1989] 1WLR 654 (at 664) she observed (at [66]):

> *" …. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country … can resume their normal role in relation to the child."*

Her Honour continued:

> *"[70]. I accept the concept of easing the returning mother and child back into the country in which they were both habitually resident prior to the wrongful retention. The abduction provisions in the 1980 Convention are a means to an end, not an end in themselves. It is obviously for the benefit of the child that the transition between countries should be as smooth and as comfortable as the circumstances of the case allow. However, any attempt by this Court to regulate the conduct or circumstances of the parents once the child has left Australia needs to operate only until a court of competent jurisdiction in the other state can be seised of the matter and must, I think, not impinge on the powers of that court to make relevant orders on the proper and timely applications that could, and should, be made by the parties. In my view, the conditions which can be properly imposed on return orders made under the 1980 Convention, should be marked as much by appropriate restraint and respect for the operation of law in the requesting state as they are for the reasonable needs of the returning party and child in the immediate to short term.*

[71]. ….. Notwithstanding the findings of this court, it is prudent to attach some conditions which provide some protection and comfort for the child [and the mother] when they return to Israel."

Conditions may be quite varied – and it is up to the taking parent to consider what those conditions might be to ensure the safe return of the child, including the arrangements once the child is back in their home State.

It is important that each party consider what "soft landing" arrangements should be in place in the event that their application fails. Taking steps to prepare for either outcome ensures the focus remains on the needs of the child and results in a more child-centred approach. Developing appropriate conditions to return can also be an effective means of identifying those matters which are important in order to return the child to the home State.

Examples of conditions to return may include payment by the left-behind parent of the airfares for the returning parent and child, or the provision by the left-behind parent of an amount of money to cover the immediate needs of the taking parent in relation to accommodation and food on their return.

One of Australia's most high-profile Convention cases is ***Department of Communities (Child Safety Services) & Garning*** [2011] FamCA 485[3] known as the "**Italian Girls' case"**. The case was heard in the Family Court, and on appeal to the Full Court of the Family Court and the High Court of Australia.

The Italian Girls' case involved the wrongful retention of four Italian girls (aged 8, 9 12 and 14) in Australia by their Australian-born mother who had returned with her from Italy for a one-month holiday. The couple had a fifth daughter who had died when she was an infant, which had resulted in the father experiencing bouts of depression. Both parties were granted custody of the children under Italian law. Initially, in her application, the mother opposed the return of the children on the basis of the father's consent and acquiescence. She also invoked the "grave risk" exception on the basis that returning the girls to Italy would put them at physical or psychological harm due to the father's mental health. Finally, she raised the children's views and objection to returning.

The trial Judge, Justice Forrest found that:-

- The father had not given his consent or acquiesced to the children remaining in Australia;

[3] See also, ***Garning & Director-General, Department of Communities (Child Safety Services)*** [2012] FamCAFC 35; *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest* [2012] HCA 47.

- There was insufficient evidence to determine that the father posed a grave risk; and

- The children had not reached an age or degree of maturity to take their views into account.

At the conclusion of his judgment, his Honour noted (and made orders accordingly):-

> *"[128]. Conscious of the fact that I have the power to order any conditions that I consider necessary to give effect to the Convention, mindful of the mother's evidence about her financial circumstances prior to leaving Italy and noting the submissions of counsel for the Central Authority that I could make orders returning the children subject to a condition that some financial provision for the mother's needs be put in place to secure the return of the children to Italy, I have determined that I will make an order returning the children to Italy conditional upon the provision to the mother, prior to her departure for Italy and, only on the basis that she actually is returning to Italy with the girls, of the sum of AUD$8,000 for her and the children's immediate support upon return to Italy.*
>
> *[129]. I consider that amount of money such as shall allow her to immediately re-accommodate herself and the four girls and support herself and them whilst she is resolving, in the short term, ongoing parenting and financial support arrangements with the father."*

The mother appealed the decision, on a range of grounds, including an application to admit further evidence, all of which were dismissed by the Full Court of the Family Court and subsequently, by the High Court of Australia.

Developing conditions to return should be done early on in proceedings to ensure they are comprehensive and are able to be met, as well as to enable procedural fairness. This reduces the risk of frustrating the purpose of the Convention, and fosters the prompt return of the child taking place.

As the High Court observed in ***DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services*** (at [40] per Gaudron, Gummow and Hayne JJ)

> *"… care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced".*

When developing conditions for return it is important to consider the following factors:

- Are the conditions to return simple and straightforward?

- What are the practicalities of fulfilling the condition? If it is impracticable the Court may not impose it.

- When are the conditions to be fulfilled? Is it a condition precedent to return?

- What is the risk of relying on the conditions being met after the return? It is preferable to have conditions that can be complied with prior to the child's return?

- How long will it take to apply the conditions? They should normally apply only in the short term, as otherwise it may interfere with the functions of the Court or authorities in the State of habitual residence.

While the left-behind parent may through their application propose conditions, it is the role of the Central Authority to inform the Court about which conditions being sought by the other party, if any, the left-behind parent will be able to comply with.

In ***Secretary, Department of Family and Community Services & Hilton*** ("**Hilton**") [2015] FamCA 849, Kennedy Partners represented the applicant father who was seeking the return of his two-year child to Norway following the wrongful removal by the mother to Australia. The mother relied upon the grave risk defence pursuant to Reg 16(3)(b) of the Regulations. In his affidavit the father proposed a list of the actions he would do to ensure the safe return of the child. These actions readily translated into the orders made by Justice McClelland, who made a conditional order for the return of the child. The orders included conditions and undertakings as follows:-

> *"4. The following conditions apply in relation to the Order for the return of the child, being Order 1 above:*
>
> > *4.1. That the Central Authority facilitate the father in furnishing a written undertaking to the Court, on or before 4pm on 16 October 2015, that he:*
> >
> > *4.1.1. has done all things necessary to withdraw the criminal proceedings pending in Norway in respect of the respondent mother removing the child from Norway without his knowledge or consent;*
> >
> > *4.1.2. will not voluntarily support any punishment or committal of the respondent mother in respect to any contempt of the Norwegian Court;*

4.1.3. undertakes to pre-pay for airline tickets for the respondent mother and the child to travel from Sydney to Town H, Norway. If needed, the father undertakes to accompany the respondent mother and child or to accompany the child on his own during the return;

4.1.4. will vacate the home at Town H, Norway and make it available to the respondent mother and the child. The father will continue to service the mortgage and outgoings in respect of the home. It is noted that there is a wireless internet connection at the home which will be made available to the respondent mother;

4.1.5. will make a motor vehicle available to the respondent mother and continue to meet all expenses related to that vehicle;

4.1.6. will make a mobile telephone and subscription available to the respondent mother;

4.1.7. has maintained a place for the child at a pre-school in Norway. He will continue to pay any fees and charges associated with the child's attendance at the pre-school when the child returns to Norway; and,

4.1.8. undertakes to provide financial support for the child and the respondent mother from the day of their return to Norway, which includes covering their indexed costs equating to 2380 Norwegian Krone (NOK) per month for the child and 4590 (NOK) for the respondent mother. It is noted that these amounts may be reduced, subject to any welfare entitlements the respondent mother and the child may be entitled to in Norway.

5. That the Central Authority cause the father's written undertakings the subject of these Orders to be lodged at the Sydney Registry of the Court, and furnish copies thereof by mail or email to the mother."

In the event, the mother chose not to accompany the child back to Norway. The child continues to reside in the father's sole custody there, and the mother has made no attempt to see or contact the child since the return.

There is little value in crafting conditions to return if there is no capacity for both or either party to satisfy them. In ***Arthur & Secretary, Department of Family & Community Services and Anor*** (2017) FLC 93–781, the Full Court (Bryant CJ, Thackray and Austin JJ) observed:

"[92*]. Whatever may be the position where a defence has been successfully raised, we do not consider it proper, when making a*

mandatory return order, to impose conditions that cannot be met. The discretion to impose conditions has to be exercised having regard to the purpose of the Regulations. As this Court said in ***Wolford & Attorney-General's Department*** *(Cth) [2014] FamCAFC 197:*

> *75. We should observe that unlike* ***McDonald [& Director-General, Department of Community Services NSW*** *(2006) FLC ¶93-297] or* ***DP v Commonwealth Central Authority****, this is not a case where a grave risk of harm was otherwise established. It follows that in making it easier for children in their place of habitual residence, undertakings or conditions should not be imposed which are unnecessary or, rather than give effect to the Abduction Convention, undermine it.*

[93]. As Butler-Sloss LJ has said, conditions also must not be used "to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child". Similarly, the High Court has said that conditions must be such that they "will be met voluntarily or … can readily be enforced".

In this case, the first instance judge had adjourned the application for return orders of the child to New Zealand to enable consideration of "the terms of the order … or any conditions or undertaking required for that order". The primary judge went on to impose eight conditions including a requirement for particular undertakings to be given. The father, on appeal, challenged the orders. He submitted he was not able to fulfil certain conditions and sought that they be set aside. He argued that the orders were *ultra vires* because he could not meet the cost of the conditions, and thus would not be able to facilitate the return the child, which would therefore not give effect to the Convention. He further contended the orders were too vague to be enforceable.

The Full Court found that the father's inability to satisfy the conditions would result in the failure of the child to be returned New Zealand. Their Honours concluded that in the circumstances of this case it was not appropriate to impose additional conditions in relation to expenditure of funds by the father, and the controversial conditions were set aside.

B.2: Undertakings

In addition to conditions to return, it is possible to seek undertakings from the left-behind parent – particularly if there is a concern in relation to the welfare of the child, or the taking parent, immediately upon their return to the State of habitual residence.

For example, in the **Italian Girls' case** (supra), to facilitate the girls' return the father gave an undertaking to withdraw criminal proceedings against the mother in the Italian courts for having unlawfully retained the children in Australia.

In ***Townsend v Director-General, Department of Families, Youth and Community Care*** (1999) FLC 92-842 (at 85,857–85,858) the mother resisted orders that the two children be returned to the USA where custody proceedings would take place, and appealed on the grounds that the trial judge erred in requiring the father to make undertakings rather than the Court imposing conditions.

The trial judge made the following orders:-

> ``***PROVIDED*** *the FATHER files an Undertaking in Form 41A in this Court and, in respect of Undertakings in paragraphs (c), (d), (e) and (f) carries them into effect:*
>
> *(a) that he agrees and will agree to a Stay of the Orders, if any, of the courts in the United States of America, relating to the custody of the children and he will not remove, nor support the removal, of the children from the care and control of the MOTHER until the issue of custody is heard and determined by those Courts;*
>
> *(b) that he agrees to co-operate with the MOTHER to ensure that the Courts of the United States of America determine the issue of custody of the children without delay;*
>
> *(c) that he will take all necessary steps to support the MOTHER's applications to Immigration authorities in the United States of America for her and the children to return to and remain in that country as long as necessary to enable the issue of custody of the children to be heard and determined by the Courts of that country;*
>
> *(d) that he will pay to the Australian Central Authority sufficient moneys to pay for airline tickets from Australia to the United States of America for the MOTHER and the children;*
>
> *(e) that he will pay to the Australian Central Authority for the payment to the MOTHER the sum of $US5,000 to cover the initial cost of temporary accommodation for the MOTHER and the children;*
>
> *(f) that he will pay to the Australian Central Authority for payment to the MOTHER the sum of $US5,000 to cover the initial cost of living expenses for 14 days for the MOTHER and the children.*

IT IS ORDERED:

(1) That the children, [ALT], born 22 June 1994 at Brisbane, Australia and [TDT], born 3 April 1993 at Brisbane, Australia be forthwith returned to the country of the United States of America."

In this case, Ellis ACJ and Chisholm J held that the determination of whether to require undertakings or impose conditions was a matter of discretion:

> *"[61]. The husband's affidavit had indicated a willingness to adhere to these conditions. However in our view it was a matter for his Honour to consider which conditions if any he thought it proper to impose, or what undertakings to require, and we are not persuaded that he fell into error. In particular, in the absence of evidence as to United States law and practice on the matter, we see no reason to assume that the undertakings required by his Honour would be less effective in carrying out the intent of the Convention than orders expressed as conditions."*

In the case of ***Daker*** (supra) the Court made the return orders conditional upon the requesting parent — in this case the father — also agreeing to provide the mother, via the State Central Authority, with a written undertaking that he would not take legal action in Israel in relation to the care of the child until the mother has arrived in Israel, and then only on not less than 30 days notice to the mother.

See also ***Department of Family and Community Services & Gaudin*** [2017] FamCA 767,[4] where an application was made for the return of the two children to the United States. The taking mother relied on the grave risk defence (which was not made out) and maintained the children had become stateless when the parties had formed a mutual intention that they were no longer habitually resident in the United States. She also made it clear that, regardless of the outcome, she would not return to the USA. Justice Watts at first instance made orders for the return of the children; and in the event the mother decided to return with the children, his Honour made orders placing conditions upon the mother and outlined detailed undertakings required from the father in relation to the return. The undertakings included:

> *"2.2. In the event the mother gives that notice [to return to the United States] to the Department, the father is to provide to the Respondent and the Applicant an undertaking in writing that he will:*
>
> > *2.2.1. Not file any application or motion in the Circuit Court of State D (Family Court Branch) for the mother to be dealt with for*

[4] Kennedy Partners provided advice and counsel to the father's attorneys in Australia and the USA and liaised with the Australian Central Authority on the father's behalf.

contempt or contravention of the current ex parte orders that the mother return the child or any related order;

2.2.2. Not do anything or sign any document that would have the effect of commencing or continuing proceedings against the mother for contempt or contravention of court orders in the Circuit Court of State D (Family Court Branch) arising from any conduct of the mother to up until the date of the implementation of the return order;

2.2.3. Suspend all divorce proceedings until final parenting orders are made in the United States of America;

2.2.4. Prior to the mother and children's return to State D, seek a variation of the current ex parte orders so that upon the respondent's return the children shall be physically placed with her until further orders are made by the Circuit Court of State D (Family Court Branch);

2.2.5. Do all things and sign all documents to seek expedition of the current family law proceedings in the Circuit Court of State D (Family Court Branch);

2.2.6. Until orders or rulings with respect to child support are made by a Court of competent jurisdiction, or the appropriate agency or authority in State D:

2.2.6.1. Pay an amount of USD$3,300 per month by way of child support;

2.2.6.2. Pay C's child care fees at E Centre (the Company F child care facility);

2.2.6.3. Pay B's school fees;

2.2.6.4. Do all acts and things to ensure that the mother and children remain beneficiaries of his health insurance plan."

In the event the mother chose to remain in Australia, and the children were returned to the care of the father in the United States.

However, unlike conditions precedent discussed above, an undertaking given to an Australian Court is not enforceable in the foreign Court (nor in the Australian Courts if the party breaching the undertaking is not present in, or

does not return to, Australia). As the Honourable Justice Bennett has noted in relation to undertakings:[5]

> "*A simple undertaking offers no meaningful protection for a child when the undertaking is given to a court in a jurisdiction to which at least one parent never thinks they will have to return. Accordingly, undertakings do not figure in my disposition of matters. An exception would be where I accept an undertaking to record an expression of intention about otherwise unenforceable matters such as a left-behind parent warranting that he or she will not cooperate with any criminal prosecution of the taking parent, in the home state. That may be of some evidentiary value."*

B.3: Direct Judicial Communication

An alternative approach to facilitating the safe and prompt return of the child is to seek assistance through the judiciary.

The operation of the Convention can be facilitated through the International Hague Network of Judges. The role of a Network Judge includes:-

- To promote child protection collaboration and direct judicial communication
- To cooperate with all professionals involved in child protection matters, especially with the Central Authorities

Many contracting States, including Japan and Australia, have one (or more) designated Network Judge(s). Judge Hironori Wanami, Judge Tomoko Sawamura, and Judge Yoshiaki Ishii – all from the General Secretariat, Supreme Court of Japan, Tokyo – are the designated International Hague Network Judges for Japan. Justice Victoria Bennett AO is the principal Hague Network Judge for Australia

Direct communication between judges in each jurisdiction can assist with arrangements regarding return orders, including scheduling hearings in the home State upon return. In addition, short-term parenting arrangements can be established in the home State prior to the matter being listed for interim decisions.

In Article 13 cases, cooperation between the Network Judges may be of assistance in working between States to accept and enforce undertakings even

[5] The Honourable Justice Victoria Bennett, "*Legal Framework and Operation of the Hague 1980 and 1996 Conventions*, (Presentation delivered at the Symposium on Cross-Border Disputes Involving Children: Perspective on Family Disputes Involving Children in a Globalised Society, Singapore, 2016).

though there are generally no consequences for their breach. Safe harbour orders and complementary orders (or mirror orders) can also be made.

C: ENFORCING THE RETURN OF THE CHILD

C.1 Enforceability measures

Applications for enforcement of return orders are part of the role of the Central Authority.

If an order is not complied, with an application is made to the Court to redress the non-compliance. As mentioned above, this is not common in Australia due to the high level of compliance by the taking parent with orders to return the child to his or her place of habitual residence. If the Central Authority returns to Court it is usually for the purpose of varying the orders when the circumstances of the parties have changed. This might include the taking mother falling pregnant to a new partner and being subsequently unable to travel; the child's grandparents becoming unwell and needing care and assistance by the taking parent; or financial constraints which have arisen.

However where enforcement is required, the *Family Law Rules 2004* provide the following measures:-

a) Location and recovery orders

b) Warrants for arrest

c) Applications for contravention of orders

d) Contempt of Court

C.2 Location and recovery orders

The Central Authority can apply for a location order in relation to a Convention matter.

Location orders require a person who has information about the child's whereabouts to provide that information to the Court.

Recovery orders are made under Section 67Q of the Act. A recovery order is an order:-

(a) requiring the return of a child to:

(i) a parent of the child; or
(ii) a person with whom the child is to live under a parenting order; or

(iii) a person with whom the child is to spend time under a parenting order; or
(iv) a person with whom the child is to communicate under a parenting order; or
(v) a person who has parental responsibility for the child.

(b) authorising or directing a person or persons, with such assistance as he, she or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purposes of finding a child;

(c) authorising or directing a person or persons, with such assistance as he, she or they require, and if necessary by force, to recover a child;

(d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to one of his or her parents; or a person who has parental responsibility for the child;

(e) giving directions about the day-to-day care of a child until the child is returned or delivered to another person;

(f) prohibiting a person from again removing or taking possession of a child;

(g) authorising the arrest, without warrant, of a person who again removes or takes possession of a child;

The child's best interests is the paramount consideration when determining whether to make a recovery order.

The Australian Federal Police administer recovery orders and are responsible for their enforcement. The Central Authority has standing to make an application.

An application for a recovery orders typically addresses details of:-

- The order breached
- The last known whereabouts of the child
- Efforts made to locate the child, including information about those who might be harbouring the missing parent
- Any welfare concerns arising from the wrongful retention of the child
- A brief history of the relationship between the parent and the person the child is presumed to be with
- A summary of previous Court hearings and family law orders

- Particulars about the child and where he/she usually lives
- Where the child might be and the basis for that belief
- Why it is in the child's best interests to be returned to the parent
- The likely impact on the child if a recovery order is not made
- Any other factors relevant to the case

The Court regards recovery order applications as urgent and will balance this urgency with the time taken to hear the matter. In ***Tokely &Tokely*** (2014) FLC ¶93-601, where the matter was adjourned for four months in a context where the evidence suggested the child was at risk of psychological harm and an urgent hearing was required, the Full Court of the Family Court (Thackray, Ryan & Aldridge JJ) observed:

> *"[49]. Section 67U of the Act empowers the court to make a recovery order. The term recovery order is defined by s 67Q. As is made plain by s 67V, in deciding whether to make such an order, the paramount consideration is the best interests of the child. The purpose is to restore a child to a person with whom the child is to live, spend time with and so on in accordance with s 67Q.*
>
> *[50]. In adjourning the matter for so long the trial judge was required to consider those interests. I accept the submission of the mother that the delay in this matter did not address the urgent nature of a recovery order and ran the risk of the subsequent hearing being more in the nature of an interim parenting application rather than a recovery order application."*

By their very nature, the impact of recovery orders can be traumatic for the child and the Court is reluctant to make orders unless the justification for them is sound. Courts will look to the alleged risk to the child. As Judge Altobelli of the Federal Circuit Court noted in ***Drew & Jensen*** [2017] FCCA 656:

> *"[95]. … Nowhere in … the Father's Affidavit … does he discuss the alleged risks to the children that he asserted in his first Affidavit and in the Notice of Risk that justified the urgent ex parte drastic order. What happened to the Father's concerns about the Mother's mental health? What happened to the Father's concerns about the Mother's physical abuse of X? What happened to the Father's concerns about the children being removed from the country? They are the sort of concerns that might warrant consideration of a recovery order."*

When a child is returned to the person applying for the recovery order, the person seeking the recovery is to give notice to the court (s 67Y of the Act) and if a location order is in force, to the person the location order applies to.

The question of who bears the cost of such an order was determined in ***Re F (Hague Convention: Claim for Expenses)*** (2007) FLC ¶93-335. The father appealed against orders dismissing his application for payment of costs in relation to recovery proceedings for the return of a child to the USA following the wrongful retention of the child by the mother in Australia. The appeal was dismissed by the Full Court on the basis that s 117AA of the Act does not permit an order for expenses to be made against the State Central Authority.

C.3 Warrants for arrest

An alternative avenue for enforcement is through the issue of an arrest warrant. The Central Authority is able to apply for an order for the issue of a warrant under Reg 14 of the Regulations. Pursuant to Reg 31 a warrant

> *"(a) authorises a person named or described in the warrant, with such assistance as is necessary and reasonable and, if necessary and reasonable, by force:*
>
> *(i) to find and recover the child; and*
>
> *(ii) if the person reasonably believes that the child is in, or on, a vehicle, vessel, aircraft or premises and the circumstances are so serious and urgent that the entry and search of the vehicle, vessel, aircraft or premises is justified:*
>
> *(A) to stop, enter and search the vehicle, vessel or aircraft; or*
>
> *(B) to enter and search the premises; and*
>
> *(iii) to deliver the child to the person named in the warrant …"*

In the **Italian Girls' case** (supra), warrants were issued for the Australian Federal Police to remove the children from the mother and return them to Italy. Despite having her appeal dismissed in both the Full Court of the Family Court and on an application for Special Leave to Appeal in the High Court of Australia, the mother still refused to return to Italy with the children.

The original orders made by Forrest J were stayed until the appellate Full Court had made its determinations. On 4 May 2012, Forrest J made further orders which were not opposed by the mother. They provided for the mother to deliver the four children to Brisbane International Airport at a time and date nominated by the State Central Authority and not before 16 May 2012. The orders gave

sufficient time allocation for the mother's High Court application to be filed, heard and determined.

However, on 14 May 2012, two days before the children were meant to return to Italy pursuant to the orders, the girls disappeared. The State Central Authority made an urgent application for an arrest warrant to issue pursuant to Reg 31 of the Regulations. The warrant was issued based on the maternal grandmother having made serious threats to the girls' health and safety, including threats to their lives as well as their mother's.

The warrant authorised: "law enforcement authorities in the State and the Commonwealth to take possession of the four children as soon as they may be located by such law enforcement authorities, and for a further order that once recovered pursuant to that warrant the children live with a person nominated by an officer of the applicant State Central Authority, pending their return to Italy."

Following a police search, the children were found at a relative's home a week later and were returned to Italy. Much of the latter stages of this case were played out in the media and generated a great deal of attention, particularly for the perceived draconian treatment of the children and the dramatic scenes of the children being forcefully moved into police vans and onto the flight to Italy

C.4 Application for contravention orders

Applying to the Court for contravention of orders is an alternative avenue for parties to enforce compliance with return orders. The legislative pathway presents a progression in degree of seriousness and sanctions. The Court determines preliminary issues in relation to the contravention and whether the respondent has a "reasonable excuse" for the contravention.

A person is said to have contravened an order affecting children if, and only if:[6]

(a) the person bound by the order has:

(i) intentionally failed to comply with the order; or

(ii) made no reasonable attempt to comply with the order

(b) or in other cases, if she or he has:

(i) intentionally prevented compliance with the order by a person who is bound by it; or

(ii) aided or abetted a contravention of the order by a person who is bound by it.

[6] Section 70NAC, Family Law Act

The standard of proof rests with the respondent establishing on the balance of probabilities that they had reasonable excuse for the contravention, while the evidentiary onus for a more serious contravention is for the applicant to satisfy the Court beyond reasonable doubt that grounds for making the order exist.

A reasonable excuse includes, but is not limited to:

- The respondent did not understand their obligations under the order;
- The respondent's actions (or inaction) were necessary to protect the health or safety of a person (including the respondent or a child); and
- The action or inaction was for a period not longer than necessary to protect the health and safety of the child.

Penalties for an intentional breach of orders correspond with the seriousness of the breach. However, the child's best interests remain the paramount consideration, leaving the Court with the power to vary orders and determine sanctions as appropriate. Penalties include fines, the imposition of a bond, a period of community service or a sentence of imprisonment.

In ***Tamal & Semak*** [2017] FamCA 172[7], the father removed two of the three children from Australia to Country E without the mother's consent in late 2014. The mother communicated with the children via Skype or telephone. Almost a year later, the mother arranged to meet the father in the Middle East on the pretext of reconciling with him. However, the father only brought one of the children with him, leaving Child D in Country E with the paternal grandmother. The mother successfully recovered Child C and returned to Australia with him. The father suffered from depression and mental illness and in September 2013 was charged for the offences of assault occasioning actual bodily harm and common assault. He was granted bail pending hearing. On his return to Australia in December 2016 he was arrested for breach of his bail conditions and was granted conditional bail, including the surrender of his passport, in relation to the pending criminal charges.

In late December 2016, the mother filed a parenting application seeking sole parental responsibility for the three children including a return order for Child D and restraining the father from taking the children outside the Commonwealth of Australia. Other than through electronic communication, the mother had not seen Child D since 2014.

[7] This is not a 1980 Convention case given Country E is not a convention country. Consequently, the Central Authority did not play a role in these proceedings.

On 13 March 2017, Foster J made orders granting the mother sole parental responsibility for the children. Inter alia, he made the following order:

> "*7. The father shall within one month of this date do all things necessary and sign all necessary documents so as to cause the return of the child, D born … 2012 to the Commonwealth of Australia and into the care of the mother."*

In April 2017, the mother brought a contravention application against the father for failing to comply with the orders. The application was heard in June 2017. The father gave evidence that he suffered from depression, was not allowed to leave Australia and had made various efforts for friends and family to return the child – none of which had come to fruition.

Ultimately, the father was found to have no reasonable excuse. He had intentionally failed to comply with the order to return Child D from Country E to Australia and had taken no reasonable steps to comply. In his judgment (***Tamal & Semak (No 2)*** [2017] FamCA 972), Foster J stated:

> *"[49]. The removal of a child from Australia in circumstances such as these and the failure to procure the child's return constitutes a most serious disregard for the orders and authority of this Court. The father's continuing contravention is a most serious disregard for the child's right to reside in accordance with orders with his mother and siblings here in Australia.*
>
> *[50]. The father's "attempts" to comply with his obligation to return the child are superficial and unconvincing. He fails to understand the serious obligation imposed on him by the subject orders. Such obligation requires clear evidence on the balance of probabilities that his actions have provided him with a reasonable excuse for his ongoing contravention. He has failed to adduce such evidence.*
>
> *[51]. In all the circumstances of this matter, as discussed above, the Court is not satisfied that the father has established reasonable excuse for his contravention of the court's order.*
>
> *[52]. The Court is, otherwise, satisfied beyond reasonable doubt that the father has behaved in a way that shows a serious disregard for his obligations under the primary orders."*

The Court was of the view that a monetary penalty would be inappropriate. Ultimately, having considered a community service order as a means of coercive remediation, and taking into account the serious disregard for the father's obligations and continuing (and likelihood of future) non-compliance, his

Honour imposed a sentence of six months imprisonment, ending when the father complied with the orders.

C.5 Contempt of Court applications

A party wanting to prosecute a breach of orders can also commence contempt proceedings under Section 112AP of the Act. The Family Court's power to hear contempt proceedings is found in Section 35 of the Act.

Section 112AP(1)(b) applies to a contempt of court that constitutes a contravention of an order under the Act and involves a flagrant challenge to the Court's authority. Contempt applications should only be instituted when there is no compliance with the orders, and the Court's authority is specifically challenged.

Allegations of contempt must be proved beyond reasonable doubt.

Contempt proceedings can have serious outcomes, including fines and/or imprisonment, for the person found to be in contempt and therefore an application to institute proceedings should only be made when all of a party's rights have been exhausted. There are no prescribed legislative or common law guidelines, and Section 112AP gives the Court a wide discretion to impose consequences following a finding of contempt. There is also no defined length of sentence of imprisonment (see ***DAI & DAA*** (2005) FLC 93–215). Given the breadth of discretion given to the Court, the power to impose penalties is exercised very carefully.

In ***Kerrigan and Raiffe (No 2)*** [2013] FCCA 2240 the father faced two charges of contempt of court as a result of failing to comply with orders for the return of the 10 year-old child from India. The father had been given many opportunities to comply with the orders. He was aware of the orders and clearly understood the effect of them, yet failed to comply with them. In addition, the mother had given an undertaking that she would pay all costs associated with the return of the child to Australia.

His Honour Justice Cassidy stated:

> *"[34]. I consider these two contraventions to be a flagrant challenge to the authority of this Court for the following reasons:*
>
> *a) India is not a Hague Convention country;*
>
> *b) The mother and father are presently in Australia;*
>
> *c) The child is presently in India.*

[35]. The Court has given the father a number of opportunities, in fact, almost a daily opportunity since August, to return the child to Australia. The father has chosen not to do that in circumstances where he has been given sufficient warning that if he continues to fail to do what is necessary to return the child to Australia, that he could face a term of imprisonment. There could be no more direct example of a flagrant challenge to the authority of this Court and I am therefore satisfied that he is guilty of both contempts as charged."

The father was sentenced to one month imprisonment for the first charge, and a further indefinite term of imprisonment for the second charge until the child had returned to Australia and the court had evidence of that fact: ie the child had to be produced to the Court before release orders would be made.

D: IMPLICATIONS FOR JAPAN

Ultimately, in all Convention proceedings, the child must be placed in an optimal situation should an order be made that he or she return to the State of habitual residence. So too, the taking parent must not be subjected to direct or indirect punishment, which would in turn adversely affect the child, if he or she returns with the child. Rather than relying on punitive enforcement measures, well thought-out arrangements, including contingency planning, will facilitate and foster confidence in the process and are likely to better influence the ultimate orders a judge will make.

The following is a guide to the range of practical considerations which may be of assistance when developing submissions and orders:-

1. Prepare a proposed list of detailed conditions to return early in proceedings.

2. Consider arrangements which provide a level of comfort based on a "soft landing" for the child and the taking parent if a return is ordered. Propose interim accommodation, support and practical arrangements that enable stability and certainty.

3. Ensure the taking parent is not placed indirectly or directly in an intolerable situation (be it financially, psychologically, physically or legally) if they return with the child.

4. Make sure the conditions to return can be complied with both practically and financially.

5. Develop proposals or conditions that are practical and ensure the child is not disadvantaged or unduly negatively impacted upon the return. Arrangements should be child-focused, reasonable and appropriate, with

the underlying intention of promoting the child's well-being and minimising trauma to him or her.

6. Determine if undertakings or other steps to allay fear of prosecution in the courts of the home State upon return are required.

7. Engage the assistance of the Hague Network Judge in relation to orders and proceedings in the other State.

8. Work closely with the Central Authority to facilitate the prompt return of the child, or to instigate proceedings if the return order is not met.

9. Liaise with suitably qualified colleagues in the home State to ensure that issues are dealt with speedily and appropriately upon return.

Ian Kennedy AM is Senior Partner of Kennedy Partners Melbourne. **Monique MacRitchie** is a solicitor with Kennedy Partners and a former Judicial Legal Associate with the Family Court of Australia

Rule 70. Enforcing a Judgment for a Specific Act

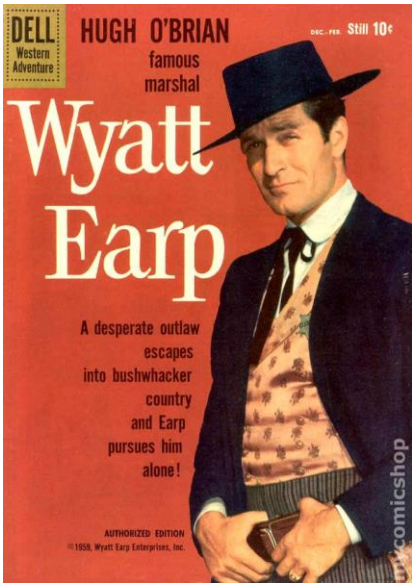
(a) PARTY'S FAILURE TO ACT; ORDERING ANOTHER TO ACT. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

…

(e) HOLDING IN CONTEMPT. The court may also hold the disobedient party in contempt.

28 U.S. Code § 566 - Powers and duties

(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law. …..



(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties…..

(e) (1) The United States Marshals Service is authorized to— ….

(D) assist State, local, and other Federal law enforcement agencies, upon the request of such an agency, in locating and recovering missing children.

Getting Your Custody Order Recognized & Enforced in the U.S

The Hague Convention is not an exclusive remedy. This means that parents may use other laws to seek return of, or access to, a child that is in the United States. The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), is a uniform state law which has been enacted in some form in 49 states, the U.S. Virgin Islands, Guam, and the District of Columbia. The UCCJEA requires state courts to enforce child custody and visitation determinations made in a foreign country where the foreign court substantially conformed with the UCCJEA's jurisdictional standards, as long as the parties had notice and opportunity to be heard. Only limited defenses apply. The act provides expedited enforcement proceduresfor enforcement, and procedures to register custody and visitation determinations in advance of enforcement. The UCCJEA also regulates when a court in the United States has jurisdiction to make or modify a custody order, and when to defer to courts in other states or countries.

…

Comparison of Hague Convention and UCCJEA Enforcement Remedies

When you have a choice between using the Hague Convention (if you are in a country that is a treaty partner of the United States), or filing an action under the UCCJEA to enforce a foreign custody/access order, you and your attorney will decide the best strategy to achieve your objectives. (It may be possible to request both remedies in the alternative.) The following is a list of comparisons between the Hague Abduction Convention and the UCCJEA. This is provided for general informational purposes only and is not intended to be legal advice. You should always discuss your case with your attorney before taking any actions. Your attorney will advise you about your state's law, which may differ from the uniform act.

Abduction cases where no court order exists

- You do not need a custody order to seek return under the Hague Convention.
- You need a custody or visitation order in order to use the UCCJEA's expedited enforcement procedures.

Speed

- The Hague Convention requires 'return forthwith' and envisions expedited proceedings. Courts can be asked to explain delays after six weeks. However, no specific time frame is set for holding the hearing.
- UCCJEA's enforcement is intended to be very fast. The uniform act calls for 'next day' enforcement.

Age

- The Hague Convention applies to children until age 16.
- The UCCJEA applies to children until age 18.

Court

- Hague Convention return cases can be brought in federal or state court. Access cases are brought in state court.
- UCCJEA enforcement actions can only be brought in state court in a state which has enacted some form of the UCCJEA.

Access cases

- Hague Convention Article 21 remedy does not specifically include returning a child to another country for visits, though the court may decide to do so.
- UCCJEA requires enforcement of foreign orders according to their terms, which would include visits in another country.

Defenses

- The Hague Convention provides exceptions to the return obligation. The court has discretion to order return even when an exception is established.
- UCCJEA provides very limited defenses to enforcement

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

Federal Practice Manual for Legal Aid Attorneys

4.2 Sanctions

Updated 2017 by Jeffrey S. Gutman

(footnotes removed)

4.2.C. The Inherent Power of the Court

The sanctioning power of the federal courts "is not limited to what is enumerated in statutes or in the rules of civil procedure." Federal courts have the inherent power to punish persons who abuse the judicial process. The inherent power of the court is an "implied power squeezed from the need to make the courts function." Rule 11 and § 1927 do not displace the court's inherent power, but instead they exist concurrently.

The inherent power to sanction is broad. The scope of the power reaches "any abuse" of the judicial process. This includes the authority to sanction for conduct that occurs outside of the courtroom and is not limited to attorneys or parties. Courts also have broad discretion to determine the appropriate sanction to be imposed.

One such sanction, "limited to those cases where the litigant has engaged in bad-faith conduct or willful disobedience" is attorney fees. Those fees, however, must be compensatory in nature, rather than punitive. Thus the attorney fee award is limited to the amount of fees expended because of the misconduct at issue. That is, the court may generally award fees only for legal work that would not have been necessary but for the misconduct. Where appropriate, courts may impose attorney fees representing the entire cost of litigation or the entire cost after some point in time. But such a case is "exceptional" and occurs when all of the expenses were caused by the sanctioned behavior.

Given the broad authority granted, a court's use of the inherent power should be used cautiously. Any use must comply with due process. Use of the power will be reviewed under the abuse of discretion standard.

JEREMY D. MORLEY

The Hague Abduction Convention

Second Edition

Practical Issues and Procedures for Family Lawyers

ABA Defending Liberty Pursuing Justice

SECTION OF FAMILY LAW

Co-sponsored by the Section of International Law

§ 1.19 RELATIONSHIP OF THE CONVENTION TO THE UCCJEA

The Hague Convention operates independently of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA). The UCCJEA (or its predecessor, the Uniform Child Custody Jurisdiction Act) has been incorporated into the law of all U.S. states.

A left-behind parent often has the choice of proceeding under the UCCJEA instead of under the Hague Convention. If a child's "home state" (as that term is defined in UCCJEA Sec. 102(7)) is a foreign country, then, as far as U.S. courts are concerned, courts of that country have primary jurisdiction to make a custody order (Sec. 201), and they have "continuing exclusive jurisdiction" concerning custody of the child as long as the "substantial connection" provisions of section 201 are met.[39]

Section 105 of the UCCJEA requires courts in the United States to enforce custody determinations of other countries if jurisdiction was in substantial compliance with the requirements of the Act, provided only that the foreign custody law does not violate human rights.

It may be preferable for a left-behind parent to bring suit under the UCCJEA instead of under the Hague Convention. There are several reasons for this:

- The UCCJEA requires a court in the U.S. state in which a child is located to register and enforce a custody order issued by the child's home state, even if the home state is a foreign country. This means that the primary venue for the litigation is the jurisdiction from which the child was taken. It allows the left-behind parent to bring suit on his or her home turf, which is likely to be far more convenient and comfortable than a distant and unfamiliar American court. The left-behind parent can use a local lawyer in the home state to

38. *State Central Authority & Quang* [2009] FamCA 1038; *Gumbrell v. Jones* [2001] NZFLR 593.

39. UCCJEA, § 202.

handle the bulk of the work, and the local court will most likely be more sympathetic.

- The foreign country will normally be the child's home state for UCCJEA purposes once the child has lived there for six months. However, that may or may not be sufficient to constitute habitual residence. In any event, if habitual residence is to be an issue in a Hague case, it is an expensive issue to prove, since it is extremely fact-based and often requires lawyers to collect, evaluate, and present extensive evidence and extensive testimony.
- The UCCJEA does not permit the alleged abductor to assert in the U.S. court the exceptions that can be asserted in a Hague case. Registration of a foreign custody order can be contested only on the following grounds: that (1) the issuing court had no jurisdiction to enter the child custody determination, or (2) the foreign child custody determination has been vacated, stayed, or modified by a court having proper jurisdiction to modify same, or (3) notice or an opportunity to be heard was not given to the person contesting jurisdiction (provided he or she was entitled to receive notice).[40] There are no defenses. By contrast, exceptions are invariably claimed in Hague Convention cases. If one exception is upheld, return may be denied.
- Many countries are not parties to the Hague Convention. A case can be brought under the UCCJEA to register and enforce a foreign custody order issued by any country in the world provided only that the country was the child's "home state," that the action was initiated in compliance with U.S. concepts of due process, and that the foreign custody law does not violate human rights.
- The Hague Convention does not effectively provide for the enforcement of access rights. The UCCJEA has no such restriction.
- The Hague Convention applies only in respect to children under the age of 16.
- Hague cases generally raise "interesting" (i.e., expensive) issues. UCCJEA enforcement cases generally (but not always) do not. Therefore UCCJEA cases are generally substantially cheaper.

On the other hand, it might be better in many cases to bring suit under the Hague Convention, instead of under the UCCJEA, for a variety of reasons:

40. UCCJEA, § 305.

- The courts in the child's habitual residence might not exercise custody jurisdiction if the child is no longer located there. From a U.S. perspective the courts of that country might have jurisdiction, but if those courts do not have jurisdiction under their own jurisdictional rules, and if there was no custody order in place prior to the child's removal, there will be no foreign custody order to register and enforce in the United States.
- If the foreign country was not the home state for purposes of the UCCJEA because the child lived there for less than six months (unless he or she was less than six months old), a custody order issued by a court in that country will generally not be enforceable under the UCCJEA, since it will not have been "a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act]" (UCCJEA Sec. 105(b)).
- If proper notice or a proper opportunity to be heard was not provided by the foreign court, this should be fatal to an effort to register and enforce the order in the United States. UCCJEA Section 305(d)(3) requires that a registered order be vacated if the person contesting registration was entitled to receive proper notice (as required by the UCCJEA) but such notice was not received.
- If the courts in the child's habitual residence act slowly, it may be better to bring a Hague case forthwith in the place where the child is currently located.
- If the courts of the habitual residence will not handle the custody case unless and until the child is returned there, it would be possible for the left-behind parent to wait until the U.S. court has custody jurisdiction, usually after six months, and then to sue for custody in the U.S. state where the child is located. In such a situation, however, a Hague case would invariably be a far wiser course, since it would be much quicker and would not open the door to a full-blown best-interests analysis.
- Financial considerations might favor a Hague case, especially if the foreign country provides legal aid to its nationals for Hague cases but not for UCCJEA cases.

41. *In re* T.L.B., 272 P.3d 1148 (Colo. App. 2012).

United States Codes

PUBLIC LAW 100-300
100th Congress
(H.R. 3971, 29 April 1988)

42 USC 11601 et seq.
INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 and for other purposes.

Section 11607.

(b) Costs incurred in civil actions

…" (3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate."

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

PREFATORY NOTE

Enforcement Provisions

One of the major purposes of the revision of the UCCJA was to provide a remedy for interstate visitation and custody cases. As with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders. If either parent leaves the State where the custody determination was made, the other parent faces considerable difficulty in enforcing the visitation and custody provisions of the decree. Locating the child, making service of process, and preventing adverse modification in a new forum all present problems…..

The provisions of Article 3 provide several remedies for the enforcement of a custody determination. First, there is a simple procedure for registering a custody determination in another State. This will allow a party to know in advance whether that State will recognize the party's custody determination. This is extremely important in estimating the risk of the child's non-return when the child is sent on visitation. The provision should prove to be very useful in international custody cases.

Second, the Act provides a swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child at the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

The scope of the enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Article 2 nor the PKPA allows an enforcing court to modify a custody determination.

Third, the enforcing court will be able to utilize an extraordinary remedy. If the enforcing court is concerned that the parent, who has physical custody of the child, will flee or harm the child, a warrant to take physical possession of the child is available.

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

The involvement of public authorities will also prove more effective in remedying violations of custody determinations. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the public authorities as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition, the public authorities may have resources to draw on that are unavailable to the average litigant.

This Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation of the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. The Act does not mandate that public authorities be involved in all cases. Not all States, or local authorities, have the funds necessary for an effective custody and visitation enforcement program.

平成２９年（受）第２０１５号　人身保護請求事件
平成３０年３月１５日　第一小法廷判決

主　　文

原判決を破棄する。

本件を名古屋高等裁判所に差し戻す。

理　　由

上告代理人今里恵子，同佐野みゆきの上告受理申立て理由について

１　本件は，米国に居住する上告人が，上告人の妻であって日本に居住する被上告人により，上告人と被上告人との間の二男である被拘束者が法律上正当な手続によらないで身体の自由を拘束されていると主張して，人身保護法に基づき，被拘束者を釈放することを求める事案である。

２　原審の確定した事実関係の概要は，次のとおりである。

(1)　上告人と被上告人は，いずれも日本国籍を有する者であるところ，平成６年に日本において婚姻し，長男（平成８年生まれ）及び長女（平成１０年生まれ）をもうけた後，平成１４年頃に家族４人で米国に移住した。

被拘束者は，平成１６年▲▲月▲▲日に米国で出生し，戸籍法１０４条１項所定の日本国籍を留保する旨の届出がされたことにより，米国籍と日本国籍との重国籍となっている。

(2)　上告人と被上告人の関係は，平成２０年頃から悪化した。被上告人は，平成２８年１月１２日頃，上告人の同意を得ることなく，被拘束者（当時１１歳３箇月）を連れて日本に入国し，その後現在に至るまで，ａ市内で被拘束者と共に暮らし，被拘束者を監護している。

(3)　上告人は，平成２８年７月，国際的な子の奪取の民事上の側面に関する条約の実施に関する法律（以下「実施法」という。）２６条に基づき，被上告人に対し，米国に被拘束者を返還することを命ずるよう東京家庭裁判所に申し立てた。同

裁判所は，同年９月，被上告人に対し，米国に被拘束者を返還することを命ずる旨の終局決定（以下「本件返還決定」という。）をし，本件返還決定は，その後確定した。

(4)　上告人は，本件返還決定に基づき，東京家庭裁判所に子の返還の代替執行の申立て（実施法１３７条）をし，子の返還を実施させる決定（実施法１３４条１項，１３８条）を得た。

執行官は，平成２９年５月８日，被上告人の住居において，実施法１４０条１項に規定する被上告人による子の監護を解くために必要な行為をした（以下，これを「本件解放実施」という。）。被上告人は，本件解放実施の際，執行官による再三の説得にもかかわらず玄関の戸を開けることを拒否したため，執行官は，２階の窓を解錠して立ち入ることとなった。その後も，被上告人は，被拘束者と同じ布団に入り身体を密着させるなどして，本件解放実施に激しく抵抗した。また，被拘束者も，米国に帰ることを促す執行官に対し，このまま日本にいることを希望し，米国には行きたくない旨を述べて，これを拒絶した。執行官は，子の監護を解くことができないとして，本件解放実施に係る事件を終了させた（国際的な子の奪取の民事上の側面に関する条約の実施に関する法律による子の返還に関する事件の手続等に関する規則８９条２号）。

(5)　上告人は，米国カリフォルニア州上位裁判所に，被上告人との離婚を求める訴えを提起するとともに，被拘束者についての監護等に関する命令を求めたところ，同裁判所は，平成２９年８月１５日までに，上告人が被拘束者についての監護を単独で行うものとすることなどを内容とする命令をした。

(6)　被拘束者は，平成２９年９月２７日及び同年１０月６日，被拘束者代理人と面談し，その際，日本にいることを希望する旨の意思の表明が被上告人の圧力によるものであるかのように受け取られることは非常に不満である，自己の意思により日本での生活を希望していることを強く主張したいなどと述べた。また，被拘束者は，上記のとおり希望している理由として，ようやく日本での生活に慣れてきた

のに米国に戻って生活するのは大変である，飲酒した上告人から，暴言を吐かれたり，けがをする程度のものではなかったものの暴力を受けたりしたことがあり，来日して上告人と離れたことで安心した面もあるなどと述べた。なお，被拘束者は，本件返還決定に関する実施法に基づく手続や米国カリフォルニア州上位裁判所における被拘束者の監護権等に関する手続などについて，一部誤解していたところもあったが，被拘束者代理人の説明を受けて正しく理解した。

(7)　被上告人は，現在，薬剤師として勤務する傍ら，食事の支度など被拘束者の身の回りの世話をしている。

被拘束者は，来日後，ａ市内の小学校に通い，平成２９年４月に同市内の中学校に進学した。被拘束者は，勉学や部活動に励み，友人や教員との人間関係も良好で，家庭においても，被上告人と親和し，兄，姉及び他の親族とも交流を持っている。また，被拘束者は，現在，日本語による意思疎通に問題はなく，年齢相応に筋道を立てて会話をすることができる。

３　原審は，上記事実関係の下において，次のとおり判断して，上告人の請求を棄却した。

(1)　被拘束者は，現在，日本での生活環境になじみ，良好な人間関係を構築して充実した学校生活を送っており，家庭内においても被上告人と親和して，情緒も安定し，年齢相応に発達を遂げて健やかに成育しているものと見受けられ，また，その判断能力が欠けているなどといった事情はうかがわれない。これらのことなどを考え合わせると，被拘束者は，自己の真意を曲げて日本にいることを希望する旨の意思を表明したとは解されず，自由な意思に基づいて当該意思を表明したというべきである。よって，被上告人の被拘束者に対する監護が人身保護法及び同規則にいう拘束に該当するとは認められず，また，上告人の本件請求は，被拘束者の自由に表示した意思に反するというべきである。

(2)　被上告人の被拘束者に対する監護状況，被拘束者の年齢及び意向などを考慮すると，被上告人の被拘束者に対する監護が人身保護法及び同規則にいう拘束に

該当するとしても，その違法性が顕著であるとは解されず，本件返還決定が確定していることは，本件の帰すうに影響しない。

４　しかしながら，原審の上記判断はいずれも是認することができない。その理由は，次のとおりである。

(1)　被上告人の被拘束者に対する監護が人身保護法及び同規則にいう拘束に当たるか否か等について

意思能力がある子の監護について，当該子が自由意思に基づいて監護者の下にとどまっているとはいえない特段の事情のあるときは，上記監護者の当該子に対する監護は，人身保護法及び同規則にいう拘束に当たると解すべきである（最高裁昭和６１年（オ）第６４４号同年７月１８日第二小法廷判決・民集４０巻５号９９１頁参照）。本件のように，子を監護する父母の一方により国境を越えて日本への連れ去りをされた子が，当該連れ去りをした親の下にとどまるか否かについての意思決定をする場合，当該意思決定は，自身が将来いずれの国を本拠として生活していくのかという問題と関わるほか，重国籍の子にあっては将来いずれの国籍を選択することになるのかという問題とも関わり得るものであることに照らすと，当該子にとって重大かつ困難なものというべきである。また，上記のような連れ去りがされる場合には，一般的に，父母の間に深刻な感情的対立があると考えられる上，当該子と居住国を異にする他方の親との接触が著しく困難になり，当該子が連れ去り前とは異なる言語，文化環境等での生活を余儀なくされることからすると，当該子は，上記の意思決定をするために必要とされる情報を偏りなく得るのが困難な状況に置かれることが少なくないといえる。これらの点を考慮すると，当該子による意思決定がその自由意思に基づくものといえるか否かを判断するに当たっては，基本的に，当該子が上記の意思決定の重大性や困難性に鑑みて必要とされる多面的，客観的な情報を十分に取得している状況にあるか否か，連れ去りをした親が当該子に対して不当な心理的影響を及ぼしていないかなどといった点を慎重に検討すべきである。

これを本件についてみると，被拘束者は，現在１３歳で，意思能力を有していると認められる。しかしながら，被拘束者は，出生してから来日するまで米国で過ごしており，日本に生活の基盤を有していなかったところ，上記のような問題につき必ずしも十分な判断能力を有していたとはいえない１１歳３箇月の時に来日し，その後，上告人との間で意思疎通を行う機会を十分に有していたこともうかがわれず，来日以来，被上告人に大きく依存して生活せざるを得ない状況にあるといえる。そして，上記のような状況の下で被上告人は，本件返還決定が確定したにもかかわらず，被拘束者を米国に返還しない態度を示し，本件返還決定に基づく子の返還の代替執行に際しても，被拘束者の面前で本件解放実施に激しく抵抗するなどしている。これらの事情に鑑みると，被拘束者は，本件返還決定やこれに基づく子の返還の代替執行の意義，本件返還決定に従って米国に返還された後の自身の生活等に関する情報を含め，被上告人の下にとどまるか否かについての意思決定をするために必要とされる多面的，客観的な情報を十分に得ることが困難な状況に置かれており，また，当該意思決定に際し，被上告人は，被拘束者に対して不当な心理的影響を及ぼしているといわざるを得ない。

以上によれば，被拘束者が自由意思に基づいて被上告人の下にとどまっているとはいえない特段の事情があり，被上告人の被拘束者に対する監護は，人身保護法及び同規則にいう拘束に当たるというべきである。また，上記説示に照らすと，本件請求は，被拘束者の自由に表示した意思に反してされたもの（人身保護規則５条）とは認められない。

(2)　被上告人による拘束に顕著な違法性（人身保護法２条１項，人身保護規則４条）があるか否かについて

国境を越えて日本への連れ去りをされた子の釈放を求める人身保護請求において，実施法に基づき，拘束者に対して当該子を常居所地国に返還することを命ずる旨の終局決定が確定したにもかかわらず，拘束者がこれに従わないまま当該子を監護することにより拘束している場合には，その監護を解くことが著しく不当である

と認められるような特段の事情のない限り，拘束者による当該子に対する拘束に顕著な違法性があるというべきである。

これを本件についてみると，被上告人は，本件返還決定に基づいて子の返還の代替執行の手続がされたにもかかわらずこれに抵抗し，本件返還決定に従わないまま被拘束者を監護していることが明らかである。他方で，米国への返還のために被上告人の被拘束者に対する監護を解くことが著しく不当であることをうかがわせる事情は認められない。したがって，被上告人による被拘束者に対する拘束には，顕著な違法性がある。

5　以上と異なる原審の判断には，判決に影響を及ぼすことが明らかな法令の違反がある。論旨はこの趣旨をいうものとして理由があり，原判決は破棄を免れない。そして，前記事実関係を前提とする限り，上告人の本件請求はこれを認容すべきところ，本件については，被拘束者の法廷への出頭を確保する必要があり，この点をも考慮すると，前記説示するところに従い，原審において改めて審理判断させるのを相当と認め，これを原審に差し戻すこととする。

よって，裁判官全員一致の意見で，主文のとおり判決する。

（裁判長裁判官　山口　厚　裁判官　池上政幸　裁判官　小池　裕　裁判官　木澤克之　裁判官　深山卓也）

Translation provided by:

Hague Convention Division
Consular Affairs Bureau
Ministry of Foreign Affairs of Japan

2017 (Ju) No. 2015 Case of a request for Habeas Corpus relief
March 15, 2018, Judgment of the First Petty Bench

Main text of the judgment (decision)

The judgment in the prior instance is quashed

This case is remanded to the Nagoya High Court

Reasons

Reasons for the petition for acceptance of final appeal filed by the appeal counsels, IMAZATO Keiko and SANO Miyuki

1. This is a case where the appellant, who lives in the United States of America, claims that his second son born between himself and his wife, who is the appellee and lives in Japan, is having his physical freedom restrained without legitimate procedure and seeks to have the said restrained child released based on the Habeas Corpus Act.
2. The outline of the facts determined by the court of prior instance is as follows.

(1) Both the appellant and the appellee have Japanese nationality. They got married in Japan in 1994. After having their oldest son (born 1996) and their oldest daughter (born 1998), they moved to the United States sometime around 2002 as a family of four.

The child currently under restraint was born in the United States on mm dd, 2004, and by the submission of a notification of the intention to reserve Japanese nationality prescribed in Article 104 (1) of the Family Register Act, he has dual American and Japanese nationality.

(2) The relationship between the appellant and the appellee deteriorated from around 2008. On January 12, 2016, the appellee entered Japan with the restrained child (then eleven years and three months) without obtaining the consent of the appellant.

Since then to the present, the appellee has been living with the child in city “a” and exercising custody over the child.

(3) In July 2016, based on Article 26 of the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as “the Implementation Act”), the appellant filed a petition with the Tokyo Family Court to order the appellee to return the restrained child to the United States. In September of the same year, the said court issued a final order ordering the appellee to return the restrained child to the United States (hereinafter referred to as “Return Order”), and later the said Return Order became final and binding.

(4) Based on the said Return Order the appellant filed a petition with the Tokyo Family Court for execution by substitute of the return of the child (Article 137 of the Implementation Act) and obtained an order to implement the return of the child (Article 134 (1) and 138 of the Implementation Act).

On May 8, 2017, a court execution officer took the necessary steps to release the child from the care of the appellee at the appellee’s dwelling (hereinafter referred to as “the Release”) as prescribed in Article 140 (1) of the Implementation Act. At the time of the Release, since the appellee refused to open the door of the house despite persuasions repeatedly attempted by the court execution officer, the court execution officer opened a window on the second floor and entered through it. Even after that, the appellee wrapped herself closely with the restrained child in a single duvet bedcover and strenuously resisted the Release. In addition, when the court execution officer urged the child to return to the United States, he said that he wished to remain in Japan as he was, that he did not want to return to the United States and he refused to be released. The court execution officer ended the said Release on the basis that it was impossible to release the child from the mother’s care (Article 89 (ii) of the Rules of Procedures in Case for Return of Child under the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction).

(5) The appellant brought an action in a California Superior Court seeking a divorce from the appellee and also sought an order of custody relating to the restrained child, and by August 15, 2017 the said court made an order granting the appellant sole custody of the child.

(6) On September 27, 2017 and October 6, 2017, the restrained child had a meeting with his attorney, and the child stated that he was very dissatisfied that it was considered that he expressed the wish to stay in Japan because of pressure from the appellee. He strongly wanted to allege that he wished to live in Japan by his own decision. Also, as a reason for the above-mentioned wish, he said that he had got accustomed to life in Japan at last and it would be hard to return to live in the United States. He had been subject to abusive language and violence by the drunk appellant although it did not amount to injuries. He felt relief since he came to Japan and was away from the appellant. Besides, although he had partially misunderstood the procedures of the Implementation Act relating to the Return Order and the procedures relating to the rights of custody over himself in the California Superior Court in the United States, he correctly understood those issues through his attorney's explanation.

(7) The appellee works as a pharmacist at present and looks after the restrained child including preparing food.

The restrained child attended an elementary school in city "a" after coming to Japan and in April 2017, he entered junior high school in the same city. He works hard at study and school clubs, has a good relationship with friends and teachers, fits well with the appellee at home, and interacts with his elder brother and sister and other relatives. In addition, he has no problem of communicating in Japanese at present and can make a reasonable conversation at a level appropriate for his age.

3. Based on the facts related to the case described above, the court of prior instance concluded that the Petition should be dismissed, ruling as follows:

(1) At present, the restrained child is accustomed to life in Japan, is building good human relationships and has a fulfilled school life. At home, he fits well with the appellee, is emotionally stable and seems to be growing up healthily at a level appropriate for his age. Moreover, there is no circumstance showing that he lacks the competence to make judgments. Putting these things together, it cannot be seen that the restrained child's expression of a will to stay in Japan is a distortion of his true wish, and it must be said that the said expression of will is based on his free will. Therefore, the appellee's custody over the restrained child cannot be seen as coming under the restraint referred to in the Habeas Corpus Act or its rules. Moreover, the appellant's petition in this case is contrary to the restrained child's freely expressed will.

(2) Taking into consideration the situation of the appellee's custody over the restrained child, his age and his intention, even though the appellee's custody of the restrained child comes under the meaning of the restraint referred to in the Habeas Corpus Act and its rules, the illegality of the restraint is not conspicuous and the above-mentioned Return Order becoming final and binding has no influence on the outcome of this case.

4. However, the conclusion of the court of prior instance described above is not acceptable, for the following reasons.

(1) Whether or not the custody of the appellee over the restrained child corresponds to the restraint referred to in the Habeas Corpus Act and its rules.

In the case of the custody of a child who has mental capacity, if there are special circumstances in which the child cannot be seen as staying with the custodian based on the child's free will, the said custodian's custody over the child should be seen to correspond to the restraint referred to in the Habeas Corpus Act and its rules (Refer to 1986 (O) No. 644, judgment of the second petty bench of the Supreme Court of July 1986, Minshu Vol. 40, No. 5, at 991). As seen in this case, if one of the two parents having custody of a child crossed a national border and removed the child

to Japan and the child was asked to decide whether he or she wished to stay living with the taking parent, the decision would relate to which country the child would live in as his or her base in the future. Moreover, for a child with dual nationality, it might involve a question as to which nationality to choose in the future. In the light of these points, it should be seen as a significant and difficult decision to make for the child. Moreover, in the case of a removal like the one described above, it can be expected that in general there will be a serious emotional confrontation between the mother and the father, and it will be very difficult for the child to have contact with a parent living in a different country. Also, the child will inevitably live with a different language and in a different cultural environment from those he or she had before the removal. As a result, it should be assumed that the child would often be in a difficult position to obtain unbiased information which is necessary to make the above-mentioned decision. Taking these points into account, when deciding whether or not the child's decisions are based on his or her free will, basically, it is necessary to carefully consider whether the child has adequately obtained varied and objective information which is necessary to make the above-mentioned decision in the light of its importance and difficulty, and whether the taking parent exerts an undue psychological influence on the child.

In this case, the restrained child who is now thirteen years old can be seen as having mental capacity. However, from his birth to coming to Japan, he lived in the United States and he had no foundations for living in Japan. He came to Japan at a time when he was eleven years and three months old and certainly did not have the adequate mental competence to make the type of decisions mentioned above. Later, it seems that he did not have adequate chance to communicate with the appellant. Since he came to Japan, it can be recognized that he has had no option but to depend on the appellee to live. Further, despite the Return Order involved in this case becoming final and binding, the appellee in the situation described above showed an attitude of refusing to return him to the United States. At the time of the execution by substitute of the return of the child based on the Return Order, the

appellee strenuously resisted the Release in front of the restrained child. Considering these circumstances, it has to be said that the child under restraint was put in a difficult situation to adequately obtain varied and objective information necessary for him to decide whether or not he remains with the appellee. Such varied and objective information includes the meaning of the Return Order and the execution by substitute of the return of the child based on it, and the information about his own life after returning to the United States according to the Return Order in this case. It also must be said that the appellee exercised an undue psychological influence over the restrained child at the time of his decision-making.

Based on the above, it must be said that there are special circumstances in which the restrained child cannot be seen as staying with the appellee based on his free will. It should be concluded that the appellee's care of the child corresponds to the restraint referred to in the Habeas Corpus Act and its rules. Also, in the light of the above explanation, it cannot be recognized that the petition in this case is contrary to the freely expressed will of the restrained child (Article 5 of the Habeas Corpus Rules).

(2) Whether or not the restraint by the appellee is conspicuously illegal (Article 2, Paragraph (1) of the Habeas Corpus Act, Article 4 of the Habeas Corpus Rules).

In cases of Habeas Corpus claims for seeking the Release of a child who was removed to Japan over national borders, if the restraining party does not comply with the decision ordering the restraining party to return the child to his or her State of habitual residence based on the Implementation Act, but rather continues the restraint by exercising custody of the child, it must be said that there is conspicuous illegality in the restraint of the child by the restraining party unless there are special circumstances under which it is recognized as extremely inappropriate to release the child.

In this case, it is clear that the appellee resisted the execution by substitute of return of the child based on the Return Order when it was carried out and is continuing to exercise custody over the restrained child and not complying with the

said Return Order. On the other hand, there are no circumstances that would suggest that it is extremely inappropriate to release the child from the care of the appellee in order to return him to the United States. Therefore, there is conspicuous illegality in the constraint of the restrained child by the appellee.

5. The ruling of the court of prior instance, which is different from the above discussion, contains a violation of law that obviously affects its judgment. The appellant's reasons for the petition are well-founded, and the decision of prior instance should inevitably be quashed. In addition, as long as the above-mentioned facts are premised, the appellant's reasons for the petition should be accepted. In this case, it is necessary to ensure that the restrained child appears in court. The court takes this point into consideration and recognized that it is appropriate to have the court of prior instance proceed with the case and renew the judgment. The court holds to remand the case.

Accordingly, the court unanimously decides as set forth in the main text. (Presiding Justice YAMAGUCHI Atsushi, Justice IKEGAMI Masayuki, Justice KOIKE Hiroshi, Justice KIZAWA Katsuyuki, and Justice MIYAMA Takuya)

International Academy of Family Lawyers

SESSION 3

The Marital Estate: How to locate and divide foreign assets

Kennedy Partners LAWYERS

IAFL TOKYO SYMPOSIUM
29 MAY 2018

THE MARITAL ESTATE: HOW TO LOCATE AND DIVIDE FOREIGN ASSETS – AN AUSTRALIAN PERSPECTIVE

Presenter
John Spender
Kennedy Partners Lawyers

Relationships increasingly transcend international boundaries

Kennedy Partners LAWYERS

Overview of presentation

- The main issues and topics to cover:
  1. The Australian Statutory Framework
  2. Pre-trial disclosure & discovery
  3. Alternative channels to locate assets
  4. Other methods used to identify assets
  5. Choosing the right jurisdiction for your client
  6. Enforceability
  7. Specific orders

The Australian Statutory Framework

- *Family Law Act 1975* (Cth)
- Courts exercise broad discretionary power
- Property division – court must be satisfied that it is "just and equitable" to adjust property interests
- Property division process is a series of inter-related steps:
  1. Determine the asset pool - identify and value all assets and resources and quantify their liabilities
  2. Determine the contribution-based entitlements - identify and assess the contributions of the parties (expressed in %)
  3. Determine the adjustment that should be made (if any) - section 75(2) factors
  4. Are the orders to be made "just and equitable"

Pre-trial disclosure & discovery

- Consider the corporate structures that may be involved: partnerships, companies, discretionary trusts (often a family trust), unit trusts (business or investment with unrelated 3rd parties)
- This will help you to:
  - Identify key personnel and ownership of the entity
  - Obtain copies of the relevant documentation
    - » Documents can be obtained from the client, the other party or third party sources

Disclosure

- Obligation to give "full and frank" disclosure in a timely manner about assets, liabilities and income
- Rule 13.04 *Family Law Rules 2004* ("**the Rules**") – provides a detailed list of the types of information a party should provide
- Disclosure requirements vary but may include:
  - financial statements including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
  - a list of directors and shareholders
  - the company's constitution and amendments (for corporations)
  - the partnership agreement (for partnerships)
  - a copy of the trust deed (for trusts)

Financial statements & taxation returns

- Usually the first place to identify assets
- Valuation of assets may be essential
- Financial statements include the balance sheets, profit and loss statements and all notes, schedules and attachments
- Will assist in identifying:
  - The value of the assets
  - Loan accounts or funds owed (liabilities a trust/entity may seek to recover)
  - The dividend paid to the shareholders, if any
  - A regular pattern of distribution from a trust (which can be considered a financial resource of that party)
  - A beneficiary's interest in a trust
  - Any unpaid distributions owed to a party which are, effectively, an asset in the hands of that party
- Taxation returns – show distributions a party has received from a trust

Consequences for non-disclosure

- The court may draw adverse inferences against the non-disclosing party if there is material upon which some inference can be based (see ***Suiker & Suiker***, ***Black & Kellner***, ***Chang v Su***)
- ***Chang v Su*** - assets in Taiwan and Australia
  - Both claim non-disclosure
  - H's Australian residency visa application revealed H was worth in excess of AUD$4.55 m
  - No evidence to account for how H lost the money
  - W merited a meaningful adjustment – she received the Australian properties worth AUD$1.25 m

Duties of lawyers

- Practitioners have the following duties:
  - Duty to the Court – you cannot knowingly or recklessly mislead the Court, or permit your clients to do so, or be party to your clients doing so
  - Duty to advise clients to disclose financial documents, if they do not, then you must refuse to act for them
- Disclosure of a large number of documents that have no practical relevance to the issue in dispute does not constitute compliance with the Rules
- Breach can have serious professional and legal consequences

Alternative channels to locate assets

- Subpoena
  - Consider
    - » who you should serve,
    - » the scope of the subpoena,
    - » the relevance of the information – is there a legitimate forensic purpose (see ***Kelton & Brady and Anor***, ***Dillon & Dillon***)
  - Bank records and credit card statements
    - » Find hidden connections regarding assets, loans and trusts
    - » Discover hidden assets and expenditure
- Notice to produce (seldom used)

Alternative channels to locate assets (2)

- Database searches
  - Through third party organisations
  - Searches can reveal:
    - » Commercial property – Australian Securities & Investment Commission
      - shareholders and company directors and secretary
      - What a party's shareholding is
      - Historical information – ie changes to the entity and office holders
    - » Real estate – Titles Office
      - Ownership of property, whether encumbered by mortgage or caveat, what a property was sold for
      - Search by address, land identification or registered name
      - Copies of mortgages and caveats can be obtained to check borrowers and guarantors
    - » Personal property - Personal Property Securities Register
      - Motor vehicles, chattels encumbered by a loan

Other methods used to identify assets

- Specific questions
  - Can request answers to a set of written questions
  - No more than 20 questions
  - Must not be vexatious or oppressive
  - Not a common tactic but can be very effective
- The *Corporations Act 2001* (Cth)
  - A director of a company
    - » may inspect the books of a company (s 198F)
    - » has a right of access to the financial records of a company at all reasonable times (s 290)
  - Inspection must be for the purposes of a legal proceeding; and
  - Must be a proceeding the former director is a party to, or might be brought against them, or proposes to bring in their capacity as a director of the company

Other methods used to identify assets (2)

- Probate searches
  - Public Record Office of Victoria
  - Reveals the inventory of the estate and a copy of the Will admitted to probate
    - » will either confirm or deny a parties' entitlement to the estate; and
    - » will give some idea of the value of the estate
- The Hague Evidence Convention
  - Used in rare cases to extract evidence or inspect documents from overseas jurisdictions by sending a Letter of Request from a judge to a Central Authority in the other State

Choosing the right jurisdiction

- Which jurisdiction will offer the best result for your client, Australia or Japan?
- There may be strategic advantage in where you file proceedings.
- Jurisdiction is conferred if either party is:
  - An Australian citizen; ordinarily resident in Australia; or present in Australia
- The Courts will not necessarily exercise jurisdiction if it is not appropriate, for instance if:
  - There are proceedings on foot in Japan
  - The parties are not in Australia
  - There is no real nexus with Australia

Inappropriate forum test & forum shopping

- Contested jurisdiction based on common law rules of private international law
- Test is the "clearly inappropriate forum" if:

  "*continuation of the proceedings in [the Australian] court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging' or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment"* (***Henry v Henry***)
- The court considers a range of issues with respect to whether or not a stay of proceedings should be granted
- See ***Chen & Tan, Allen & Cortez*** and ***Costigan & Costigan & Ors*** where the court indicated that Australia may be an appropriate forum where neither spouse party lives in Australia

Doctrine of Res Judicata

- Has another country already dealt with the matter?
- Doctrine of *res judicata* applies where a cause of action, including the adjustment of property rights, has been full and finally determined by a non-Australian court (see elements to consider in ***Marginson v Blackburn Borough Council***)
- The Full Court in ***Caddy v Miller*** declined to allow a property matter already determined in California to reopen
- If there has been a final property settlement order made in Japan, there may not be the opportunity to commence proceedings in Australia

Enforceability

- Parties and property can be overseas – orders are made *in personam* not *in rem*
- *Mozambique Rule* prevents the courts from making orders in relation to ownership of foreign land
- *Foreign Judgments Act 1991* (Cth) – excludes matrimonial proceedings from the definition of "*action in personam*" (see ***de Santis v Russo***)
- Possible enforcement via the common law
- Orders made in court of competent jurisdiction overseas may be replicated in the orders of an Australian court if just and equitable, but will not be enforceable in their own right (***Galloway & Midden (No 2)***)

Specific assets – superannuation orders

- Bear in mind if either or both parties have superannuation entitlements in Australia
- Superannuation is treated as property and are considered another "species of asset"
- Superannuation payments and benefits require specific orders particularly in relation to superannuation splitting
- Superannuation arrangements are effected by court orders or a financial agreement made by the parties
- An option is to have property orders made in Japan and enter into an Australian financial agreement at the same time

Additional orders

- Partition orders
  - If the proceedings cannot commence in Australia an option may be to seek the sale and partition of the real estate. This may result in the partition or division of the sale proceeds between the parties in the proportions in which they own the property
- Restraining orders
  - If there is concern that a party will leave Australia and dispose of assets overseas, may be necessary to seek an order precluding them from leaving the country and requiring delivery of their passport to the court (see ***Restein & Restein***)
  - The court has power to restrain freedom of international movement in financial cases (***Brown & Brown***)

Summary and final tips

- Is there a legitimate international aspect to the case? This can be identified through disclosure and discovery techniques
- Which countries have jurisdiction?
- Can each jurisdiction determine the whole or only part of the matter?
- What are the advantages and disadvantages of the foreign forum?
  - In each jurisdiction, consider the scope, the relevant principles to be applied, the likelihood of the court exercising its powers, the likely outcomes, enforceability of the orders, the costs and benefits
- Engage advice and counsel from local practitioners to assist with the decisions and for assistance in how best to locate and divide the matrimonial assets for your client

QUESTIONS

Thank you

John Spender
Kennedy Partners Lawyers

Kennedy Partners
LAWYERS

IAFL TOKYO SYMPOSIUM
TUESDAY 29 MAY 2018

THE MARITAL ESTATE: HOW TO LOCATE AND DIVIDE FOREIGN ASSETS – AN AUSTRLIAN PERSPECTIVE[1]

John Spender[2]
Kennedy Partners, Melbourne

A: INTRODUCTION

It is increasingly common for parties from different parts of the globe to meet and form relationships; and to have connections with, or assets in, more than one jurisdiction.

While the United Kingdom and New Zealand still top the list of birth countries of Australian residents born overseas, there are large numbers from China, India, and the Philippines (with these three countries rounding out the top five). Many more individuals from a wide range of countries (including many from Japan) are in Australia at any given time to live, or for work, education or other purposes.

Equally, more and more Australians live overseas pursuing their careers or are in a relationship with people they have met at home, abroad or, increasingly, through the internet.

It is hardly surprising that if these relationships break down, issues arise which present real challenges to Australian and Japanese lawyers in advising their clients. It is becoming increasingly frequent for advisors to have to consider the ramifications of marriage or relationship breakdowns involving "international" couples in a wide range of contexts from identifying, locating and disentangling property interests and entitlements, dealing with issues of child support and spousal maintenance and determining the status of pre-nuptial and

[1] This paper draws on a range of internal sources from the firm of Kennedy Partners, including papers the author (and various colleagues and former colleagues of his firm) have presented at conferences and seminars in Australia and overseas. The author would like to thank Ian Kennedy AM, Amanda Humphreys, Julia Mansfield and Monique MacRitchie for their work from which the writer has drawn.
[2] John Spender is a partner of Kennedy Partners, Melbourne.

financial agreements and orders from overseas courts. Very often these issues, and their implications, are not immediately apparent and the appropriate forum for determining them will not be clear.

It is becoming more commonplace to uncover property or resources owned or controlled by a party in one or more overseas jurisdiction, or in which one of the parties has an interest. It is a matter for practitioners to determine whether the matrimonial assets (in Japan for example) are sufficient to meet their client's reasonable expectations, or whether strong efforts need to be taken to bring the foreign assets (in Australia for example) into the proceedings to obtain a proper result for the client. Often, however, the value of the overseas property may be unknown — yet could represent a very significant portion of the matrimonial asset pool — and obtaining a full picture of the matrimonial estate may be problematic when one or either of the parties does not provide full disclosure.

With this background, the purpose of this paper is to identify and highlight the aspects practitioners should consider when advising about property divisions and related financial issues with international aspects in the context of relationship breakdown.

In the context of this symposium, too, this paper aims to provide some guidance to Japanese family lawyers, who are dealing with either or both of the following circumstances:

1. The formerly married couple are both in Japan, but either the lawyer's client or the other party have an interest in property in Australia; or
2. Either the client or the other party are living in Australia, and either or both have an interest in property in Australia.

This paper also specifically focuses on what can be done it such circumstances to locate those assets in Australia and to determine best how to divide them. The paper will also focus on how the Australian Courts divide matrimonial assets, how Australian practitioners go about locating assets both in Australia and overseas, the issues around jurisdiction and forum selection and the enforceability of orders across borders.

B: THE AUSTRALIAN STATUTORY FRAMEWORK

As a Japanese lawyer acting for clients with an Australian connection, and with assets in Australia, it is necessary to first understand the Australian matrimonial property framework.

Under the *Family Law Act 1975* (Cth) ("**the Act**"), the family law courts[3] have jurisdiction over the financial affairs of both married and de facto (including same sex) couples including with respect to:-

- Declarations and alteration of property interests;
- Division of property;
- Spousal maintenance;
- Superannuation/pension splitting;
- Property injunctions;

and are empowered to make whatever orders are considered appropriate in relation to the matters in which they are given jurisdiction by the Act.[4]

B.1 Overview

The Act is the overarching Australian legislative framework governing the affairs of couples on relationship breakdown.

Australia does not have a community of property regime, an accrual system or any fixed statutory entitlements on relationship breakdown. The courts exercise a broad discretionary power when determining the application of principles and factors outlined in the Act to the individual circumstances of each case.

Property division and spousal maintenance are not ancillary to principal relief in Australia. Financial issues between married couples can be dealt with by the family law courts, independently of the divorce process, at any time.

The provisions relating to spousal maintenance and property division are contained in Part VIII (for married couples) and Part VIIIAB (for de facto couples) of the Act.

B.2 Property division

That Act empowers the court to alter the property interests of either or both parties to a marriage. This is a broad, discretionary power vested in the court to make "such orders as it

[3] The Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia.

[4] The Family Court of Western Australia also has the jurisdiction conferred on it under both federal and state legislation. In addition to the *Family Law Act 1975* (Cth) ("**Family Law Act**"), there is the *Family Court Act 1997* (WA).

considers appropriate" — tempered only by the requirement that it must be just and equitable to make an order; and that, in turn, any order made is "just and equitable".[5]

In considering what orders (if any) should be made, the court is required to take into account a range of matters set out in the Act including:

- The contributions of each party to the acquisition, conservation or improvement of the property. Contributions may be financial or non-financial; direct or indirect; or made by a party or on behalf of a party.
- Contributions to the welfare of the family constituted by the parties and any children (including contributions made in the capacity of homemaker or parent). These contributions to do not have to be tied to any specific asset and are to be recognised in a substantial — and not a token — way.
- The effect of any proposed order upon the earning capacity of either party.
- The factors in s 75(2) – summarised below, and replicated in s 90SF(3) for de facto couples — to the extent that they are relevant to property division ("**s 75(2) factors**").
- Any other order affecting a party to the marriage or a child of the marriage.
- Any liability which either party may have under the Child Support Scheme in relation to a child of the marriage.

B.3 Section 75(2) factors

The menu of additional factors which may be relevant to the just and equitable alteration of property interests of a particular couple includes:

- The age and state of health of each party;
- The physical and mental capacity of each party for appropriate gainful employment;
- Their respective income, property and financial resources;
- Whether either party has the care or control of a child under 18.
- The commitments of each party necessary to enable the party to support:
    - himself or herself; or
    - a child or other person who that party has a duty to maintain
- A standard of living that is in all the circumstances reasonable.
- The extent to which the payment of maintenance would enable a party to increase his or her earning capacity by undertaking a course of education or training or to establish himself or herself in a business, or otherwise to obtain an adequate income.

[5] **Stanford & Stanford** (2012) 247 CLR 108.

- The extent to which each party has contributed to the income, earning capacity, property and financial resources of the other party.
- The duration of the marriage and the extent to which it has affected the earning capacity of a party.
- The need to protect a party who wishes to continue in the role of parent.
- If either party is cohabiting with another person, the financial circumstances of that cohabitation.
- The terms of any order for property adjustment made or proposed to be made.
- Any child support payable, or liable to be paid in the future, for a child of the relationship.
- Any other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.
- The terms of any financial agreement binding on the parties.

B.4 Application of statutory provisions

Subject to the Court satisfying itself that it is just and equitable to adjust the property interests of the parties, the general approach to the property division process (as described by the Full Court of the Family Court in ***Hickey and Hickey and A-G for the Commonwealth of Australia (intervening)*** (2003) FLC 93-143 at p78,386) normally involves a series of inter-related steps, being:

1. To identify and value all of the assets and resources of the parties (regardless of whose name they are in or where they are located) and to quantify their liabilities. In most instances, the pool of assets is evaluated at the date of the hearing. Each party has a duty to make full and frank disclosure concerning their financial affairs to the other party and to the Court.
2. To identify and assess the contributions of the parties to those assets and determine the contribution-based entitlements of the parties (expressed as a percentage of the net assets, if possible and appropriate).
3. To identify and assess all other relevant matters — including the s 75(2) factors to the extent that they are relevant — and to determine the adjustment (if any) which should be made to the contribution-based entitlements established at Step 2.
4. To look carefully at the orders which are proposed to be made on the basis of the findings and the determination of the contribution and additional factors to ensure that

any orders made are just and equitable (or "fair") in all the circumstances. The question of whether the result is just and equitable relates to the order to be made, not just to the underlying percentage division.

A further step — to give consideration as to whether either party is entitled to receive spousal maintenance — may be required if the property division does not enable each party to support himself or herself adequately.

B.5 Spousal maintenance

Each party to a relationship has an obligation to maintain the other party to the extent that:-

(a) The first party is reasonably able to do so; and

(b) The other party is unable to provide adequately for their own support by reason of:-

(i) Having the care and control of a child of the marriage or relationship under the age of 18 years;

(ii) Age or physical or mental incapacity for appropriate gainful employment; or

(iii) Any other adequate reason.

The entitlement to, and quantification of, spousal maintenance is determined by comparison of the financial circumstances of each of the party (taking into account all of their income, assets, resources and liabilities) and applying the same s 75(2) factors summarised above.

Maintenance orders may take the form of periodic payments (either for a limited term or on an ongoing basis), a lump sum payment or both — and may be varied or discharged if a party receiving periodic payments remarries or re-partners or there is a significant change in the circumstances of either party which justifies a variation to or discharge of the order.

B.6 Clean break

The Act requires the court to make, as far as practicable, orders which will end the financial relationship between the parties and avoid further proceedings between them. Clean break orders are accordingly made wherever possible.

C: PRE-TRIAL DISCLOSURE AND DISCOVERY

Cases involving division of property can naturally vary significantly in terms of the assets and entitlements to be adjusted and in relation to the legal and practical issues which come up for consideration. For instance, corporate structures are being used more frequently by clients to

operate businesses, distribute income and manage assets. In Australia the vast majority of companies registered are private entities and not listed on the Stock Exchange.[6] Additionally, trusts, including family trusts, have become more prevalent and can create some of the most vexed issues in property law matters.

The most common commercial structures used by clients in Australian family law matters are:

1. Partnerships - for example a farming partnership or an accounting practice.

2. Companies - for example a building company or a property developer. Companies are also frequently used as corporate trustees.

3. Discretionary trusts – often a Family Trust or used as a structure to operate a business wholly owned by the parties, for example an architecture practice.

4. Unit trusts – for example a business or investment with unrelated third parties.

When dealing with one or any of these corporate structures, a practitioner must be able to identify a number of key elements (for example the key personnel and the ownership of the entity) and identify any potential issues that may arise with the entity or as a result of any property settlement which involves the entity. To do this, a practitioner must obtain and review copies of the relevant documentation.

Documents can be obtained from third party sources, the client or the other party. Obtaining information can be extremely difficult if your client has little or no knowledge of the commercial structure or the financial position of the entity.

In relation to family trusts, there can be significant disputes as to whether a party has an interest in a trust, the extent or value of that interest, and whether a party actually, or in reality, controls the trust. There are often disputes and difficulties in relation to obtaining the necessary financial information and documents about the other party's interest in a trust.

So how do you go about obtaining the relevant information?

C.1 Disclosure

Under Australian law, "each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner.[7] In

[6] Australian Securities & Investments Commission, *2017 Company registration statistics*, (April 2018) <http://asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/2017-company-registration-statistics/>.

[7] See, for example, the Family Law Rules 2004, r 13.01(1); Federal Circuit Court Rules 2001, r 24.03.

financial cases, parties are obligated to provide relevant information and documents to the other parties in the proceedings in relation to their assets, liabilities and income.[8] Rule 13.04 of the *Family Law Rules 2004* ("**the Rules**") sets out a detailed list of the types of information a party should provide:

(1) A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:

> (a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;
>
> (b) any vested or contingent interest in property;
>
> (c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
>
> (d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
>
> (e) the party's other financial resources;
>
> (f) any trust:
>
> > (i) of which the party is the appointor or trustee;
> >
> > (ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;
> >
> > (iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;
> >
> > (iv) over which the party has any direct or indirect power or control;
> >
> > (v) of which the party has the direct or indirect power to remove or appoint a trustee;
> >
> > (vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;

[8] See ***Black & Kellner*** (1992) FLC 92-287, ***Weir & Weir*** (1993) FLC 92-338.

(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or

(viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;

(g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:

(i) in the 12 months immediately before the separation of the parties; or

(ii) since the final separation of the parties; and

(h) liabilities and contingent liabilities.

(2) Paragraph (1)(g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.

(3) In this rule: "legal entity " means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.

Parties to proceedings must provide a financial statement with their application before the court will make any orders in relation to property settlement. In a simple financial case, disclosure includes[9] but is not limited to taxation returns and assessments, a superannuation statement and a Notice of Appeal in relation to child support. In circumstances where the value of any item of property in which a party has an interest is not agreed, a market appraisal of that value must be produced.

In relation to commercial structures the disclosure requirements vary depending on type but may include:-

- financial statements including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;
- a list of directors and shareholders
- the company's constitution and amendments (for corporations)[10]
- the partnership agreement (for partnerships)[11]

[9] Family Law Rules 2004 (Cth), schedule 1, item 4(5).
[10] Ibid 4(5)(iii).
[11] Ibid 4(5)(v).

- a copy of the trust deed (for trusts)[12]

Financial statements and taxation returns

Typically, disclosure should reveal the financial statements of the company, or trust, and taxation returns. These can be closely reviewed by practitioners and are usually the first place to look to identify assets. If any valuation of the assets in the company or trust, or alternatively, the interest of a party in a trust is to occur, then this information will be essential.

Such financial statements should include the balance sheets (assets and liabilities), profit and loss statements (income and expenses), and all notes, schedules and attachments. The financial statements will also assist in the identification of:

1. The value of the assets
2. Loan accounts or funds owed (liabilities which a trust or entity may seek to recover)
3. The dividend paid to the shareholders, if any
4. A regular pattern of distribution from a trust (which can be considered a financial resource of that party)
5. A beneficiary's interest in a trust
6. Any unpaid distributions owed to a party which are, effectively, an asset in the hands of that party.

Taxation returns should indicate and include distributions a party has received from a trust.

C.2 Consequences for the client of non-disclosure

If there is to be a just and equitable order that alters the parties' interests in property, there must be full and frank disclosure between the parties of all relevant circumstances to determine their true financial positions both presently and in the near future. However, if a party deliberately fails to meet the duty, the court may draw adverse inferences against the non-disclosing party if there is material upon which some inference can be based.[13]

[12] Ibid 4(5)(iv).
[13] See ***Suiker & Suiker*** (1993) FLC 92-436; ***Black & Kellner*** (1992) FLC 92-287; ***Chang v Su*** (2002) FLC 93-117; [2002] HCATrans 446, ***Nott & Nott*** [2009] FMCAfam 770; and ***Jacks & Parker*** (2011) FLC 93-462.

In **Chang & Su**[14] the Full Court held that the trial judge had the ability to make an order for alteration of property interests in a context where there were competing proposals and a lack of full and frank disclosure of assets. In this case, the parties were born in Taiwan, married in Sydney and dissolved the marriage four years later. The wife lived in Australia with the child of the marriage and two children from her previous relationship. The husband lived in Taiwan and visited Australia to have contact with their child. The husband came from a wealthy family, had a range of business interests in Taiwan and two properties in Sydney worth $1.25 million. He claimed his liabilities exceeded his assets around $620,000 whereas the wife claimed her liabilities to be around $585,000 and she was on government benefits. Both parties claimed the other had not provided full and frank disclosure, with the wife alleging the husband had previously claimed assets worth $50 million and the husband showing evidence of the wife's undisclosed business interests. In his Australian residency application, the husband stated he was worth in excess of $4.55 million and her Honour, Justice Moore, could not find any evidence to account for how he had lost the money. She observed:

> "[107]. ... At the time their relationship began the husband was a man of substantial financial means, with tertiary qualifications and working in various companies in Taiwan in which he had interests. His portrayal of himself as someone with more debt than property now is implausible. The extent of his net asset position I could not say, but it is likely he remains a person of substantial means in Taiwan ..."

In considering the s 75(2) factors including the wife's limited earning capacity and her responsibility for the child, her Honour concluded the wife merited a meaningful adjustment in her favour. Due to the husband's non-disclosure it was not possible to determine proportions however, her Honour was of the view it was just and equitable for the wife to acquire the husband's Australian properties. The husband's subsequent attempt to appeal to the High Court of Australia was refused.[15]

C.3 Duties of lawyers in Australia

One is also assisted to some extent in obtaining documents in Australia by the fact that the paramount duty of Australian legal practitioners is to the Court[16]. Australian lawyers cannot

[14] ***Chang v Su*** (2002) FLC 93-117

[15] See [2002} HCATrans 549 (5 November 2002)

[16] Australian Solicitors Conduct Rules, Rule 3

knowingly or recklessly mislead the Court[17] or permit their clients to do so, or be party to their clients doing so.[18]

Further, Australian lawyers in family law matters have a duty to advise their clients to disclose all relevant financial documents and, if the client fails or refuses to do so, must refuse to continue acting for the client.[19]

Further, disclosing a large number of documents that have no practical relevance to the issues in dispute does not constitute compliance with the Rules and costs may flow as a result.

While naturally there are instances of lawyers failing in these obligations, the existence of same is of powerful assistance to ensure that full and frank disclosure is made. Breach of such duties can have serious professional and legal consequences for the lawyer.

D: DIGGING DEEPER – ALTERNATIVE CHANNELS TO LOCATING ASSETS

If documents are not forthcoming through disclosure, there are other channels you can engage to obtain information regarding bank accounts, real estate or company directors and shareholders. The most commonly practiced methods are via subpoena, a notice to produce, or database searches. Additionally, practitioners can prepare specific questions, review company books, conduct probate searches or seek judicial assistance (for discovery of foreign assets) through The Hague Evidence Convention.

D.1 Information via subpoena

For information that is not publicly or readily available, a party can issue subpoena for the production of documents and/or for a person to attend court to give evidence.[20] Practitioners should consider whether a subpoena ought to be issued to an accountant, a financial institution (such as a bank) or someone personally (for example a third person in their capacity as director of the relevant entity). There are certain aspects to keep in mind when seeking information via subpoena and they should not be used as a 'fishing' expedition.

Legitimate forensic purpose

[17] Ibid, Rule 19.1

[18] Ibid, generally Rules 19 and 20

[19] Family Law Rules, schedule 1, items 6(1)(b) and (4)

[20] Family Law Rules 2004 (Cth), r 15.17; Federal Circuit Rules 2001 (Cth), r 15A.02.

The court will look to the forensic purpose for which the subpoena is issued.[21] As Justice Cronin stated in ***Papadopoulos & Papadopoulos (No 2)*** [2007] FamCA 1683, [49]: *"The question of what is relevant takes on significance. The objective must be to assist the parties and the court in the determination of the issues in dispute."*

When issuing a subpoena, it is helpful to consider the following questions:

- Has each interested person been served?
- In trust matters - has the trustee of the trust also been served?
- What is the scope of the subpoena? If it is too wide, it will likely be objected to.
- What is the relevance of the information you are seeking? Does it have a legitimate forensic purpose?

In respect of relevance, in the case of ***Kelton & Brady and Anor*** [2017] FamCAFC 186, his Honour, Justice Murphy observed:

> *[14]. ... It is accepted that a proper basis for objection is that the documents have no "apparent relevance" to the issues in the proceedings.*
>
> *[15]. It is now settled that a subpoena can be set aside in so far as it seeks production of documents which have no "apparent relevance" to the issues in the proceedings.*
>
> *[16]. In so holding for the purposes of proceedings in the Family Court, the Full Court in* **Hatton***, above, cited with approval what was said by Beaumont J in* **Trade Practices Commission v Arnotts Ltd and Ors (No 2)***:*
>
> > *… Does the material sought have an apparent relevance to the issues in the principal proceedings, ie, is adjectival, as distinct from substantive, relevance established? Does the subpoena have a legitimate forensic purpose to this extent? This involves a consideration of the matter from the standpoint of [the person at whose request the subpoena was issued].*

In ***Dillon & Dillon*** [2012] FamCA 319 Justice Cronin referred to the test of "apparent relevance" as stated by the Full Court in ***Hatton & Attorney-General of the Commonwealth of Australia*** [2000] FamCA 892. His Honour noted:

> *[9]. The words 'apparent relevance' still have a nebulous quality about them. Other courts have approached the question of relevance by asking whether the subpoena*

[21] See **Mansfield & Mansfield** [2017] FCCA 13 where Brown J found that the documents sought could not be regarded as oppressive in nature, an abuse of court process or a fishing expedition.

has a legitimate forensic purpose or is ultimately likely to add, in some way or other, to the relevant evidence in the case (see **Spencer Motors Pty Ltd v LNC Industries** *[1982] 2 NSWLR 921 at 927). The scope of the inquiry albeit by examination of the evidence set out in the affidavit, must be narrow (***Seven Network Limited v News Limited (No 11)** *[2006] FCA 174).*

Bank records and credit card statements

Subpoena are particularly helpful in gaining access to banking records when they are not forthcoming from the other party. It is otherwise not possible to obtain such records if a party does not provide them. An Australian bank will not disclose these upon request to a non-account holder owing to privacy legislation.

Reviewing the other party's bank records may well provide hidden connections and information about the other parties' assets, loans or trusts. For instance, in relation to trusts, bank statements may reveal payments in from a trust or the payment of other financial benefits by a trust or alternatively, funds loaned to a trust and thus establishing a connection between the financial affairs of the party and the trust.

Additionally, bank records and credit card statements can be used to locate and identify hidden assets or expenditure. If it becomes apparent from a lawyer's review of such statements that his or her client has concealed assets from the other party, the client must be advised to disclose these.

D.2 Notice to produce

A party can also serve a Notice to Produce.[22] This is seldom used in practice, but requires a party to produce, at a hearing or trial, documents specified by the serving party.

D.3 Information via searches

In Australia, for a small fee, database searches can be conducted through third-party organisations to identify specific information in relation to corporations, property, real estate and personal property. There is no central database for trusts. These types of searches are commonly conducted and are a fundamental starting point for most property related matters.

[22] Family Law Rules 2004 (Cth), r 15.76; Federal Circuit Rules 2001 (Cth), r 15A.17.

Documentation and information collected from searches include:

- Corporations
    - A company search will identify when a company was registered, the current directors and secretary and shareholders as well as the company address. This can be done through Australian Securities & Investments Commission.
    - A company search will also reveal what a party's shareholding is, what class and percentage of shares they hold, and whether the shares are held by the party personally or on trust.
    - Historic company searches can also be done to identify current and historical officeholders and shareholders. This will assist in identifying changes to the entity as well as when a party resigned from their office position and transferred their shareholdings.
    - A business search will reveal when a business was registered.
    - A personal search will identify the companies in which a party is a director and/or secretary and the person's shareholdings. This is an invaluable search to do.
    - Such searches, however, will not reveal the financial information of the company, such as taxation returns and financial statements. This information is not publicly available. If this information is not voluntarily disclosed by the other party, steps such as subpoenas (to the other party's accountant, for example), are required.
- Real property
    - Title searches will assist to check ownership, whether the property is held as joint tenants or tenants in common, whether the property is encumbered by a mortgage or caveat and what a property was sold or transferred for. You can search by address, land identification or registered name.
    - An index search (at the Titles Office)[23] can be done to check which real properties are owned by the parties and relevant companies.
    - Copies of the registered mortgages, mortgages and caveats can be obtained to check the borrowers and any guarantors.
    - One can also obtain copies of the transfers of land signed by the party when he or she purchased the real property. Such a document will reveal how much the property was purchased for.

[23] Landata, <https://www.landata.vic.gov.au/>.

- Since stamp duty on mortgages was abolished in Victoria in 2004, it is no longer possible to search a copy of the mortgage and find out the amount borrowed by the part

- Personal property
  - A search of the Personal Property Securities Register[24] ("**PPSR**") will identify whether a motor vehicle or other chattel is encumbered, for example by a loan.
  - Charges are also registered on the PPSR.

D.4 Other methods used to identify and locate assets

Specific questions

There may be times when it is relevant to ask the other party specific questions and put them to proof of an asset. A party is entitled to serve on another party a request to answer specific questions after a case has been allocated to the first day before a judge.[25] There must only be one set of written questions in writing, no more than 20 questions and they must not be vexatious or oppressive.[26] The person responding must answer each question fully and frankly, or provide specific grounds as to why they object to doing so.

Specific questions are not a common tactic in property proceedings but can be very effective. They can be particularly effective when information provided by the other party to date indicates inconsistencies in his or her position, and thus require the other party to clarify that position. In one such case in which Kennedy Partners has acted, the use of such an approach ultimately revealed the non-disclosure by the other party of assets worth about $AU6,000,000, and the matter then settled on advantageous terms.

Corporations Act

Officeholders of a company also have a right to access company books pursuant to the *Corporations Act 2001* (Cth) ("**the Corporations Act**"). While s 198F of the Corporations Act is seldom used in family law proceedings[27] it provides that a director of a company may inspect the books of a company — this is a statutory right. Section 290 of the Corporations Act provides that a director of a company has a right of access to the financial records of a company at all reasonable times.

[24] Australian Financial Security Authority, *Personal Property Securities Register* <https://www.ppsr.gov.au/>.
[25] Family Law Rules, r 13.26.
[26] Family Law Rules, r 13.26(3)
[27] Possibly because practitioners are not aware of it.

In ***Kelly & Lomax*** [2014] FamCA 431 the wife sought access to documents the husband allegedly had a right to obtain pursuant to s 198F of the Corporations Act. Citing Emmett J at [23] and [25] in ***Hardcastle v Advanced Mining Technologies Pty Ltd*** [2001] FCA 1846, Justice Hogan observed two possible restrictions on the right of inspection conferred by s 198F. The first being

> *… inspection must be for the purposes of a legal proceeding. The legal proceeding must be one to which the person requesting access is a party, one that the person proposes to bring in good faith or one that the person has reason to believe will be brought against him or her.*

And the second

> *… is that the proceeding must be a proceeding to which the former director is a party or believes might be brought against him or her or which he or she proposes to bring in his or her capacity as a director of the company.*

Ultimately, Justice Hogan did not make an order in the terms sought by the wife, however, this was on the basis of the relevance of the documents sought.

Probate search

Searches can be conducted for Wills and Probate files through the Public Record Office of Victoria. This can be helpful if your client instructs you that the other party has received an inheritance, as a result of which they have a future expectancy, that has not been disclosed.

Such searches will normally reveal the inventory of the estate and a copy of the Will admitted to probate. Thus, they will either confirm or deny that the party does have an entitlement pursuant to the estate and will give some idea of the value of the estate.

Hague Evidence Convention

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("**the Convention**") is used in rare cases to extract evidence or inspect documents from overseas jurisdictions. Australia ratified the Convention on 23 October 1992, subject to several reservations and declarations.[28] Although Japan is not a contracting State, there are 61 contracting States who are party to the Convention.[29]

[28] HccH, *Status Table* <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>.
[29] Ibid.

Primarily the Convention facilitates Letters of Request from a judicial authority between Central Authorities in each State. Aspects the Letter of Request should specify include[30]:

- Names and addresses of the parties and their representatives;
- The nature of the proceedings for which the evidence is required;
- The evidence to be obtained or judicial act to be performed;
- Names and addresses for any persons such as witnesses to be examined;
- Questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;
- The documents or property, real or personal, to be inspected;

E: CHOOSING JURISDICTION

Once you have identified, located and disentangled the various property interests and entitlements for your client and you have a fuller picture of the asset pool, you next need to consider which jurisdiction best meets your client's needs and expectations.

For example, if it becomes apparent that although the parties, or the client of the Japanese lawyer are in Japan, the bulk of the assets may be in Australia, and thus it may be more practical to issue proceedings there.

In this regard, practitioners need to be aware of the various options available to the client in different jurisdictions as well as the ability (or not) to engage jurisdiction in their home country. There may be strategic advantage to filing proceedings in certain jurisdictions (for example, Australia compared to Japan). While this paper does not address the cost of court proceedings and taxation implications, these are also factors that need to be considered.

E.1 Jurisdiction

Jurisdiction over ancillary financial matters is conferred under the Act in relation to married couples if, at the date an application is filed, either party to the marriage is:-

(a) An Australian citizen;

(b) Ordinarily resident in Australia; or

(c) Present in Australia.

[30] *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Art 3. Note a model Letter of Request can be found at HccH, <http://www.hcch.net/upload/actform20e.pdf>.

De facto, including same sex de facto, couples have to clear some additional hurdles if they want to invoke the Australian jurisdiction.

In particular:-

(a) A party must be resident in a participating jurisdiction (all States and Territories except WA) when the application is made; and

  (i) have resided in that jurisdiction for at least one-third of the relationship; or

  (ii) in the case of the applicant, have made substantial contributions in that jurisdiction; or

  (iii) In the alternative to all of the foregoing, that the parties were both resident in that jurisdiction when the relationship broke down[31]; and

(b) The relationship must have existed for at least two years; or

  (i) there is a child of the relationship; or

  (ii) the applicant has made contributions which it would be unjust to ignore; or

  (iii) the relationship is registered under State or Territory law.[32]

The general principle is that where a party has legitimately invoked the jurisdiction of the Australian courts, that person has *prima facie* right to insist on the court exercising that jurisdiction.

However, the family law courts will not necessarily exercise jurisdiction if it is not appropriate for the proceedings to be conducted in Australia (for example, where there are proceedings on foot in Japan; the parties are not in Australia; or there is no real nexus with Australia).

In such cases, the Australian court may need to determine whether the Australian proceedings should continue, or whether they should be permanently stayed in favour of proceedings in a more appropriate jurisdiction.

If the court determines that it is appropriate to have the proceedings determined in Australia, it may then need to consider whether the respondent should be restrained by way of anti-suit injunction from commencing or continuing related proceedings in another jurisdiction.

[31] Family Law Act, s 90SD.
[32] Ibid s 90SB.

E.2 The clearly inappropriate forum test and forum shopping

Except with respect to New Zealand,[33] Australia is not a party to any international agreement or convention governing the exercise of jurisdiction or containing rules for preventing "forum shopping". Issues of contested jurisdiction are determined by the common law rules of private international law as interpreted and applied by the High Court of Australia.

Broadly, the test in Australia is the "clearly inappropriate forum" test, which focuses only on the suitability of the local jurisdiction.

Australia will be regarded as a clearly inappropriate forum only if "*continuation of the proceedings in [the Australian] court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging' or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'*": See ***Henry v Henry*** (1996) FLC 92-685, at 83,121.

In determining whether or not a stay of proceedings between parties with respect to their marital relationship should be granted, the court is required to consider a list of issues including:-

1. Whether both countries have jurisdiction with respect to the parties and their marriage.
2. Whether each country will recognise the other's orders and decrees.
3. Whether any orders made in Australia may need to be enforced in other countries, and the relative ease with which that can be done.
4. Which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy?
5. The order in which the proceedings were instituted, the stage the proceedings have reached and the costs which have been incurred.
6. The connection of the parties and their marriage with each of the jurisdictions ("the relevant connecting factors") and the issues on which relief might depend in each.

[33] *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013). In Australia, this Agreement was given legislative effect by the enactment of the *Trans-Tasman Proceedings Act 2010* (Cth) ("the TTP Act"), to which I will refer in further detail below.

7. Whether the parties, having regard to their resources and their understanding of the relevant languages, are able to participate in the respective proceedings on equal footing.

8. The legitimate personal and juridical advantages accruing to the party invoking the Australian jurisdiction.[34]

Practically, this means that it is relatively difficult to have an Australian Court declare itself a clearly inappropriate forum in a financial matter, assuming that there is some reasonable nexus with Australia. It is worth noting that there have been various Family Court decisions indicating that Australia may be an appropriate forum to determine the financial dispute between the parties when neither of the spouse parties lives in Australia. (See, for example, ***Chen & Tan*** [2012] FamCA 225 (supra) (per Kent J), ***Allen & Cortez*** [2016] FamCA 320 (per Macmillan J), and, more recently, ***Costigan & Costigan & Ors*** [2017] FamCA 879 (per Carew J).[35]

Thus, the overriding issue for practitioners presented with a matter in which there is a potential choice of jurisdiction, and where Australia is one of those jurisdictions, is: which jurisdiction will provide the client with the best result?

That is in itself a complex question, which Australian legal practitioners often need to consider.

Most jurisdictions, even if superficially similar to Australia, tend to apply principles which are very different from Australia's — and from each other.

Australia's discretion-based regime for property division and spousal maintenance encompasses a wide range of factors, and enables the outcome to be tailored to the particular circumstances of the individual couple. In contrast, many jurisdictions (including the European civil law world and the jurisdictions which have derived their law from that system) have statutory regimes which determine the division of property on relationship breakdown in a formulaic manner and may have limited (or even no) provision for spousal maintenance.

New Zealand essentially has a regime for equal sharing of matrimonial property (but in most instances excludes property held in trusts, which are historically regarded as sacrosanct).

Even within the UK things are not clear cut — and the laws vary in different parts of that country.

[34] See, generally, *Henry & Henry*, FLC 92-685, at 83,124, per Dawson, Gaudron, McHugh & Gummow JJ.
[35] The writer acted for the wives in each of the two last mentioned cases.

England and Wales have a menu of factors in s 25 of their Matrimonial Causes legislation which looks very similar to Australia's ss 79(4) and 75(2) of the Act factors. However:-

(a) The judge-made law emanating from The Supreme Court has effectively introduced a presumption of equal division; and

(b) The English courts have a propensity to make:-

  (i) Generous, often lifetime, spousal maintenance orders; and

  (ii) Extremely generous child support orders which can include the provision of a home during their dependency, and private school and tertiary education expenses.

Scotland on the other hand, is largely an equal-sharing regime, with very limited spousal support and far less generous child support provisions.

Family law in the United States is State-based so that there are, in effect, 50 different systems within that country. That is compounded by the fact that the right to practice is often limited only to specific counties within a State, and local practice within and between these various States can vary significantly.

An onerous obligation falls on a practitioner confronted with a matter which involves more than one jurisdiction — and getting it wrong can bring about severe prejudice to the client. The correct choice of jurisdiction is fundamental to an optimal outcome. An incorrect choice can be disastrous, and give rise to significant professional indemnity issues.

The natural instinct is to look immediately to our home country when making that choice. We know the jurisdiction; we know the likely outcomes; it is familiar; it feels comfortable.

However, and commenting on this issue, from an Australian perspective:

(a) If you are acting for a wife, who has connections with the UK, as a general rule, it would be better to proceed in England and Wales, although probably not in Scotland;

(b) If you are acting for a husband, again, as a general rule, New Zealand might offer better results; and

(c) If the case involves substantial pre-marriage or inherited assets European civil law might better protect those from a claim by a spouse, and limit entitlements to a share of the "matrimonial" assets.

A second major consideration is enforceability. You may obtain a very favourable order in Australia, but if the assets (especially real assets) are held elsewhere, the Australian order

might be entirely useless — and invoking the Australian jurisdiction may exclude the possibility of proceeding in a more appropriate jurisdiction.

As I will comment below, too, the same may well apply to proceedings in Japan. One may obtain a very favourable result there, but if the assets are primarily in Australia, there may well be difficulties enforcing it.

That problem can be particularly acute where assets and resources are held in more than one jurisdiction. The questions which then arise are:-

(a) Where will you get the best result (financially) for your client? and

(b) What practical value will any orders made in a particular jurisdiction have?

It is vital to consider all the options — and to have expert local advice with regard to the other jurisdiction or jurisdictions.

A list of family law experts in other jurisdictions can be found at the website of the International Academy of Family Lawyers.[36]

E.3 Res judicata – the matter has already been dealt with

The doctrine of res judicata

Where a cause of action, including the adjustment of property rights, has been fully and finally determined by a non-Australian court, the doctrine of *res judicata* (cause of action estoppel) applies, and the prior adjudication of a cause of action estops parties from proceeding with the same cause of action in another forum. The relief granted in such a situation is a permanent stay of the subsequent claim.

The elements of the doctrine of *res judicata* (derived from the English case of ***Marginson v Blackburn Borough Council*** [1939] 2 KB 426) are that:

- The decision was judicial;
- The decision was in fact pronounced;
- The tribunal had jurisdiction over the parties and the subject matter;
- The decision was final and on the merits;
- The decision determined the same question as raised in later litigation; and

[36] International Academy of Family Law <https://www.iafl.com>.

- The parties to the later litigation were the parties to the earlier litigation.

Further, the fact that an order is capable of *ex post facto* variation does not reflect upon its finality for the purposes of the application of the doctrine.

Even if a family law proceeding cannot be conducted in the other country, including all property in the matrimonial asset pool will be of advantage to your client as the judgment is likely to be upheld in the other jurisdiction.

In ***Caddy v Miller*** (1996) FLC 91-720 the Full Court of the Family Court of Australia considered a case where orders for division of property had been made in California relating to property located in California and Australia. Amongst other things, the orders confirmed the parties' ownership of an undivided one-half interest in a home in Australia but contained no order to alter their interest in that property. The wife subsequently sought orders in Australia with respect to the home, seeking recognition of the Californian divorce and an order that the husband transfer all of his interest in the home to her. The husband argued, inter alia, that cause of action estoppel prevented the wife from bringing an application for an adjustment of property interests under the Family Law Act. The Full Court held that the existence of a prior judicial decision of a court of competent jurisdiction, which was final and which involved the determination between the same parties of the same question sought to be litigated in Australia, meant that a cause of action estoppel arose against the wife. Further, the Full Court observed that any difficulties in relation to enforcement could not affect the nature and validity of orders made properly between the parties.

Consequently, if there has been a family property settlement order made in Japan, there may well not be the opportunity to commence proceedings again in Australia.

F: ENFORCEABILITY

F.1 Giving effect to the orders

Jurisdiction under the Act is *in personam* and not *in rem*: that is, orders can be made which require a person (individual or corporate) to do certain things to give effect to orders (for example, the alteration of property interests) but orders cannot be made against the property itself.

A judgment *in personam* binds the parties and their privies; whereas a judgment *in rem* is binding on the world at large — whether the parties, their privies or otherwise.

This poses potential problems where the property is foreign land (a major issue in, for example, cases involving Australian citizens or permanent residents who often hold land in their country of origin).

The *Mozambique Rule*[37] recognises that only the country where the land is situated can effectively enforce an order relating to title in or possession of the land. The family law courts will not make orders directly in relation to the ownership of foreign land (and are precluded from doing so under the *Mozambique Rule*). They do however have jurisdiction to make orders *in personam,* requiring a party to deal with overseas assets in a specified way and will do so unless such orders will be:-

(a) in direct conflict with the law of foreign jurisdiction; or

(b) manifestly futile,

and have the capacity to impose consequences on a party who is in breach of an obligation created by an *in personam* order.

While penalties may be imposed on a party who is in breach of an obligation created by an *in personam* order it does not in itself mean that the order can be enforced or implemented (especially if the party has removed him or herself from the Australian jurisdiction) unless there is a mechanism for enforcement of foreign orders available under the law of the *lex loci*.

F.2 Enforceability of overseas decisions

The Australian Attorney-General's Department provides helpful guidance in relation to enforcement of overseas judgments on its website:

> *Whether a foreign judgment can be enforced in Australia depends on where the judgment was issued and the type of judgment that was issued.*
>
> *Currently, the enforcement of foreign judgments in Australia is governed by both statutory regimes and common law principles.*
>
> *With respect to statutory regimes, the* Foreign Judgments Act 1991 *and the* Foreign Judgments Regulations 1992 *provide for the procedure and scope of the judgments that can be enforceable under the statutory regime.*
>
> *Additionally, Australia is party to the bilateral treaty for the* Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994 *with the United*

[37] See British South Africa v Companhia de Mocambique, [1893] AC 602, House of Lords.

Kingdom. However, Australia is not party to The Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

In instances when there is no international or statutory agreement, the foreign judgment must be enforced under common law principles.

Given the complexity of most matters, we recommend seeking legal advice from a local Australian lawyer.

Foreign Judgments Act 1991

When determining whether a foreign court acted with jurisdiction the Australian courts will look to the *Foreign Judgments Act 1991* (Cth) ("the **FJ Act**").

Specifically, an *"action in personam"* does not include *"proceedings in connection with matrimonial matters"* or *"a matrimonial cause".*[38]

Justice Atkinson of the Supreme Court of Queensland, in ***de Santis v Russo*** [2001] QSC 65 distinguished (at [9]) the obligation of a parent to financially support a child as an action *in personam* (ie against a person) rather than proceedings against specific property. Further he found that the obligation related to the maintenance of children rather than proceedings in connection with matrimonial matters and did not falling within the definition of s 3. The Italian court therefore, was found to have jurisdiction.

Common law principles

If a judgment does not fall within the scope of the FJ Act (or any other act), consideration can also be given to registration in Australia of a foreign judgment pursuant to common law principles. This means the courts will look at case law precedent in making their determination.

Expert local advice will be required in assessing the prospects of that option, whether in Australia or elsewhere.

Otherwise

Australia is otherwise not a party to any international agreement or convention specifically governing the recognition and enforcement of orders in relation to the alteration of property interests between spouses and de facto partners.

[38] Foreign Judgments Act 1991 (Cth), s 3(1)(a).

Property orders made in a court of competent jurisdiction overseas may well be recognised and given appropriate weight — or even, for all practical purposes, replicated in the orders of an Australian court if that is considered just and equitable when applying the principles governing property division under the Act — but they will not be enforceable in their own right.

Similarly, Australian property orders, made *in personam*, may not be enforceable overseas.

In ***Galloway & Midden (No 2)*** (2014) FLC 93-586, the Full Court allowed the wife's appeal where the trial judge failed to consider how, if at all, the wife could secure the transfer of properties to herself in Country F where she asserted the properties were held on trust for her. The properties, being a chateau on two titles, had been registered in the names of two of the wife's children in 2002, to avoid foreign ownership restrictions in Country F. In 2008, one son transferred his interest to the other son without the wife's knowledge. The wife gave evidence that she was estranged from that son. The Full Court found that there was no evidence before the trial judge as to whether the asserted trusts were established under Australian law and, even so, if such trusts could be enforced in the foreign country (particularly where the ownership of the properties had been structured to avoid foreign ownership laws); how the wife might secure transfer of the properties to her if so ordered by the Australian court; the remedies available to the wife to "rescue" the foreign property; or the costs to her of pursuing any potential remedies in that jurisdiction. The Full Court determined that the trial judge had erred in finding that the particular properties in Country F formed part of the property of the parties in these circumstances without making a finding as to the nature of the wife's interest in the properties and identifying her existing legal or equitable interests in them, as required by ***Stanford v Stanford*** (2012) 247 CLR 108.

It is therefore important to seek local advice in each relevant jurisdiction, in relation to not only the merits of a property case but also enforceability of any orders made. Expert evidence may in fact be required from an overseas expert practitioner in relation to the issue of enforceability in the case of a forum dispute or a contested property case involving more than one jurisdiction.

F.3 Orders to divide specific assets - superannuation

An important issue to bear in mind, too, is whether either or both parties have superannuation entitlements in Australia.

In this regard, it is wise to beware the requirements for specific orders regarding superannuation payments and benefits, particularly in relation to superannuation splitting orders. In Australia, under s 79 of the Act, virtually all interests in superannuation funds,

including future and contingent interests, are treated as if they are property and are considered "another species of asset".[39] Part VIIIB, Division 3 of the Act gives the court the power to 'spilt' (divide) a party's superannuation benefit or 'flag" (restrain) the payment of benefits. Procedural fairness must be accorded to the Superannuation Trustee and each superannuation fund has particular requirements of what is required in orders made by the court to effect the split.

It is important to bear in mind that such superannuation arrangements can only be effected by virtue of either Court orders made pursuant to the Act or a financial agreement made by the parties pursuant to the Act.

Consequently, one option for Japanese practitioners may be to have Court orders for other property made in Japan, but for the parties to enter into an Australian financial agreement at the same time to deal with the Australian superannuation entitlements.

Naturally, that requires the consent and cooperation of both parties.

G: OTHER RELEVANT MATTERS

G.1 Alternative orders which may be sought in relation to Australian real property

It may be the case that the parties jointly own real estate in Australia, but they cannot commence family law proceedings in Australia owing to failure to meet the jurisdictional requirements, or because one of the family law Courts has determined that Australia is a clearly inappropriate forum.

In such circumstances, an option may be to seek the sale and partition of the real estate pursuant to the legislation of the Australian State or Territory, which may well result in the partition or division of the sale proceeds between the parties in accordance with the proportions in which they own the property.[40]

G.2 Orders restraining a party from leaving Australia

There may be instances, too, where there is concern that a party will leave Australia and dispose of assets overseas, or, alternatively, simply make it more difficult for a judgment to be enforced against him or her.

[39] In the Marriage of Coghlan [2005] FLC 93–220 at 79,642.
[40] See, for example, Part IV of the Property Law Act 1958 (Victoria)

In appropriate cases, it may be necessary to seek an order precluding the other party from leaving Australia and requiring delivery of his or her passport to the court: See for example Guest J in ***Restein & Restein*** [2003] FamCA 1146 (unreported). The Full Court has accepted that the Court does have power to restrain freedom of international movement in financial cases: ***Brown & Brown*** (2007) FLC 93-316.

G: PRACTICALITIES FOR JAPANESE PRACTITIONERS

Taking instructions in a matter involving foreign jurisdictions requires the practitioner firstly to recognise that there is a legitimate international aspect to the case. This can be done through disclosure and discovery techniques including issuing subpoena, scrutinising bank records, financial statements and taxation returns, and/or searching company and property databases and company books.

Once the full extent of the parties' financial interests are ascertained the practitioner needs to consider:-

1. Which countries potentially have jurisdiction;

2. Whether each jurisdiction can determine the whole or only part (and if so, which part) of the matter;

3. The advantages and disadvantages to the client of the foreign forum as compared to Japan including:-

    (a) The scope of each of the potential jurisdictions with regard to the matters in dispute;

    (b) The relevant principles likely to be applied;

    (c) The likelihood of the foreign court exercising jurisdiction;

    (d) The likely outcome if the matter is pursued in either jurisdiction;

    (e) The enforceability of Australian orders in the foreign jurisdiction, or foreign orders in Australia; and

    (f) The costs and benefits of each available option.

Engaging advice and counsel from local practitioners in the relevant jurisdiction will benefit and assist in any or all of these decisions including getting assistance in how to best locate and divide the foreign matrimonial assets for your client.

I trust that the above is of some assistance to Japanese practitioners who are dealing with matters involving Australia.

John Spender

21 April 2018

International Academy of Family Lawyers
Family Law Symposium: Waseda University, Tokyo, Japan

The Marital Estate: How to locate and divide foreign assets – a mainly English perspective

Tuesday 29 May 2018

WILLIAM LONGRIGG

International Academy of Family Lawyers

Background

- England and Wales is a common law jurisdiction. Scotland is a hybrid of common law and civil law.
- Matrimonial Causes Act 1973 is the statute governing financial provision on divorce.
- The court has wide discretion to deal with financial issues on divorce.
- Various factors under Section 25 Matrimonial Causes act which need to be taken into account on divorce:
- income, earning capacity, property and other financial resources of each party;
- the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future;
- the standard of living enjoyed by the family before the breakdown of the marriage;
- the age of each party to the marriage and the duration of the marriage;
- any physical or mental disability of either of the parties;
- contributions made by each party or likely to be made in the foreseeable future including any contribution by looking after the home and caring for the family;
- the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it (this is in reality seldom applied);
- the value to each of the parties to the marriage of any benefit which they may lose the chance of acquiring because of the divorce;

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Background – Cont'd

- The court is under an obligation to find a clean break where it can.
- *White –v- White* 2001 1 ALL ER 1, HL.
- The court is keen on "fairness".
- Needs, Compensation and Sharing – headline considerations arising from case law, not from statute.
- Spousal maintenance – when making an order the court is under an obligation to consider whether the periodical payments should be made only while the payee adjusts, without undue hardship, to the termination of the payments. Payments can be made for joint lives or for a term and cease automatically on a parties remarriage. Capitalisation is common where there is money.

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Pre-Trial Disclosure and Discovery

- This is thorough in England and Wales.
- The procedure is designed to get to the bottom of the financial disclosure and encourage the parties to negotiate and settle. The process can be cumbersome and expensive.
- First Directions Appointment, Financial Dispute Resolution hearing, Final Hearing.
- There is a duty of full and frank disclosure.
- Lawyers have a duty to the court not to mislead the court. Parties can be punished for not telling the truth. Failing to tell the truth to the court is contempt of court which is a criminal offence. This is not necessarily the case in many other jurisdictions.

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Locating Foreign Assets

- Questionnaires must disclose all assets worldwide. Duties of disclosure relates to all assets, wherever situated.
- Standard disclosure will include 12 months bank statements. Questionnaires can seek an extended period where this can be justified.
- Enquiries can be made of Companies House and the Land Registry which will identify an individual's interest in companies or property by searching publicly held records.
- Database searches can be carried out through third party organisations.
- Greylist is an organisation that can test which of the 275,000 worldwide banks an individual has been in contact with by sending a test e-mail. Once a connection with a particular bank has been established, consideration can be given to what further enquiries can be made.
- Forensic accountants may analyse disclosure.
- Analysis software can be used to build a financial picture from bank statements.
- Letters of request can be sent to a court in a foreign jurisdiction (and equally from a foreign court to the English Court) requesting assistance in obtaining documents and/ or evidence from a witness.
- In the EU letters of request between members are governed by the Taking of Evidence Regulation 2016/2001/EC).

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Locating Foreign Assets – Cont'd

- The Hague Convention on the taking of evidence abroad in Civil or Commercial matters governs the transmittance of evidence between signatory countries.
- Japan is not a contracting state.
- The UK implemented its obligations under the Hague Convention by passing the Evidence (Proceedings in Other Jurisdictions) Act 1975 which (together with the Civil Procedure Rules Part 34) sets out the principles and procedures the English Courts must follow.
- The UK has a number of bilateral treaties with other countries.
- If a party is not covered by the Hague Convention or a bilateral treaty, assistance can still be sought and given as a matter of mutual judicial cooperation.
- The English Court's approach to receiving letters of request under the Hague Convention is *"we ought to afford foreign courts the fullest benefit we can".*
- *Zakay v Zakay* [1998] 3 FCR 35 – In financial remedy proceedings in England the wife alleged, and the husband denied, that he was the beneficial owner of shares held by a Gibraltarian trust company. The letter of request from the English Court to Gibraltar was upheld.

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Locating Foreign Assets – Cont'd

- *Panayiotou v Sony Music* [1994] Ch 142 – the rules do not limit the inherent jurisdiction of the court to make requests to foreign courts to ensure the production of documents from abroad. There is no logical reason why the principles by reference to which the court determines whether, and if so to what extent, to require a person who is not a party to the proceedings to produce documents or to give oral evidence should differ according to whether he is in England and Wales or abroad.
- *Charman v Charman* [2005] EWCA Civ 1606 – the court considered orders to third parties abroad to produce documents for use in ancillary relief proceedings where the husband had considerable assets in an offshore discretionary trust. The Court made it clear that a request would not be made if it is a fishing expedition. The letters of request to Bermuda in this case were approved. However, the Bermudian Judge refused to order the trustees to disclose any information. Happily, the tide has turned in Bermuda and in *Jennings v Jennings* 2009 the Supreme Court in Bermuda said the Court in *Charman* had been wrong.
- The procedure is by summons to the High Court. The foreign judiciary is requested to assist and compel attendance of witnesses for the purpose of giving evidence and being cross examined. The High Court can also issue a letter of request requesting documents that could have been subject to a subpoena duces tecum.

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Choice of Jurisdiction

- England and Wales is currently part of the European Union and has signed up to Brussels II which sets out the rules on which EU countries have jurisdiction and how. This has been very useful as between EU countries.
- Jurisdiction under Brussels II revised is set out in article 3 which provides that in matters relating to divorce, legal separation or annulment, jurisdiction lies with the courts of the member state where:
  - (a) the spouses are habitually resident;
  - (b) the spouses were last habitually resident and one of them still lives there;
  - (c) the respondent is habitually resident;
  - (d) in the event of a joint application, either of the spouses is habitually resident;
  - (e) the applicant is habitually resident if he resided there for at least one year immediately before the application;
  - (f) the applicant is habitually resident if he resided there for at least six months immediately before the application was made AND is either a national of that member state or (in the case of the UK and Ireland) has his domicile there; or
  - (g) both spouses are nationals, or in the case of the UK and Ireland, both spouses are domiciled.

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Choice of Jurisdiction – Cont'd

- If an English person is living in Japan and married to a Japanese person, then the English person would have the jurisdiction to apply for a divorce in England because (a) she is domiciled in the UK (and England specifically) and (b) no other EU country has jurisdiction. But beware – as she may not be able to apply for 'maintenance' if the divorce takes place under this rule.

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Choice of Jurisdiction – Cont'd

- As between countries in the European Union (apart from Denmark), first in time seizes the divorce jurisdiction.
- This is not the case as between UK jurisdictions and countries which are not part of the European Union.
- 'Forum shopping' is permissible and expected.
- Forum conveniens is a concept which allows a court with jurisdiction to hear proceedings to decline to exercise its jurisdiction on the basis that matters should be determined in another more appropriate forum. The concept derives from the statutory test in paragraph 9, schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 – a court may grant a stay if it appears that the balance of fairness – to include convenience – means that it is appropriate for the proceedings to be disposed of in another jurisdiction.
- The discretion is very wide and depends on the facts of the case.
- The court must consider whether there is evidence that another jurisdiction is more appropriate. The burden of demonstrating that fairness points to another jurisdiction falls on the party seeking the stay. The Court must *"have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense that may result from the proceedings being stayed or not being stayed."* [DMPA1973, para. 9(2)].

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Choice of Jurisdiction – Cont'd

- *Chai v Peng* [2014] EWHC 3419 – the wife was not prevented from continuing with her financial remedy proceedings in England despite the finding of forum conveniens by the Malaysian Court. The English Court had jurisdiction to hear the case based on the wife's habitual residence. The Court found that the Malaysian court had determined that Malaysia was not an inappropriate forum – not that it was more appropriate than England which was a different test. The English court found that the connecting factors to England and Malaysia were fairly equal with a small bias in the wife's favour. This decision was upheld on appeal by the husband.
- *JKN v JCN* [2010] EWHC 843 – this case dealt with the question of whether the English Court is prevented from exercising its discretion to stay English proceedings by virtue of Brussels II and the judgment in *Owusu*. *Owusu* rejected the argument that England no longer had any discretion to refuse a divorce on forum grounds after Brussels II. The Court decided that New York was the more appropriate forum and stayed the English proceedings.
- London is still regarded as "the divorce capital of the world". Why? The disclosure system is onerous (for the discloser) and the awards are generous (for the financially weaker party).

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Part III of the Matrimonial and Family Proceedings Act 1984

- This allows the English court to make financial orders after an overseas divorce, whether or not a previous financial order has been made in that other or in any other jurisdiction.
- The statute was originally designed to deal with unfairness arising from divorces in jurisdictions which traditionally gave little or nothing to the financially weaker spouse on divorce.
- The court may not give permission for a Part III application to be made unless it considers there is a substantial ground for making an application. Part III does not define substantial.
- *Agbaje* [2010] UKSC 13 – The Court held that Part III is to be applied in light of the purpose of the Act, which was the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where the parties had substantial connections with England.

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Part III of the Matrimonial and Family Proceedings Act 1984 – Cont'd

- In terms of quantum three principles should be applied. First, primary consideration should be given to the welfare of any child. Secondly, it will never be appropriate for the court to make an award which is greater than that it would have made if the proceedings had been brought here. Finally, where possible the order should provide for the reasonable needs of each spouse.
- Connection with England and Wales needs to be established – at the time of the foreign decree either:- (a) at least one of the parties was domiciled in England and Wales, or (b) at least one of the parties was habitually resident in England and Wales for one year preceding the application or decree; or (c) at least one of the parties is entitled to a beneficial interest in a property in England and Wales that was once the matrimonial home (in which case the court is confined to dealing with that property.)
- Ongoing arguments about such cases being dealt with on a 'needs' basis rather than eg 'sharing'
- Zimina v Zimin [2017] - the Court of Appeal overturned an order made under Part III granting a lump sum to a wife who had been divorced in Russia and received a substantial settlement there. The application was made 5 years after the wife received her award in Russia and was found to be an attempt to have a second bite of the cherry. Where the foreign settlement has been fairly reached it is not appropriate to make an Order under Part III.

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Variation of Trusts Section 24(1)(c) Matrimonial Causes Act 1973

- Trusts can be a particular issue in big money cases.
- Many people with overseas assets have set up trusts.
- Trusts are a common law concept, often hard to explain to a judge in a civil law jurisdiction.
- If the order is unlikely to be enforced abroad, the English court is unlikely to make the order.
- 'Firewall' legislation has been enacted in various jurisdictions, in part to avoid enforcement of orders from overseas jurisdictions.
- Choice of law governing the trust is of relevance, as is choice of trustees.
- Trustees can be joined to the proceedings – but beware of the cost of doing so!

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Freezing Orders

- The English Courts have the ability to make worldwide Freezing Orders (WFO), restraining a party from disposing of or dealing with assets (MCA 1973 section 37 and under the inherent jurisdiction).
- There are strict safeguards that must be adhered to – see UL v BK [2013] EWHC 1735.
- The applicant must show clear evidence of unjustified dealing with assets giving rise to the conclusion that there is a solid risk of dissipation of the assets to the prejudice of the applicant.

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International Academy of Family Lawyers Family Law Symposium: Waseda University, Tokyo, Japan

The Marital Estate: How to locate and divide foreign assets – a mainly English perspective

Tuesday 29 May 2018

WILLIAM LONGRIGG

International Academy of Family Lawyers
Family Law Symposium 29th MAY 2018
Waseda University, Tokyo, Japan

The Marital Estate : How to locate and divide foreign assets from a French perspective

Charlotte Butruille-Cardew,
Partner CBBC
PARIS - FRANCE

Differences bewteen MPR and Financial compensation

Financial obligations of the divorcing spouses :

- When the marriage terminates, the matrimonial property regime (MPR: *régime matrimonial*) of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.
- This allocation of assets is determined by the matrimonial regime chosen by the spouses and is independent from the cause of the dissolution of their marriage. Therefore, if the marriage is dissolved by divorce, the allocation of assets as determined by their matrimonial regime will be combined with the divorcing financial rights of the spouse (compensatory benefit : *prestation compensatoire*).

Divorce and compensatory benefit must be dealt with in the same judgement (French Supreme Court, 28 January 1987).
However, the winding up of the MPR is ordered, unless the spouses agreed upon it, later on, in a separated proceeding (Article 267 of the French Civil Code / L213-3 Organisational Code, French Supreme Court, 20 March 2013, for international divorces)

Compensatory benefit : maintenance obligation 1/

Interim spousal support

According to French divorce proceedings, the Family Judge rules on interim measures in the *Ordonnance de non conciliation*.

As part of this interim measures, the Judge could grant monthly payment as part of spousal support (*devoir de secours)* to one of the spouse.

- Its aim is to ensure the same lifestyle to the weaker financial spouse after the couple's separation. It does not take into account the length of marriage.
- The interim measures granted are effective throughout the entire procedure and until the divorce is finalised.
- Depending on the complexity of the divorce and the relations between the spouses, this procedure could last for 3 to 5 years and sometimes even more.
- That means that a spouse could receive for 3 to 5 years, as a minimum, a monthly payment, as part of a spousal support and this amount will not be deducted from the amount allocated as a compensatory benefit.
- "Divorce puts an end to the duty of support between spouses" (article 270 FCC)

Compensatory benefit : maintenance obligation 2/

In all cases of divorce and unless agreed otherwise by the spouses, one of the spouses may be compelled to pay the other a **compensatory benefit** (*prestation compensatoire).*

Capital payment has to be made in the way of a lump sum or a series of lump sums payable over a maximum of eight years or a property transfer order, "for ownership or usufruct, for use or dwelling". The property transfer can be ordered in relation to a joint ownership, but also the personal asset of the other spouse.

Financial compensations in divorce are always subject to the judge discretion. The criteria to fix the compensatory benefit are completely different from those for the interim spousal support (*devoir de secours)*. Its aim is to **offset the separation's effects**.

According to article 271 of the FCC, the Judge **shall take into account – needs and incomes /foreseeable future and** :

- *the duration of the marriage;*
- *the ages and states of health of the spouses;*
- *their professional qualifications and occupations;*
- *the consequences of the professional choices made by one spouse during their living together for educating -the children and the time which must still be devoted to this education, or for favouring his or her spouse's career to the detriment of his or her own;*
- *the estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime;*
- *their existing and foreseeable rights;*
- *their respective situations as to retirement pensions, having estimated, as much as possible, the reduction of the retirement rights that circumstances mentioned in the sixth paragraph above might cause for the spouse creditor of the compensatory allowance.*

Matrimonial Property Regime (MPR)

- The matrimonial regime of a married couple is set by rules that organize asset administration and entitlement within the marriage, both during the marriage and upon its dissolution. It is often referred to in Common Law countries - where the notion does not exist – as matrimonial property rights.
- European Regulation on Matrimonial Regime (2016/1103) – 23,01,2019 defines it as a "set of rules relating to the economic relations of the spouses between them vis-à-vis third parties".
- The MPR determines the powers of the spouses, either individually, or jointly, to administer their assets and defines the rights of third parties (generally creditors) in relation to the couple's estate. When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets acquired during the marriage.

Choice of law rule / international cases

- The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

  However : interim spousal support : French law question in relation to the matrimonial home ?

- Hague Convention dated 14 March 1978 and EC Regulation n° 2016/1103 on Matrimonial property regimes

Disclosure : Compensatory benefit 1/

- **The French system is very favourable to parties who do not intend to disclose fully and exhaustively their assets and income,** especially when these are not located in France but in other countries.
- In case of divorce, **there are no set formula, compulsory documentations or questionnaire** that a party should provide the Court with in relation to their assets or wealth.

  Therefore it is up to each party to request from the other party the document or information which he/she believes are deemed relevant. However, a default in responding to this request or to provide the relevant documentation is not sanctioned by the Court.

  At the end of the divorce process (and only at that time for the purpose of the compensatory benefit), the parties have to swear a statement of income and means (article 272 FCC)", but there is no sanction in case if inaccuracies. In rare cases : C.civ 1ère 11/09/13 N° 12-17730 – possible revision. This statement is not even an official or Court requested form.

- In the request for divorce with the French court, **a party can require a Notary (*Notaire*) to be appointed in ordered to obtained a notarised Court expertise** on the MPR or/ on the compensatory benefit and often on both

  The Notary can request that a party provides some documents,
  If one of the party does not agree with the valuation proposed or the wealth declared to the Notary by the other party, unless there is an agreement or a Court order, that party will have to instruct at his/her own costs a private expert to propose another valuation,
  If a party does not comply, there is no sanction, the Notary simply stating that the relevant documents could not be obtained,

Disclosure : Compensatory benefit 2/

- Absence of *In personam jurisdiction* and no contempt of Court – no jail imprisonment,
- Possibility to consult banks (FICOBA) - France only.
- No subpoena. Cannot join third party : e.g.: trustees.
- No obligation to answer questions from the Court or from the opposing party.
- Discretionary power from the Court to order the producing of documents – sometimes with penalty but fairly rare.
- The judge, using his discretion, draws conclusions from the lack of proper and full disclosure, if the requesting party has managed to evidence that the other side has not satisfied proper disclosure.

MPR : the concealment of community assets : sanction in the absence of disclosure

- **If the parties are married under a community of assets regime :**
  « *Recel de communauté* » or **Concealment of community assets** [art 1477 CC]
- **The spouse who has attempted to deprive the other spouse of his/her share of the community assets, will be - as a sanction- deprived of his/her own share in the concealed asset to the benefit of the innocent spouse.**
- If the fraud is discovered, the perpetrator of the concealment will receive a smaller portion of the community assets in comparison to what he/she would normally have been entitled to, in application of the community of property regime, whilst the innocent spouse will receive a greater portion.

  → The *« recel de communauté »* is a concrete application of the law of retaliation (*G. Cornu, les Régimes Matrimoniaux: PUF, Thémis, 9e éd. 1997, n°98).*

MPR Post-divorce issues – sharing tax (« *droit de partage* ») – assistance from the French Tax Authorities

- Orders relating to the winding up of matrimonial regimes are automatically transmitted to the **Tax administration that raises a tax of 2.5% applicable on the net total amount of the community assets** or on the joint assets in case of a separation of property regime.
- **It is supposed to be a worldwide assets tax,**

Conclusion: **MPR no sanction either from the Court - limited to the cases involving a community of assets or throughout an indirect tax assistance**

Assets Abroad - principles

- **Limited jurisdiction abroad on obtaining information on assets or entities**:
  - letter of Rogatory, never used,
  - little use of *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,*
- **No division or/and rare allocation of foreign assets** (Notary/Judges/sharing tax).
  - Lex rei sitae will apply if the assets are located in a non Member State,
  - French Courts/ Notaries : no winding up of the matrimonial regime if the assets are located in the UK (Court of Appeal Paris : 15 November 2007)

No conservatory/protective measures

- Application of the principle of territoriality for conservatory measures, execution or administration of bank accounts located abroad.
- **A French Judge cannot**, unless otherwise agreed to, **order or authorize an enforcement measure, whether compulsory or protective, to be performed on accounts in a foreign State.**
  - The French Judge may not impose provisional measures on a bank account located in Spain (Cour de cassation, 21 January 2016);
  - Nor could he impose forced execution measures on foreign bank accounts. (Cour de cassation, 12 May 1931),
- Limited use of Article 20 of the European Regulation Brussels Iia (divorce) : *"In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter".*

Matrimonial home

The matrimonial home : property rights (1) and accessory rights to the divorce (interim measures) (2).

- Property rights = exclusive jurisdiction of the Judge of the place of situation of the property and application of the law of the place of situation of the property *(lex rei sitae)*, *" the Judge of the State of location of the immovable asset has exclusive jurisdiction to liquidate the immovable asset located in its State, even when a Judge, in another State, is seized with the divorce. Hence, the divorce decision would only be partially enforced and it would then be necessary to deal with the liquidation separately. (CA Paris, Nov. 15, 2007),*
- European case-law considers that the foreign Judge has sole jurisdiction to hear a dispute over the division of an undivided shares of a property located abroad, even if the owners of the said property are both French residents.

"The judgment under appeal rules on the liquidation of the joint ownership existing between Mrs. Y ... and MX .., who lived in concubinage, and says in particular that they are undivided owners, by virtue of an authentic Spanish deed, a property located in Benidorm (Spain);

Whereas, however, the Court of Justice of the European Union has ruled (ECJ, judgment of 17 December 2015, C-605/14) that the first paragraph of Article 22 (1) of Regulation (EC) No 44/2001 of the Council of 22 December 2000 must be interpreted as falling within the category of disputes "in respect of immovable real rights" within the meaning of that provision, an action for dissolution, by means of a sale whose implementation is entrusted to an agent, undivided co-ownership on immovable property;

Considering that the Spanish Judge has sole jurisdiction to hear a dispute over the ownership and partition, between French residents, of an undivided property on a property located in Spain, so that the French judge must automatically raise his incompetence ".

Cour de cassation, 20 April 2017

2/ Free use of the matrimonial home ⇔ duty of support (interim maintenance) = personal right.

"The free disposal of the matrimonial home in fulfilment of the duty of support (maintenance) between spouses shall not be assimilated to a real right of use and habitation, but consists in the attribution of the free use of housing that constitutes a personal right "(Cour de cassation, 24 September 2008)

- If a foreign Judge were to grant one of the spouses the right to remain (free use/disposal) in the matrimonial home as a form of "maintenance" = application of *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation).*
- Right to remain in the former matrimonial ⇔ *"Payment in kind"* of the maintenance obligation (Annex I of the Maintenance Regulation) → direct enforceability of the Order in France.
- A French Judge does not have jurisdiction to authorize a spouse to remain in the matrimonial home when another State has jurisdiction over the substance of the divorce **without** being **proven the necessity for that spouse to obtain such measure instantly and urgently in France** (Cour de cassation, 6 December 2005) – article 20 of Brussels II a (divorce),

- Constantly reiterated by the *Cour de cassation* that the secondary residence of the spouses shall not be attributed to a spouse pursuant to maintenance obligations (CA 5 November 1997).
- The free disposal of an immovable asset - other than the matrimonial home – located abroad constitutes a real right of use and habitation (property right) => exclusive jurisdiction of the State of location of the asset.
- Impossible for a French Judge to fix and order separated residences for the spouses when residences are located abroad.

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SESSION 4

Enforcement of Japanese divorce, custody and child support orders abroad: Case Studies by Jurisdiction

Case study

Janet was born on 3 February 1981 in Houston (Texas, USA). After her graduation in 2004 Janet went on a trip around the world. When she arrived in Amsterdam in August 2005 she met Bas, born on 12 November 1979 in Amsterdam (Netherlands) . They fell in love and started cohabiting shortly after they met. Janet found a job in a bookstore in Amsterdam. She never returned to the USA, except for family visits. On 20 December 2008 they married in Amsterdam.

They got two children, who have Dutch nationality:

- Tom, born on 17 August 2010 in Amsterdam
- Amy, born on 4 December 2012 in Amsterdam

Bas works in Financial District of Amsterdam, know as the "Zuid-as". Janet meanwhile has become the manager of the bookstore, where she started working in 2005. In April 2013 Bas's employer asks him to head the bank's office in Tokyo. The family then moves to Tokyo. The children visit the Yokohama International School (YIS), where they follow a partly Dutch curriculum.

For a while the family lives a happy live there. Until Janet got depressed; the Japanese language is terribly difficult to learn, she cannot get used to the big crowds in Tokyo and the seemingly everlasting traffic jam in the city and she is developing a dislike of Japanese cuisine. Bas does not understand anything of this. They have a nice home, the children and Janet live in good wealth , she can buy and eat whatever she wants and they go on a holiday three times a year, while Janet is choosing the holiday destination. Meanwhile , Janet is staying only in bed, while the nanny is looking after the children.

In December 2016 the marriage breaks down and Janet and Bas separate. Janet files for divorce in the local court in Tokyo and together with the divorce she asks for sole custody over the children, and child support of JPY 131.000 per month per child (€ 1.000 / US$ 1240)

Bas can agree with the divorce and the child support, but not with the sole custody. He fears she will take them to Houston. The children have never been to Houston, but for family visits. The first part of their lives they grew up in Amsterdam and the last few years in Tokyo. They do not have any attachment to Houston. Moreover he thinks it is in their best interest that the parents share parental responsibility and custody after divorce, while he can agree their principle residence is with the mother, provided that she stays in Tokyo. He would like to see his children 50% of the time. In the even numbered weeks from Monday till Wednesday and in the odd numbered weeks from Thursday till Sunday. He will continue to employ the same nanny as who is now looking after the children, while Janet is in bed suffering from her depressions. The other option he is prepared to investigate is asking his employer for a job relocation to Amsterdam and then both parties to live there in Amsterdam, in order for the children to just bike between their parents´ homes with the same contact scheme.

Questions for Makiko:

1. **Does the Japanese Court have jurisdiction to hear the divorce in this case? What are the requirements for jurisdiction in an international divorce and children proceedings?**

2. **Could you specify how the proceedings will proceed after a divorce petition has been filed with the Japanese court?**

3. **Do concepts of domicile and habitual residence apply in relation to divorce and children?**

The Local court in Tokyo then pronounces in January 2018 the divorce by agreement and a child support of JPY 131.000 per month per child. Since the parents do not agree on the custody, the court awards the custody to Janet. There is also a contact arrangement as requested by Bas, therefore Tom and Amy stay with Bas:

Week 1: Thursday until and inclusive Sunday in Tokyo

Week 2: Monday until and inclusive Wednesday in Tokyo

And Bas undertakes to continue to employ the nanny, when the children are with him as he did during marriage.

Questions for Susan and Sandra

1. **Would a court in your jurisdiction recognise this Japanese decision? What are the requirements for recognition of the Japanese order?**
2. **Does it make a difference whether the decision is about divorce, custody or child support?**
3. **If there are different criteria for recognition of the decision in your jurisdiction, could you explain the differences?**

Meanwhile Bas's employer has asked him to return to Amsterdam at the end of 2018 and to work at the bank's office at the Zuid-as again. Therefore Bas starts negotiating on the relocation with Janet. Since she has a dislike of Tokyo he expects that she would not mind returning to Amsterdam with Tom and Amy. Wrong! Janet does not agree, she misses her relatives and would still like to move with the children to Texas. She says the children need a happy mother and she would only be happy in Texas. Bas does not agree and reiterates his position that the children have never lived there, while they did all live together as a happy family in Amsterdam, where she by the way also lived for at least 8 years and was happy. They do not settle the issue and Bas asks the Japanese Court to change the custody order and to give him sole custody over Tom and Amy. The day after he has filed his petition Janet is taking Tom and Amy "on a holiday" to Texas and does not come back…

Bas is furious and feels betrayed. He seeks advice from a Japanese lawyer and ask for immediate action to get Tom and Amy back.

Question for Makiko

1. **Although the court vested the sole custody with Janet, it also ordered a contact arrangement, which effectively resulted in the children being half of the time with Bas. Under the Hague Convention 1980 Contracting States shall ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. What would you advise Bas to do in this situation?**

Question for Susan

2. **Suppose that Janet comes to you. What would you advise her in terms of the Japanese custody and contact order. Would you ask for recognition and enforcement of the original order?**
3. **Does it make a difference that Bas has asked for a variation of the custody order at the Tokyo Court, before Janet left Japan with the children?**
4. **Suppose that Bas comes to you. What would you advise him in terms of the Japanese custody and contact order? Would the violation of the Japanese contact order be reason enough to ask for a return to Japan? So would you ask for recognition and enforcement of the original order?**
5. **Does it make a difference that Bas has asked for a variation of the custody order at the Tokyo Court, before Janet left Japan with the children?**
6. **Could Bas stop paying child support, since Janet is violating his parental access rights?**

Finally the court in Tokyo grants Bas's petition for the variation of the custody order and vests sole custody over the children with Bas and also their primary residence. The child support will be varied to nil, since the residence of the children will be with Bas. Although Janet was the primary caregiver during marriage and was awarded custody over the children upon divorce, the court was not satisfied that she had thought through her move to Houston carefully. Although her relatives lived there, she had never worked in the USA after her graduation in 2004 and therefore no relevant job experience. The children went to the Yokohama International School (YIS), where they followed a partly Dutch curriculum. They are not familiar with the American School system and the children were suddenly taken out of their familiar environment. Her sudden leave to the USA disrupted the children's lives heavily, which was not in the interest and welfare of the children. Moreover , Janet should have awaited the order from the Japanese court upon Bas's petition for the variation of the custody order and adjourned her decision to leave Japanese jurisdiction after this order.

Question for Susan and Makiko

4. **Did the Japanese court had jurisdiction with regard Bas's petition, considering that Janet, Tom and Amy were in Houston at the time of rendering this decision?**

5. **Would you ask for recognition and enforcement of this decision re custody and child support in Texas, assuming that you would represent Bas?**
6. **If you would represent Janet, what would be your advice with regard to enforcement?**

the japan times

NEWS

NATIONAL / CRIME & LEGAL

Japanese lawmakers enact law on court jurisdiction for international divorces

KYODO

ARTICLE HISTORY | APR 18, 2018

The Diet on Wednesday enacted a revised law stipulating Japanese court jurisdiction over international divorce, in a move expected to speed up lengthy proceedings.

Before the revision, determination of court jurisdiction could take years as the previous law had no provision on the matter. The legislation will be put into effect in the near future, and will enter into force within the following 18 months.

The revised law on personal status litigation details the circumstances under which an international couple or a Japanese couple with one or both spouses living outside Japan can file for divorce in a Japanese court, taking into account evidence and relevant parties' links to Japan.

The amended law provides that a lawsuit can be filed with a Japanese court if the defendant's address is in Japan, if both husband and wife are Japanese nationals, or if a couple's last common residence and the plaintiff's current address is in Japan.

For instance, cases that can be handled by a Japanese court will include a foreign national living outside Japan and seeking divorce with a Japanese spouse in Japan or a Japanese national living in Japan requesting divorce from a foreign national who moved abroad but had lived with the Japanese spouse in Japan immediately before their separation.

But a Japanese court may deny jurisdiction under special circumstances, such as a couple having lived separately for a long period of time with almost no evidence to establish their last common residence in Japan.

According to the Justice Ministry, 634 divorce suits involving foreign nationals were filed in Japan in 2016.

Meanwhile, the Diet also enacted a revised law that stipulates a request for adoption can be filed with a Japanese court regardless of nationality as long as adoptive parents or adopted children are expected to live in Japan.

In 2016, 381 adoption requests involving foreign nationals were filed in the country.

LATEST NATIONAL STORIES

TEXAS RECOGNITION OF FOREIGN ORDERS

I. Custody Orders

A. Registration of Foreign Custody Orders

A parent can register their foreign judgement, decree, or other court order providing for legal custody, physical custody, or visitation regarding a child, including permanent, temporary, initial, and modification order in Texas under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). *See* TEX. FAM. CODE § 152.102(3).

1. Most county and district clerks have their own websites that the registering parent should research. The registering parent must send the following to the district clerk or county clerk in the county in which the parent lives:

    a) a letter or other document requesting registration;

        i. the letter must include the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered. TEX. FAM. CODE § 152.305(a). (*See* Appendix A);

    b) two copies, including one certified copy, of the custody determination the parent seeks to register; and

    c) a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified. (Appendix B).

2. On receipt of the required documents, the clerk will first assign the case to a court that has authority over family law issues, then that the registering court is asked to:

    a) cause the child custody determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

    b) serve notice upon the persons named in the registration letter and provide them with an opportunity to contest the registration in accordance with this section. TEX. FAM. CODE § 152.305(b). Practice Tip: Follow up with the court to make sure this action actually happens.

i. The notice to the other parent must state that:

a. a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of Texas;

b. a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

c. failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted. TEX. FAM. CODE § 152.305(c) (See example in Appendix C).

3. The parent receiving the notice may contest the validity of a registered order by doing the following:

a) Request a hearing within 20 days after service of the notice.

b) At the hearing, establish the following:

i. the issuing court did not have jurisdiction to make an initial child custody determination;

ii. the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so; or

iii. the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of the Texas Family Code, in the proceedings before the court that issued the order for which registration is sought. TEX. FAM. CODE § 152.305(d).

c) Failure to request a hearing results in the registration of the order as a matter of law. TEX. FAM. CODE § 152.305(e).

i. However, it is imperative for the parent requesting registration to follow up with the Court to ensure timely registration and notice. Texas has 254 counties, more than any other U.S. state.

ii. The person requesting registration and all persons served must be notified of the confirmation.

iii. Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. TEX. FAM. CODE § 152.305(f).

B. Enforcement of Foreign Custody Order

A parent can also seek simultaneous enforcement of their foreign judgement, decree, or other court order providing for legal custody, physical custody, or visitation regarding a child, including permanent, temporary, initial, and modification order in Texas under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).

A Texas court shall accord full faith and credit to an order issued by another state and consistent with chapter 152 which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so. TEX. FAM. CODE § 152.313.

1. A Texas court shall recognize and enforce a child custody determination of a court of another state if:

    a) the latter court exercised jurisdiction in substantial conformity with Texas Family Code chapter 152; or

    b) the determination was made under factual circumstances meeting the jurisdictional standards of chapter 152 and the determination has not been modified in accordance with chapter 152. TEX. FAM. CODE § 152.303(a).

2. The Texas court may utilize any remedy available under Texas law to enforce a child custody determination made by a court of another state, and the remedies listed in subchapter D (Enforcement) of chapter 152 are not exclusive. TEX. FAM. CODE § 152.303(b).

3. Registration is not required to seek enforcement of a child custody determination in Texas.

4. There are procedures to expedite the enforcement of child custody determinations, even providing for the taking of a child before an adversary hearing. TEX. FAM. CODE § 152.308; Appendix D.

    a) To discourage violations of court orders and to offset the cost to those enforcing them, the UCCJEA allows the assessment of expenses against the non-prevailing party, including, but not limited to, attorney's fees. *See* Appendix D.

5. Temporary Orders During Enforcement—

    a) If a Texas court does not have jurisdiction to modify a child custody determination, it may issue a temporary order enforcing the visitation schedule made by the court of another state. TEX. FAM. CODE § 152.304(a)(1).

    b) If the visitation provisions of a child custody determination of the other state do not provide for a specific visitation schedule, the Texas court may also issue a temporary order to enforce that visitation order.

        i. In this temporary order, the Court must specify a period that the court considers adequate for the parent seeking to enforce their child custody determination to obtain an order from a court having jurisdiction to make a child custody determination. TEX. FAM. CODE § 152.304(a)(2), (b).

        ii. That temporary order remains in effect until an order is obtained from the other court or the period expires. TEX. FAM. CODE § 152.304(b).

6. A prosecutor or other appropriate public official may become involved on behalf of the Court to take any lawful action to locate a child, obtain the return of a child, or enforce a child custody determination under certain circumstances:

    a) There is an existing child custody determination;

    b) A court has requested that the prosecutor or public official become involved in a pending child custody proceeding;

    c) There is a reasonable belief that a criminal law has been violated; or

    d) There is a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction. TEX. FAM. CODE § 152.315.

        i. That person or agency may even file to enforce a child custody determination.

        ii. If the respondent parent is not the prevailing party, the court may assess all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers against the respondent. TEX. FAM. CODE §152.317.

II. Child Support

Jurisdiction issues regarding child support are addressed by the Uniform Interstate Family Support Act (UIFSA). *See* TEX. FAM. CODE § 159.

A. Registration of Foreign Child Support Orders

1. A support order or income-withholding order of another state or a foreign support order may be registered in Texas by sending the following records to the appropriate court in Texas:

    a) a letter of transmittal to the court requesting registration and enforcement that includes (Appendix E):

        i. two copies, including one certified copy, of the order to be registered, including any modification of the order;

        ii. a sworn statement by the person requesting registration or a certified statement by an official responsible for the accuracy of the records showing the amount of any arrearage;

        iii. the name of the person who owes child support and, if known:

            a. that person's addresses and social security number;

            b. the name and address of the person's employer and any other source of income of that the person owing child support might have; and

            c. a description of and the location of property of that person located in Texas not exempt from execution.

        iv. the name and address of the person who is owed child support and, if applicable, the person to whom support payments are to be remitted. TEX. FAM. CODE §159.602(a).

    b) If two or more orders are in effect, the person requesting registration shall:

        i. furnish to the court a copy of each support order asserted to be in effect in addition to the documents specified in this section;

        ii. specify the order alleged to be the controlling order, if any; and

        iii. specify the amount of consolidated arrears, if any.

c) A request for a determination of which order is the controlling order may be filed separately from or with a request for registration and enforcement or for registration and modification.

i. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

2. On receipt of a request for registration, the registering court shall do the following:

a) Cause the order to be filed as an order of a court of another state or a foreign support order, together with one copy of the documents and information, regardless of their form. TEX. FAM. CODE §159.602(b)

b) Notify the nonregistering party. *See* Appendix G. The notice must:

i. be accompanied by a copy of the registered order and the documents and relevant information accompanying the order. TEX. FAM. CODE §159.605.

ii. inform the nonregistering party of the following:

a. that a registered order is enforceable as of the date of registration in the same manner as an order issued by a court of Texas;

b. that a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice unless the registered order is under Section 159.707;

c. that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages; and

d. the amount of any alleged arrearages.

iii. If the registering party asserts that two or more orders are in effect, the notice must also:

a. identify the two or more orders and the order alleged by the registering party to be the controlling order and the consolidated arrears, if any;

b. notify the nonregistering party of the right to a determination of which is the controlling order;

c. state that the procedures provided in Subsection (b) apply to the determination of which is the controlling order; and

d. state that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

c) On registration of an income-withholding order for enforcement, the support enforcement agency or the registering court shall notify the employer of the person owing child support under Chapter 158.

3. Contest Validity or Enforcement—

The parent who is designated to pay child support may contest the validity or enforcement of a registered support order, seek to vacate the registration, assert any defense to noncompliance, or to contest the remedies or amount of alleged arrearage in Texas by doing the following:

a) request a hearing within within 20 days after notice unless the registered order is under Section 159.707.

i. If a nonregistering party requests a hearing to contest the validity or enforcement of the registered support order, the registering court shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

b) proving one or more of the following defenses:

i. the issuing court lacked personal jurisdiction over the contesting party;

ii. the order was obtained by fraud;

iii. the order has been vacated, suspended, or modified by a later order;

iv. the issuing court has stayed the order pending appeal;

v. there is a defense under the law of Texas to the remedy sought;

vi. full or partial payment has been made;

vii. the statute of limitation precludes enforcement of some or all of the alleged arrearages; or

1. the statute of limitation of Texas, the issuing state, or the foreign country where the order originated, whichever is longer, applies.

viii. the alleged controlling order is not the controlling order. TEX. FAM. CODE §159.607.

c) If a party presents evidence establishing a full or partial defense under TEX. FAM. CODE §159.607(a), a court may:

i. stay enforcement of the registered support order; or

ii. continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders.

iii. An uncontested portion of the registered support order may be enforced by all remedies available under Texas law. TEX. FAM. CODE §159.607(b).

d) If the contesting party does not establish a defense under TEX. FAM. CODE §159.607(a) to the validity or enforcement of the registered support order, the registering court shall issue an order confirming the order. TEX. FAM. CODE §159.607(c).

e) If the nonregistering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law.

f) Confirmation of a registered support order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. TEX. FAM. CODE §159.608.

4. Registration and Modification—

A party or support enforcement agency, such as the Office of the Attorney General of Texas, seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order Texas if the order has not been registered.

a) A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification. TEX. FAM. CODE §159.609.

b) A Texas court may enforce a child support order of another state registered for purposes of modification in the same manner as if the order had been issued by a court of Texas, but the registered support order may be modified only if certain requirements have been met (Refer to Sections 159.611 or 159.613 of the Texas Family Code).

B. Enforcement of Foreign Support Orders

A support order or income-withholding order issued in another state or a foreign support order is registered when the order is filed in the registering court of Texas. TEX. FAM. CODE 159.603(a).

1. A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a court of Texas.

2. A court of Texas shall recognize and enforce, but may not modify, a registered support order if the issuing court had jurisdiction. TEX. FAM. CODE 159.603(b)-(c).

    a) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of Texas may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought. TEX. FAM. CODE 159.602(c).

APPENDIX A

April 30, 2018

District Clerk
Harris County, Texas

Re: Registration of Foreign Order; *In the Interest of Tom Arnold Yonemoto and Amy Beatrice Yonemoto, Minor Children*.

Dear District Clerk:

This is a formal request to register an order under the Uniform Child Custody Jurisdiction and Enforcement Act, section 152.305 of the Texas Family Code.

Enclosed please find the following:

1. Two copies, including one certified copy, of the custody determination sought to be registered;

2. Sworn statement of Mr. Bas Yonemoto; and

3. Filing fee to register a foreign judgment in the amount of $257.00.

The name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered is as follows:

Name: Bas Yonemoto
Address:
Relationship to children: Father

Name: Janet Yonemoto
Address:
Relationship to children: Mother

Thank you for your attention to this matter. If you have any questions or would like to discuss this matter further, please do not hesitate to contact me directly.

Very Truly Yours,

/s/ *Becca Weitz*
Becca Weitz
State Bar No. 24087494
One Greenway Plaza, Ste. 450
Houston, Texas 77046
bweitz@myresfamilylaw.com

APPENDIX B

SWORN STATEMENT IN SUPPORT OF REGISTRATION OF FOREIGN CHILD CUSTODY DETERMINATION

BAS YONEMOTO appeared in person before me today and stated under oath:

"My name is BAS YONEMOTO. I am above the age of eighteen years, and I am fully competent to make this affidavit.

"To the best of my knowledge and belief, the child custody determination issued from the Court of Tokyo, Japan, in Cause No. 12345 and signed on January 1, 2016, the determination that is sought to be registered, has not been modified."

_____
BAS YONEMOTO

SIGNED under oath before me on _____.

_____
Notary Public, State of _____

APPENDIX C

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

NOTICE OF REGISTRATION OF FOREIGN CHILD CUSTODY DETERMINATION

To: JANET YONEMOTO

1. A copy of a child custody determination that has been registered under Texas Family Code chapter 152, subchapter D, is attached to this notice, along with any accompanying documents and related information.

2. A registered child custody determination is enforceable as of the date of the registration in the same manner as a child custody determination issued by a Texas court.

3. A hearing to contest the validity of the registered child custody determination must be requested within twenty days after service of this notice.

4. Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

_____
District Clerk of Harris County, Texas

By: _____
Deputy

APPENDIX D

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

PETITION FOR ENFORCEMENT OF CHILD CUSTODY DETERMINATION

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. This Petition for Enforcement of Child Custody Determination is brought by BAS YONEMOTO, Petitioner, who resides at 1234 Canal Street, Amsterdam, Netherlands. The last three numbers of Petitioner's driver's license number are 123. The last three numbers of Petitioner's Social Security number are 987.

3. Respondent is JANET YONEMOTO, who currently resides at 1234 Astros Lane, Houston, Texas. Process should be served on Respondent at that address.

4. The children the subject of this suit are presently located at 1234 Astros Lane, Houston, Texas.

5. Petitioner is presently entitled to the possession of the children, TOM YONEMOTO and AMY YONEMOTO, by virtue of an order entered by the Court of Tokyo, Japan, in Cause No. 12345. This order is in full force and effect. A copy of a certified copy of the order is attached to this petition.

6. The court that issued the custody determination did not identify the jurisdictional basis on which it relied in exercising jurisdiction.

7. The determination for which enforcement is sought has not been vacated, stayed, or modified by a court whose decision must be enforced under chapter 152 of the Texas Family Code.

8. No other proceeding has been commenced that could affect the current proceeding.

9. The child custody determination sought to be enforced has been registered and confirmed under section 152.305 of the Texas Family Code on May 30, 2018 in the 300th Judicial District Court of Harris County, Texas.

10. The children are currently in the possession of JANET YONEMOTO, Respondent, at Houston, Harris County, Texas.

11. Petitioner requests that the Court issue an order directing Respondent to appear with the children at a hearing to be held the day following service on Respondent.

12. Petitioner requests that after notice and hearing Petitioner be awarded immediate physical custody of the children the subject of this suit.

13. Petitioner requests that Petitioner be provided assistance from law enforcement officials as necessary to enforce the order of the Court.

14. As a result of Respondent's restraint of the children, Petitioner has incurred communication expenses, investigative fees, expenses for witnesses, travel expenses, child care expenses to prosecute this petition. Petitioner requests judgment against Respondent for Petitioner's necessary expenses incurred by Petitioner and Petitioner's witnesses for prosecution of this petition.

15. It was necessary to secure the services of Becca Weitz, a licensed attorney, to preserve and protect the rights of Bas Yonemoto and the children. Respondent should be ordered to pay reasonable attorney's fees and expenses, and a judgment should be rendered in favor of this attorney and against Respondent.

16. Petitioner prays that the Court immediately issue its order commanding that the children be brought immediately before this Court and that Petitioner be awarded immediate physical custody of the child.

Petitioner further requests that Respondent be ordered to pay all expenses incurred and all costs of court.

Petitioner prays for recovery of all relief requested and for all general relief to which this Court may deem Petitioner entitled.

Respectfully submitted,

MYRES & ASSOCIATES, PLLC

_____

Becca Weitz
State Bar No. 24087494
One Greenway Plaza Ste. 450
Houston, Texas 77046
bweitz@myrefamilylaw.com
Attorney for Petitioner

VERIFICATION

The undersigned states under oath: "I am Petitioner in the foregoing Petition for Enforcement of Child Custody Determination. I have personal knowledge of the allegations and facts stated in it, and they are true and correct."

_____

Bas Yonemoto, *Affiant*

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

APPENDIX E

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

MOTION FOR ENFORCEMENT OF POSSESSION OR ACCESS

This *Motion for Enforcement of Possession or Access* is brought by BAS YONEMOTO, Movant, Father. The last three numbers of Movant's driver's license number are 123. Movant has not been issued a Social Security number.

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. Movant objects to the assignment of this matter to an associate judge for a trial on the merits or presiding at a jury trial.

3. Movant is a FATHER.

4. The children the subject of this suit are:

Name: TOM ARNOLD YONEMOTO
Sex: Male
Birth date: August 17, 2010

Name: AMY BEATRICE YONEMOTO
Sex: Female
Birth date: December 4, 2012

5. A motion to transfer under chapter 155 of the Texas Family Code has been filed with the Court simultaneously with this motion.

6. The parties entitled to notice are as follows:

a. Respondent, JANET YONEMOTO, who is the primary conservator.

Process should be served at 1234 Astros Lane, Houston, Texas or wherever she may be found.

7. On January 1, 2016 in Cause No. 12345 in the Court of Tokyo, Japan the Court signed an order that states in relevant part as follows:

"On odd-numbered weekends during the calendar year, Bas Yonemoto shall have the right to possession of the children on Thursday until and inclusive Sunday.

On even-numbered weekends during the calendar year, Bas Yonemoto shall have the right to possession of the children on Monday until and inclusive Wednesday."

Movant was the respondent and Respondent was the petitioner in the prior proceedings.

8. Respondent has failed to comply with the order described above as follows:

Violation 1: On Monday, April 30, 2018, Janet Yonemoto failed to surrender the minor children to Bas Yonemoto and thereafter fled to Houston, Harris County, Texas and did not return the children.

9. Movant requests that Respondent be held in contempt, jailed, and fined for each violation alleged above, for a period of six months on each count, to run concurrently.

10. Movant requests that after Respondent serves her sentence for criminal contempt, Respondent be confined in the county jail for a period not to exceed eighteen months (total for civil and criminal contempt) or until Respondent complies with the order of the Court, whichever comes first.

11. Movant requests that Respondent be placed on community supervision for ten years on release from jail or suspension of commitment.

12. On two or more occasions, Respondent has failed to comply with the order of the Court by failing to surrender the children to BAS YONEMOTO as ordered. Movant requests that the Court order a bond or security for compliance with the Court's order granting possession of or access to the children.

13. Movant requests that the Court order additional periods of possession/access for Movant to compensate for those periods denied by Respondent.

14. Movant requests that, if the Court finds that any part of the order sought to be enforced is not specific enough to be enforced by contempt, the Court enter a clarifying order more clearly specifying the duties imposed on Respondent and giving Respondent a reasonable time within which to comply.

15. It was necessary to secure the services of Becca Weitz, a licensed attorney, to enforce and protect the rights of BAS YONEMOTO and the children the subject of this suit. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of the attorney and against Respondent and be ordered paid directly to the undersigned attorney, who may enforce the judgment in the attorney's own name. Enforcement of the order is necessary to ensure the children's physical or emotional health or welfare. The attorney's fees and costs should be enforced by any means available for

the enforcement of child support, including contempt but not including income withholding. Movant requests postjudgment interest as allowed by law.

Movant prays that Respondent be held in contempt and punished as requested, that the Court order community supervision, that the Court order a bond or security, that the Court clarify any part of its prior order found not to be specific enough to be enforced by contempt, for attorney's fees, expenses, costs, and interest, and for all further relief authorized by law.

Respectfully submitted,

MYRES & ASSOCIATES, PLLC

_____

Becca Weitz
State Bar No. 24087494
One Greenway Plaza Ste. 450
Houston, Texas 77046
bweitz@myrefamilylaw.com
Attorney for Petitioner

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

ORDER TO APPEAR

Respondent, JANET YONEMOTO, is ORDERED to appear and respond to this Motion for Enforcement in 300th Judicial District Court of Harris County, Texas on _____ at _____ __.M. The purpose of this hearing is to determine whether the relief requested in this motion should be granted.

It is further ordered that any authorized person eighteen years of age or older who is not a party to or interested in the outcome of this suit may serve any citation, notice, or process in this case.

SIGNED on _____.

_____
JUDGE PRESIDING

APPENDIX F

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345-A

IN THE INTEREST OF	**§**	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	**§**	
AND AMY BEATRICE YONEMOTO,	**§**	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	**§**	**HARRIS COUNTY, TEXAS**

PETITION FOR WRIT OF HABEAS CORPUS
AND REQUEST FOR WRIT OF ATTACHMENT

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. This *Petition for Writ of Habeas Corpus and Request for Writ of Attachment* is brought by BAS YONEMOTO, Petitioner, who resides at 1234 Canal Street, Amsterdam, Netherlands. The last three numbers of Petitioner's driver's license number are ___. The last three numbers of Petitioner's Social Security number are _____.

3. This Court has exclusive and continuing jurisdiction as a result of prior proceedings.

4. The child is illegally restrained by JANET YONEMOTO, Respondent, in Harris County, Texas. Process should be served on Respondent at 1234 Astros Lane, Houston, Texas or wherever she may be found.

5. Petitioner is presently entitled to the possession of the children TOM ARNOLD YONEMOTO and AMY BEATRICE YONEMOTO by virtue of an Agreed Final Decree of Divorce signed by the Court of Japan, on January 1, 2016 in Cause No. _____. This order is in full force and effect and states in relevant part:

"On odd-numbered weekends during the calendar year, Bas Yonemoto shall have the right to possession of the children on Thursday until and inclusive Sunday.

On even-numbered weekends during the calendar year, Bas Yonemoto shall have the right to possession of the children on Monday until and inclusive Wednesday."

Petitioner incorporates this order by reference in its entirety herein and requests that the Court take judicial notice of this order. A copy of the order is attached to this petition as Exhibit A.

6. As a result of Respondent's illegal restraint of the child, Petitioner has been deprived of her superior right to possession of the child on the following dates:

Violation	Date and Time of Violation
1.	April 30, 2018
2.	May 1, 2018
3.	May 2, 2018

7. Based on the statements of Respondent, Respondent intends to continue to intentionally and willfully withhold and conceal the child from Petitioner. Respondent has enrolled the child in a school located in his district in Tarrant County, Texas to prevent Petitioner from taking the child or picking him up from school.

8. Based on these facts, Petitioner believes that Respondent will remove the child from the jurisdiction of this Court unless the child is removed from Respondent's possession.

9. Based on these facts, Petitioner believes that continued possession of the child will create and is creating a serious, immediate threat to the child's physical and emotional well being.

10. It was necessary for Petitioner to secure the services of Becca Weitz, a licensed attorney, to preserve and protect the rights of the child. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of this attorney and against Respondent and be ordered paid directly to Petitioner's attorney, who may enforce the judgment in the attorney's own name. Petitioner requests postjudgment interest as allowed by law.

11. Petitioner prays that the Court immediately issue its writ of habeas corpus commanding that the child be brought immediately before this Court and that the child be returned to Petitioner.

Petitioner prays that the Court order additional periods of possession to Petitioner to supplement all days missed due to Respondent's unlawful restraint of the child.

Petitioner further requests that Respondent be ordered to pay all costs of court.

Petitioner prays for recovery of all relief requested and for all general relief to which this Court may deem Petitioner entitled.

Respectfully submitted,

MYRES & ASSOCIATES, PLLC

Becca Weitz
State Bar No. 24087494
One Greenway Plaza, Suite 450
Houston, Texas 77046
bweitz@myresfamilylaw.com
E-Service:service@myresfamilylaw.com
Tel: 713-622-1600
Fax: 713-622-1610
Attorney for Petitioner

VERIFICATION

The undersigned states under oath: "I am Petitioner in the foregoing *Petition for Writ of Habeas Corpus and Request for Writ of Attachment*. I have personal knowledge of the allegations and facts stated in it, and they are true and correct."

BAS YONEMOTO, *Affiant*

SIGNED under oath before me on _____.

Notary Public, State of Texas

APPENDIX G

April 30, 2018

District Clerk
Harris County, Texas

Re: Registration of Foreign Support Order; *In the Interest of Tom Arnold Yonemoto and Amy Beatrice Yonemoto, Minor Children*.

Dear District Clerk:

This is a formal request to register orders under the Uniform Interstate Family Support Act, Texas Family Code section 159.602. Please register and enforce the enclosed support/income withholding orders.

Enclosed please find the following:

1. Two (2) copies, including one certified copy, of the order to be registered, as well as any orders of modification;

2. Sworn statement of Janet Yonemoto; and

3. Filing fee in the amount of $257.00.

The following information is provided with regard to the obligor:

Name: Bas Yonemoto
Address: 1234 Canal Street, Amsterdam, Netherlands
Social Security number:
Name of employer:
Address of employer:
Additional information:
Description and location of property not exempt from execution:

The obligee is Janet Yonemoto, whose address is 1234 Astros Lane, Houston, Texas

Support payments should be remitted to the following person: Janet Yonemoto

Thank you for your assistance in this matter.

Very truly yours,

MYRES & ASSOCIATES, PLLC

_____
Becca Weitz

State Bar No. 24087494
One Greenway Plaza Ste. 450
Houston, Texas 77046
bweitz@myrefamilylaw.com
Attorney for Janet Yonemoto

Enc.

APPENDIX H

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

REGISTRATION INFORMATION

Obligor:

Name: Bas Yonemoto

Address: 1234 Canal Street, Amsterdam, Netherlands

Social Security number: 123-45-6789

Employer:

Obligee:

Name: Janet Yonemoto

Address: 1234 Astros Lane, Houston, Texas

The order to be registered is dated January 1, 2016 and is entitled Agreed Final Decree of Divorce.

The order is registered in the following states:

Description and location of any property not exempt from execution:

VERIFICATION

x□ I am the party seeking registration.

□ I am the custodian of the records for this order.

I have personal knowledge that the following is true and correct: The arrearage due and owing under the order sought to be registered is $[**amount**] as of [**date**].

_____
Janet Yonemoto

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

APPENDIX I

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

NOTICE OF REGISTRATION OF FOREIGN SUPPORT ORDER

To: BAS YONEMOTO

1. A copy of the foreign support order that has been registered under Texas Family Code chapter 159, subchapter G, is attached, along with any other relevant information accompanying the order.

2. A registered order is enforceable as of the date of registration in the same manner as an order issued by a Texas court.

3. The amount of the alleged arrearage is $[**amount**] as of [**date**].

4. A hearing to contest the validity or enforcement of a registered order or the allegation of which order is the controlling order must be requested within twenty days after this notice.

5. If you wish to contest the validity of the registered order, the allegation of which order is the controlling order, or the amount of the alleged arrearage, file a written response with the district clerk and mail a copy to Janet Yonemoto within twenty days after this notice.

6. Failure to contest the validity or enforcement of a registered order or the allegation of which order is the controlling order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages.

7. Direct all child support payments to Texas State Disbursement Unit, P.O. Box 659791, San Antonio, Texas 78265-9791 for distribution according to law.

_____
District Clerk of Harris County, Texas

By: _____
Deputy

APPENDIX J

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

PETITION FOR ENFORCEMENT OF CHILD CUSTODY DETERMINATION

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. This *Petition for Enforcement of Child Custody Determination* is brought by BAS YONEMOTO, Petitioner, who resides at 1234 Canal Street, Amsterdam, Netherlands. The last three numbers of Petitioner's driver's license number are 123. The last three numbers of Petitioner's Social Security number are 987.

3. Respondent is JANET YONEMOTO, who currently resides at 1234 Astros Lane, Houston, Texas. Process should be served on Respondent at that address.

4. The children the subject of this suit are presently located at 1234 Astros Lane, Houston, Texas.

5. Petitioner is presently entitled to the possession of the children, TOM YONEMOTO and AMY YONEMOTO, by virtue of an order entered by the Court of Tokyo, Japan, in Cause No. 12345. This order as modified by the Court of Tokyo, Japan on _____, 2018, and the modified order is in full force and effect. A copy of a certified copy of the order is attached to this petition.

6. The court that issued the custody determination identified the following jurisdictional basis on which it relied in exercising jurisdiction: the Court of Tokyo Japan issued the parties' divorce decree and original parenting plan.

7. The determination for which enforcement is sought has not been vacated, stayed, or modified by a court whose decision must be enforced under chapter 152 of the Texas Family Code.

8. No other proceeding has been commenced that could affect the current proceeding.

9. The child custody determination sought to be enforced has been registered and confirmed under section 152.305 of the Texas Family Code on May 30, 2018 in the 300th Judicial District Court of Harris County, Texas.

10. The children are currently in the possession of JANET YONEMOTO, Respondent, at Houston, Harris County, Texas.

11. Petitioner requests that the Court issue an order directing Respondent to appear with the children at a hearing to be held the day following service on Respondent.

12. Petitioner requests that after notice and hearing Petitioner be awarded immediate physical custody of the children the subject of this suit.

13. Petitioner requests that Petitioner be provided assistance from law enforcement officials as necessary to enforce the order of the Court.

14. As a result of Respondent's restraint of the children, Petitioner has incurred communication expenses, investigative fees, expenses for witnesses, travel expenses, child care expenses to prosecute this petition. Petitioner requests judgment against Respondent for Petitioner's necessary expenses incurred by Petitioner and Petitioner's witnesses for prosecution of this petition.

15. It was necessary to secure the services of Becca Weitz, a licensed attorney, to preserve and protect the rights of Bas Yonemoto and the children. Respondent should be ordered to pay reasonable attorney's fees and expenses, and a judgment should be rendered in favor of this attorney and against Respondent.

16. Petitioner prays that the Court immediately issue its order commanding that the children be brought immediately before this Court and that Petitioner be awarded immediate physical custody of the child.

Petitioner further requests that Respondent be ordered to pay all expenses incurred and all costs of court.

Petitioner prays for recovery of all relief requested and for all general relief to which this Court may deem Petitioner entitled.

Respectfully submitted,

MYRES & ASSOCIATES, PLLC

_____

Becca Weitz
State Bar No. 24087494
One Greenway Plaza Ste. 450
Houston, Texas 77046
bweitz@myrefamilylaw.com

VERIFICATION

The undersigned states under oath: "I am Petitioner in the foregoing Petition for Enforcement of Child Custody Determination. I have personal knowledge of the allegations and facts stated in it, and they are true and correct."

_____

Bas Yonemoto, *Affiant*

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

APPENDIX K

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-12345

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
TOM ARNOLD YONEMOTO	§	
AND AMY BEATRICE YONEMOTO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

MOTION FOR ENFORCEMENT OF CHILD SUPPORT ORDER

This Motion for Enforcement of Child Support Order is brought by JANET YONEMOTO, Movant, Mother. The last three numbers of Movant's driver's license number are [**numbers**]. Movant has not been issued a Social Security number.

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. Movant objects to the assignment of this matter to an associate judge for a trial on the merits or presiding at a jury trial.

3. The children the subject of this suit are:

Name
Sex:
Birth date:

Name
Sex:
Birth date:

4. A motion to transfer under chapter 155 of the Texas Family Code has been filed with the Court simultaneously with this motion.

5. The parties entitled to notice are as follows:

a. Respondent, BAS YONEMOTO, who is father of the children.

Process should be served wherever he may be found.

6. On January 1, 2016, in Cause No. 1234, the Court of Tokyo, Japan signed an order that states in relevant part as follows:

"BAS YONEMOTO is ORDERED to pay support of JPY 131.000 per month per child."

Movant was the petitioner and Respondent was the respondent in the prior proceedings.

7. Respondent has violated the order described above as follows:

BAS YONEMOTO, Respondent, is in contempt of court for failing to pay to Movant the full amount of child support due on each of the payment dates shown below.

Violation	Date Due	Date Paid	Amount Due	Amount Paid
1				
2				
3				
4				
5				
6				
7				

8. Movant requests that for each violation alleged above, Respondent be held in contempt, jailed for up to 180 days, and fined up to $500, and that each period of confinement run and be satisfied concurrently.

9. Movant requests that after Respondent serves his sentence for criminal contempt, Respondent be confined in the county jail for a period not to exceed eighteen months (total for civil and criminal contempt) or until Respondent complies with the order of the Court, whichever comes first.

10. Respondent's total arrearage at the time of filing is $[**amount**] in unpaid child support not previously confirmed. Movant requests confirmation of all arrearages and rendition of judgment plus interest on arrearages, attorney's fees, and costs. Movant requests the Court to order income withheld for the arrearages, attorney's fees, costs, and interest.

11. Movant requests that Respondent be placed on community supervision for ten years on release from jail or suspension of commitment.

12. Respondent has been in arrears for thirty days or more for some portion of the amount due and is in arrears for an amount equal to at least one month's support. Movant requests the Court to order income withheld for current child support or order a bond or security.

13. Movant requests that, if the Court finds that any part of the order sought to be enforced is not specific enough to be enforced by contempt, the Court enter a clarifying order more clearly specifying the duties imposed on Respondent and giving Respondent a reasonable time within which to comply.

15. It was necessary to secure the services of Becca Weitz, a licensed attorney, to enforce and protect the rights of JANET YONEMOTO and the children the subject of this suit. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of the attorney and against Respondent and be ordered paid directly to the undersigned attorney, who may enforce the judgment in the attorney's own name. Movant requests postjudgment interest as allowed by law.

Movant prays that Respondent be held in contempt and punished as requested, that a judgment be granted for arrearage plus interest on arrearages, that the Court order community supervision, that the Court order income withheld for child support, child support arrearages, attorney's fees, and costs or order a bond or security, that the Court clarify any part of its prior order found not specific enough to be enforced by contempt, for attorney's fees, expenses, costs, and interest, and for all further relief authorized by law.

Respectfully submitted,

MYRES & ASSOCIATES, PLLC

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Becca Weitz
State Bar No. 24087494
One Greenway Plaza Ste. 450
Houston, Texas 77046
bweitz@myrefamilylaw.com
Attorney for Petitioner

APPENDIX L

NOTICE: DOCUMENT CONTAINS SENSITIVE DATA

CAUSE NO. 2018-_____

IN THE INTEREST OF	§	**IN THE DISTRICT COURT**
	§	
CHILD ONE	§	
CHILD TWO,	§	**300TH JUDICIAL DISTRICT**
	§	
MINOR CHILDREN	§	**HARRIS COUNTY, TEXAS**

ORDER IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

On May 14, 2018, the Court heard this case.

Appearances

Petitioner, MOTHER, appeared in person and through attorney of record, Becca Weitz, and announced ready for trial.

Respondent, FATHER, appeared through attorney of record, Attorney, and announced ready for trial.

Jurisdiction

The Court, after examining the record and the evidence and argument of counsel, finds that it has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

Jury

A jury was waived, and all questions of fact and of law were submitted to the Court.

Record

The record of testimony was duly reported by the court reporter for the 300th Judicial District Court of Harris County, Texas.

Children

The Court finds that the following children are the subject of this suit:

Name: CHILD ONE
Sex: Male
Birth date:
Home state:

Social Security number:
Driver's license number and issuing state:

Name: CHILD TWO
Sex: Female
Birth date:
Home state:
Social Security number:
Driver's license number and issuing state:

Parenting Plan

The Court finds that the provisions in these orders relating to the rights and duties of the parties with relation to the children, possession of and access to the children, child support, and optimizing the development of a close and continuing relationship between each party and the children constitute the parenting plan established by the Court.

Conservatorship

The Court finds that the following orders are in the best interest of the children.

IT IS ORDERED that MOTHER and FATHER are appointed Joint Managing Conservators of the following children: CHILD ONE and CHILD TWO.

IT IS ORDERED that, at all times, MOTHER and FATHER, as parent joint managing conservators, shall each have the following rights:

1. the right to receive information from any other conservator of the children concerning the health, education, and welfare of the children;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the children;

3. the right of access to medical, dental, psychological, and educational records of the children;

4. the right to consult with a physician, dentist, or psychologist of the children;

5. the right to consult with school officials concerning the children's welfare and educational status, including school activities;

6. the right to attend school activities;

7. the right to be designated on the children's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and

9. the right to manage the estate of the children to the extent the estate [has/have] been created by the parent or the parent's family.

IT IS ORDERED that, at all times, MOTHER and FATHER, as parent joint managing conservators, shall each have the following duties:

1. the duty to inform the other conservator of the children in a timely manner of significant information concerning the health, education, and welfare of the children;

2. the duty to inform the other conservator of the children if the conservator resides with for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Texas Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the fortieth day after the date the conservator of the children begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. IT IS ORDERED that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

3. the duty to inform the other conservator of the children if the conservator establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the thirtieth day after the date the conservator establishes residence with the person who is the subject of the final protective order. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

4. the duty to inform the other conservator of the children if the conservator resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order sought by the conservator after the expiration of the sixty-day period following the date the final protective order is issued. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the ninetieth day after the date the final protective order was issued. WARNING: A

CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE; and

5. the duty to inform the other conservator of the children if the conservator is the subject of a final protective order issued after the date of the order establishing conservatorship. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the thirtieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.

IT IS ORDERED that, during their respective periods of possession, MOTHER and FATHER, as parent joint managing conservators, shall each have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the children;

2. the duty to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the children to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the children.

IT IS ORDERED that MOTHER, as a parent joint managing conservator, shall have the following rights and duty:

1. the exclusive right to designate the primary residence of the child within Harris County, Texas and counties contiguous to Harris County, Texas;

2. the right, subject to the agreement of the other parent conservator, to consent to medical, dental, and surgical treatment involving invasive procedures;

3. the exclusive right after consultation with FATHER to consent to psychiatric and psychological treatment of the children;

4. the exclusive right to receive and give receipt for periodic payments for the support of the children and to hold or disburse these funds for the benefit of the children;

5. the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

6. the right, subject to the agreement of the other parent conservator, to consent to marriage and to enlistment in the armed forces of the United States;

7. the right, subject to the agreement of the other parent conservator, to make decisions concerning the children's education;

8. except as provided by section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the children;

9. except when a guardian of the children's estate or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estate if the children's action is required by a state, the United States, or a foreign government; and

10. the independent duty to manage the estates of the children to the extent the estates have been created by community property or the joint property of the parents.

IT IS ORDERED that FATHER, as a parent joint managing conservator, shall have the following rights and duty:

1. the right, subject to the agreement of the other parent conservator, to consent to medical, dental, and surgical treatment involving invasive procedures;

2. the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

3. the right, subject to the agreement of the other parent conservator, to consent to marriage and to enlistment in the armed forces of the United States;

4. the right, subject to the agreement of the other parent conservator, to make decisions concerning the children's education;

5. except as provided by section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the children;

6. except when a guardian of the children's estate or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estate if the children's action is required by a state, the United States, or a foreign government; and

7. the independent duty to manage the estates of the children to the extent the estates have been created by community property or the joint property of the parents.

The Court finds that, in accordance with section 153.001 of the Texas Family Code, it is the public policy of Texas to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, to provide a safe, stable, and nonviolent environment for the child, and to encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. IT IS ORDERED that the primary residence of the children shall be Harris County, Texas and counties contiguous to Harris County, Texas, and the parties shall not remove the children from Harris County, Texas and counties contiguous to Harris County, Texas for the purpose of changing the

primary residence of the children until modified by further order of the court of continuing jurisdiction or by written agreement signed by the parties and filed with the court.

IT IS FURTHER ORDERED that MOTHER shall have the exclusive right to designate the children's primary residence within Harris County, Texas and counties contiguous to Harris County, Texas.

IT IS FURTHER ORDERED that this geographic restriction on the residence of the children shall be lifted if, at the time MOTHER wishes to remove the children from Harris County, Texas or a county contiguous to Harris County, Texas for the purpose of changing the primary residence of the children, FATHER does not reside in Harris County, Texas or a county contiguous to Harris County, Texas.

Possession and Access

IT IS ORDERED that the conservators shall have possession of the children at times mutually agreed to in advance by the parties and, in the absence of mutual agreement, as follows:

Standard Possession Order with Elections

IT IS ORDERED that each conservator shall comply with all terms and conditions of this Standard Possession Order. IT IS ORDERED that this Standard Possession Order is effective immediately and applies to all periods of possession occurring on and after the date the Court signs this Standard Possession Order. IT IS, THEREFORE, ORDERED:

(a) Definitions

1. In this Standard Possession Order, "school" means the elementary or secondary school in which the child is enrolled or, if the child is not enrolled in an elementary or secondary school, the public school district in which the child primarily resides.

2. In this Standard Possession Order, "child" includes each child, whether one or more, who is a subject of this suit while that child is under the age of eighteen years and not otherwise emancipated.

(b) Mutual Agreement or Specified Terms for Possession

IT IS ORDERED that the conservators shall have possession of the child at times mutually agreed to in advance by the parties, and, in the absence of mutual agreement, it is ORDERED that the conservators shall have possession of the child under the specified terms set out in this Standard Possession Order.

(c) When Parents Reside 100 Miles or Less Apart

Except as otherwise expressly provided in this Standard Possession Order, when FATHER resides 100 miles or less from the primary residence of the child, FATHER shall have the right to possession of the child as follows:

1. Weekends—

On weekends that occur during the regular school term, beginning at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month and ending at the time the child's school resumes after the weekend.

On weekends that do not occur during the regular school term, beginning at 6:00 P.M. on the first, third, and fifth Friday of each month and ending at 6:00 P.M. on the following Sunday.

2. Weekend Possession Extended by a Holiday—

Except as otherwise expressly provided in this Standard Possession Order, if a weekend period of possession by FATHER begins on a student holiday or a teacher in-service day that falls on a Friday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Friday during the summer months when school is not in session, that weekend period of possession shall begin at the time the child's school is regularly dismissed on the Thursday immediately preceding the student holiday or teacher in-service day and 6:00 P.M. on the Thursday immediately preceding the federal, state, or local holiday during the summer months.

Except as otherwise expressly provided in this Standard Possession Order, if a weekend period of possession by FATHER ends on or is immediately followed by a student holiday or a teacher in-service day that falls on a Monday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Monday during the summer months when school is not in session, that weekend period of possession shall end at 6:00 p.m. on that Monday.

3. Thursdays—On Thursday of each week during the regular school term, beginning at the time the child's school is regularly dismissed and ending at the time the child's school resumes on Friday.

4. Spring Vacation in Even-Numbered Years—In even-numbered years, beginning at the time the child's school is dismissed for the school's spring vacation and ending at 6:00 P.M. on the day before school resumes after that vacation.

5. Extended Summer Possession by FATHER—

With Written Notice by April 1—If FATHER gives MOTHER written notice by April 1 of a year specifying an extended period or periods of summer possession for that year, FATHER shall have possession of the child for thirty days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 P.M. on each applicable day.

Without Written Notice by April 1—If FATHER does not give MOTHER written notice by April 1 of a year specifying an extended period or periods of summer possession for that year,

FATHER shall have possession of the child for thirty consecutive days in that year beginning at 6:00 P.M. on July 1 and ending at 6:00 P.M. on July 31.

Notwithstanding the Thursday periods of possession during the regular school term and the weekend periods of possession ORDERED for FATHER, it is expressly ORDERED that MOTHER shall have a superior right of possession of the child as follows:

1. Spring Vacation in Odd-Numbered Years—In odd-numbered years, beginning at the time the child's school is dismissed for the school's spring vacation and ending at 6:00 P.M. on the day before school resumes after that vacation.

2. Summer Weekend Possession by MOTHER—If MOTHER gives FATHER written notice by April 15 of a year, MOTHER shall have possession of the child on any one weekend beginning at 6:00 P.M. on Friday and ending at 6:00 P.M. on the following Sunday during any one period of the extended summer possession by FATHER in that year, provided that MOTHER picks up the child from FATHER and returns the child to that same place and that the weekend so designated does not interfere with Father's Day possession.

3. Extended Summer Possession by MOTHER—If MOTHER gives FATHER written notice by April 15 of a year or gives FATHER fourteen days' written notice on or after April 16 of a year, MOTHER may designate one weekend beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation, during which an otherwise scheduled weekend period of possession by FATHER shall not take place in that year, provided that the weekend so designated does not interfere with FATHER's period or periods of extended summer possession or with Father's Day possession.

(d) When Parents Reside More Than 100 Miles Apart

Except as otherwise expressly provided in this Standard Possession Order, when FATHER resides more than 100 miles from the residence of the child, FATHER shall have the right to possession of the child as follows:

1. Weekends—Unless FATHER elects the alternative period of weekend possession described in the next paragraph, FATHER shall have the right to possession of the child on weekends that occur during the regular school term, beginning at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month and ending at the time the child's school resumes after the weekend, and on weekends that do not occur during the regular school term, beginning at 6:00 P.M. on the first, third, and fifth Friday of each month and ending at 6:00 P.M. on the following Sunday.

Alternate Weekend Possession—In lieu of the weekend possession described in the foregoing paragraph, FATHER shall have the right to possession of the child not more than one weekend per month of FATHER's choice beginning at 6:00 P.M. on the day school recesses for the weekend and ending at 6:00 P.M. on the day before school resumes after the weekend. FATHER may elect an option for this alternative period of weekend possession by giving written

notice to MOTHER within ninety days after the parties begin to reside more than 100 miles apart. If FATHER makes this election, FATHER shall give MOTHER fourteen days' written or telephonic notice preceding a designated weekend. The weekends chosen shall not conflict with the provisions regarding Christmas, Thanksgiving, the child's birthday, and Mother's Day possession below.

2. Weekend Possession Extended by a Holiday—

Except as otherwise expressly provided in this Standard Possession Order, if a weekend period of possession by FATHER begins on a student holiday or a teacher in-service day that falls on a Friday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Friday during the summer months when school is not in session, that weekend period of possession shall begin at [6:00 p.m. on the immediately preceding Thursday/the time the child's school is regularly dismissed on the Thursday immediately preceding the student holiday or teacher in-service day during the regular school term and at 6:00 p.m. on the Thursday immediately preceding the federal, state, or local holiday when school is not in session].

Except as otherwise expressly provided in this Standard Possession Order, if a weekend period of possession by FATHER ends on or is immediately followed by a student holiday or a teacher in-service day that falls on a Monday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Monday during the summer months when school is not in session, that weekend period of possession shall end at 6:00 p.m. on that Monday.

3. Spring Vacation in All Years—Every year, beginning at 6:00 p.m. on the day the child is dismissed from school for the school's spring vacation and ending at 6:00 P.M. on the day before school resumes after that vacation.

4. Extended Summer Possession by FATHER—

With Written Notice by April 1—If FATHER gives MOTHER written notice by April 1 of a year specifying an extended period or periods of summer possession for that year, FATHER shall have possession of the child for forty-two days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 P.M. on each applicable day.

Without Written Notice by April 1—If FATHER does not give MOTHER written notice by April 1 of a year specifying an extended period or periods of summer possession for that year, FATHER shall have possession of the child for forty-two consecutive days beginning at 6:00 P.M. on June 15 and ending at 6:00 P.M. on July 27 of that year.

Notwithstanding the weekend periods of possession ORDERED for FATHER, it is expressly ORDERED that MOTHER shall have a superior right of possession of the child as follows:

1. Summer Weekend Possession by MOTHER—If MOTHER gives FATHER written notice by April 15 of a year, MOTHER shall have possession of the child on any one weekend beginning at 6:00 P.M. on Friday and ending at 6:00 P.M. on the following Sunday during any one period of possession by FATHER during FATHER's extended summer possession in that year, provided that if a period of possession by FATHER in that year exceeds thirty days, MOTHER may have possession of the child under the terms of this provision on any two nonconsecutive weekends during that period and provided that MOTHER picks up the child from FATHER and returns the child to that same place and that no weekend so designated interferes with Father's Day possession.

2. Extended Summer Possession by MOTHER—If MOTHER gives FATHER written notice by April 15 of a year, MOTHER may designate twenty-one days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, during which FATHER shall not have possession of the child, provided that the period or periods so designated do not interfere with FATHER's period or periods of extended summer possession or with Father's Day possession. These periods of possession shall begin and end at 6:00 P.M. on each applicable day.

(e) Holidays Unaffected by Distance

Notwithstanding the weekend and Thursday periods of possession of FATHER, MOTHER and FATHER shall have the right to possession of the child as follows:

1. Christmas Holidays in Even-Numbered Years—In even-numbered years, FATHER shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and MOTHER shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 P.M. on the day before school resumes after that Christmas school vacation.

2. Christmas Holidays in Odd-Numbered Years—In odd-numbered years, MOTHER shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and FATHER shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 P.M. on the day before school resumes after that Christmas school vacation.

3. Thanksgiving in Odd-Numbered Years—In odd-numbered years, FATHER shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 P.M. on the Sunday following Thanksgiving.

4. Thanksgiving in Even-Numbered Years—In even-numbered years, MOTHER shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 P.M. on the Sunday following Thanksgiving.

5. Child's Birthday—If a conservator is not otherwise entitled under this Standard Possession Order to present possession of a child on the child's birthday, that conservator shall have possession of the child and the child's minor siblings beginning at 6:00 P.M. and ending at 8:00 P.M. on that day, provided that that conservator picks up the children from the other conservator's residence and returns the children to that same place.

6. Father's Day—Father shall have the right to possession of the child each year, beginning at 6:00 P.M. on the Friday preceding Father's Day and ending at 8:00 a.m. on the Monday after Father's Day, provided that if Father is not otherwise entitled under this Standard Possession Order to present possession of the child, he shall pick up the child from the other conservator's residence and return the child to that same place.

7. Mother's Day—Mother shall have the right to possession of the child each year, beginning at the time the child's school is regularly dismissed on the Friday preceding Mother's Day and ending at the time the child's school resumes after Mother's Day, provided that if Mother is not otherwise entitled under this Standard Possession Order to present possession of the child, she shall pick up the child from the other conservator's residence and return the child to that same place.

(f) Undesignated Periods of Possession

MOTHER shall have the right of possession of the child at all other times not specifically designated in this Standard Possession Order for FATHER.

(g) General Terms and Conditions

Except as otherwise expressly provided in this Standard Possession Order, the terms and conditions of possession of the child that apply regardless of the distance between the residence of a parent and the child are as follows:

1. Surrender of Child by MOTHER—MOTHER is ORDERED to surrender the child to FATHER at the beginning of each period of FATHER's possession at the residence of MOTHER.

If a period of possession by FATHER begins at the time the child's school is regularly dismissed, MOTHER is ORDERED to surrender the child to FATHER at the beginning of each such period of possession at the school in which the child is enrolled. If the child is not in school, FATHER shall pick up the child at the residence of MOTHER at 6:00 p.m., and MOTHER is ORDERED to surrender the child to FATHER at the residence of MOTHER at 6:00 p.m. under these circumstances.

2. Surrender of Child by FATHER—FATHER is ORDERED to surrender the child to MOTHER at the residence of FATHER at the end of each period of possession.

If a period of possession by FATHER ends at the time the child's school resumes, FATHER is ORDERED to surrender the child to MOTHER at the end of each such period of possession at the school in which the child is enrolled or, if the child is not in school, at the

residence of MOTHER at 8:00 a.m..

3. Surrender of Child by FATHER—FATHER is ORDERED to surrender the child to MOTHER, if the child is in FATHER's possession or subject to FATHER's control, at the beginning of each period of MOTHER's exclusive periods of possession, at the place designated in this Standard Possession Order.

4. Return of Child by MOTHER—MOTHER is ORDERED to return the child to FATHER, if FATHER is entitled to possession of the child, at the end of each of MOTHER's exclusive periods of possession, at the place designated in this Standard Possession Order.

5. Personal Effects—Each conservator is ORDERED to return with the child the personal effects that the child brought at the beginning of the period of possession.

6. Designation of Competent Adult—Each conservator may designate any competent adult to pick up and return the child, as applicable. IT IS ORDERED that a conservator or a designated competent adult be present when the child is picked up or returned.

7. Inability to Exercise Possession—Each conservator is ORDERED to give notice to the person in possession of the child on each occasion that the conservator will be unable to exercise that conservator's right of possession for any specified period.

8. Written Notice—Written notice, including notice provided by electronic mail or facsimile, shall be deemed to have been timely made if received or, if applicable, postmarked before or at the time that notice is due. Each conservator is ORDERED to notify the other conservator of any change in the conservator's electronic mail address or facsimile number within twenty-four hours after the change.

9. Notice to School and MOTHER—If FATHER's time of possession of the child ends at the time school resumes and for any reason the child is not or will not be returned to school, FATHER shall immediately notify the school and MOTHER that the child will not be or has not been returned to school.

This concludes the Standard Possession Order.

The periods of possession ordered above apply to each child the subject of this suit while that child is under the age of eighteen years and not otherwise emancipated.

Termination of Orders on Marriage

The provisions of this order relating to conservatorship, possession, or access terminate on the marriage of FATHER to MOTHER unless a nonparent or agency has been appointed conservator of the children under chapter 153 of the Texas Family Code.

Passport Application

If MOTHER applies for a passport for the children, she is ORDERED to notify the other

conservator of that fact no later than ten days after the application.

IT IS ORDERED that if a parent's consent is required for the issuance of a passport, that parent shall provide that consent in writing no later than ten days after receipt of the consent documents, unless the parent has good cause for withholding that consent.

International Travel

Each party is ORDERED to provide the other party appropriate written authorization, within ten days after written request is received, as is necessary to allow the children to travel with the other party beyond the territorial limits of the United States. The parties are ORDERED to exchange passports as is necessary to allow such travel. IT IS ORDERED that this order shall serve as written authorization for such travel.

IT IS THEREFORE ORDERED that MOTHER shall have the right to maintain possession of any passports of the children, subject to the requirements for delivery of the passports and all other requirements set forth below.

MOTHER is ORDERED to deliver or cause to be delivered to FATHER the original, valid passports of the children, within ten days of MOTHER's receipt of FATHER's notice of intent to have the children travel outside the United States during a period of possession of FATHER. FATHER is ORDERED to return or cause to be returned to Movant the original, valid passports of the children, within ten days of the children's return from the travel outside the United States for which the passports were required.

IT IS ORDERED that if a conservator intends to have the children travel outside the United States during the conservator's period of possession of the children, the conservator shall provide written notice to the other conservator. IT IS ORDERED that this written notice shall include all the following:

1. any written consent form for travel outside the United States that is required by the country of destination, countries through which travel will occur, or the intended carriers;

2. the date, time, and location of the children's departure from the United States;

3. a reasonable description of means of transportation, including, if applicable, all names of carriers, flight numbers, and scheduled departure and arrival times;

4. a reasonable description of each destination of the intended travel, including the name, address, and phone number of each interim destination and the final travel location;

5. the dates the children are scheduled to arrive and depart at each such destination;

6. the date, time, and location of the children's return to the United States;

7. a complete statement of each portion of the intended travel during which the conservator providing the written notice will not accompany the children; and

8. the name, permanent and mailing addresses, and work and home telephone numbers of each person accompanying the children on the intended travel other than the conservator providing the written notice.

If the intended travel is a group trip, such as with a school or other organization, the conservator providing the written notice is ORDERED to provide with the written notice all information about the group trip and its sponsor instead of stating the name, permanent and mailing addresses, and work and home telephone numbers of each person accompanying the children.

IT IS FURTHER ORDERED that this written notice shall be furnished to the other conservator no less than twenty-one days before the intended day of departure of the children from the United States.

MOTHER and FATHER each are ORDERED to properly execute the written consent form to travel abroad and any other form required for the travel by the United States Department of State, passport authorities, foreign nations, travel organizers, school officials, or public carriers; when applicable, to have the forms duly notarized; and, within ten days of that conservator's receipt of each consent form, to deliver the form to the conservator providing the written notice.

IT IS ORDERED that any conservator who violates the terms and conditions of these provisions regarding the children's passports shall be liable for all costs incurred due to that person's noncompliance with these provisions. These costs shall include, but not be limited to, the expense of nonrefundable or noncreditable tickets, the costs of nonrefundable deposits for travel or lodging, attorney's fees, and all other costs incurred seeking enforcement of any of these provisions.

Child Support

IT IS ORDERED that FATHER is obligated to pay and shall pay to MOTHER child support of two thousand one hundred thirty seven dollars and fifty cents ($2,137.50) per month, with the first payment being due and payable on June 1, 2018 and a like payment being due and payable on the first day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified below:

1. any child reaches the age of eighteen years or graduates from high school, whichever occurs later, subject to the provisions for support beyond the age of eighteen years set out below;

2. any child marries;

3. any child dies;

4. any child enlists in the armed forces of the United States and begins active service as defined by section 101 of title 10 of the United States Code; or

5. any child's disabilities are otherwise removed for general purposes.

Thereafter, FATHER is ORDERED to pay to MOTHER child support of one thousand seven hundred ten dollars ($1,710.00) per month, due and payable on the first day of the first month immediately following the date of the earliest occurrence of one of the events specified above for the other child and a like sum of one thousand seven hundred ten dollars ($1,710.00) due and payable on the first day of each month thereafter until the next occurrence of one of the events specified above for the other child.

If a child is eighteen years of age and has not graduated from high school, IT IS ORDERED that FATHER's obligation to pay child support to MOTHER shall not terminate but shall continue for as long as the child is enrolled—

1. under chapter 25 of the Texas Education Code in an accredited secondary school in a program leading toward a high school diploma or under section 130.008 of the Education Code in courses for joint high school and junior college credit and is complying with the minimum attendance requirements of subchapter C of chapter 25 of the Education Code or

2. on a full-time basis in a private secondary school in a program leading toward a high school diploma and is complying with the minimum attendance requirements imposed by that school.

Withholding from Earnings

IT IS ORDERED that any employer of FATHER shall be ordered to withhold the child support payments ordered in this order from the disposable earnings of FATHER for the support of CHILD ONE and CHILD TWO.

Withholding as Credit against Support Obligation

IT IS FURTHER ORDERED that all amounts withheld from the disposable earnings of FATHER by the employer and paid in accordance with the order to that employer shall constitute a credit against the child support obligation. Payment of the full amount of child support ordered paid by this order through the means of withholding from earnings shall discharge the child support obligation. If the amount withheld from earnings and credited against the child support obligation is less than 100 percent of the amount ordered to be paid by this order, the balance due remains an obligation of FATHER, and it is hereby ORDERED that FATHER pay the balance due directly to the state disbursement unit as specified below.

Order to Employer

On this date the Court signed an Income Withholding for Support.

Payment

IT IS ORDERED that all payments shall be made through the state disbursement unit at Texas Child Support Disbursement Unit, P.O. Box 659791, San Antonio, Texas 78265-9791, and thereafter promptly remitted to MOTHER for the support of the children.

IT IS ORDERED that each party shall pay, when due, all fees charged to that party by the state disbursement unit and any other agency statutorily authorized to charge a fee.

Change of Employment

IT IS FURTHER ORDERED that FATHER shall notify this Court and MOTHER by U.S. certified mail, return receipt requested, of any change of address and of any termination of employment. This notice shall be given no later than seven days after the change of address or the termination of employment. This notice or a subsequent notice shall also provide the current address of FATHER and the name and address of his current employer, whenever that information becomes available.

Clerk's Duties

IT IS ORDERED that, on the request of a prosecuting attorney, the title IV-D agency, the friend of the Court, a domestic relations office, MOTHER, FATHER, or an attorney representing MOTHER or FATHER, the clerk of this Court shall cause a certified copy of the Income Withholding for Support to be delivered to any employer.

Health Care

IT IS ORDERED that FATHER and MOTHER shall each provide medical support for [the/each] child as set out in this order as additional child support for as long as the Court may order FATHER and MOTHER to provide support for the child under sections 154.001 and 154.002 of the Texas Family Code. Beginning on the day FATHER and MOTHER's actual or potential obligation to support a child under sections 154.001 and 154.002 of the Family Code terminates, IT IS ORDERED that FATHER and MOTHER are discharged from the obligations set forth in this medical support order with respect to that child, except for any failure by a parent to fully comply with those obligations before that date.

1. Definitions—

"Health insurance" means insurance coverage that provides basic health-care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services, that may be provided through a health maintenance organization or other private or public organization, other than medical assistance under chapter 32 of the Texas Human Resources Code.

"Reasonable cost" means the cost of health insurance coverage for a child that does not exceed 9 percent of FATHER's annual resources, as described by section 154.062(b) of the Texas Family Code.

"Reasonable and necessary health-care expenses not paid by insurance and incurred by or on behalf of a child" include, without limitation, any copayments for office visits or prescription drugs, the yearly deductible, if any, and medical, surgical, prescription drug, mental health-care services, dental, eye care, ophthalmological, and orthodontic charges. These reasonable and necessary health-care expenses do not include expenses for travel to and from the health-care provider or for nonprescription medication.

"Furnish" means—

a. to hand deliver the document by a person eighteen years of age or older either to the recipient or to a person who is eighteen years of age or older and permanently resides with the recipient;

b. to deliver the document to the recipient by certified mail, return receipt requested, to the recipient's last known mailing or residence address; or

c. to deliver the document to the recipient at the recipient's last known mailing or residence address using any person or entity whose principal business is that of a courier or deliverer of papers or documents either within or outside the United States; or

d. to deliver the document to the recipient at the recipient's electronic mail address as follows:

FATHER: [**obligor's e-mail address**]

MOTHER: [**obligee's e-mail address**]

and in the event of any change in either party's electronic mail address, that party is ORDERED to notify the other party of such change in writing within twenty-four hours after the change; or

e. to provide the document to the recipient by posting the document on the Our Family Wizard Internet Web site program, in accordance with the provisions set forth below in this order.

2. Findings on Health Insurance Availability—Having considered the cost, accessibility, and quality of health insurance coverage available to the parties, the Court finds:

Health insurance is available or is in effect for the children through FATHER's employment or membership in a union, trade association, or other organization at a reasonable cost of $100.00

IT IS FURTHER FOUND that the following orders regarding health-care coverage are in the best interest of the children.

3. Provision of Health-Care Coverage—

As additional child support, FATHER is ORDERED to continue to maintain health insurance for each child who is the subject of this suit that covers basic health-care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services.

FATHER is ORDERED to maintain such health insurance in full force and effect on each child who is the subject of this suit as long as child support is payable for that child. FATHER is ORDERED to convert any group insurance to individual coverage or obtain other health insurance for each child within fifteen days of termination of [his/her] employment or other disqualification from the group insurance. FATHER is ORDERED to exercise any conversion options or acquisition of new health insurance in such a manner that the resulting insurance equals or exceeds that in effect immediately before the change.

FATHER is ORDERED to furnish MOTHER a true and correct copy of the health insurance policy or certification and a schedule of benefits within ten days of the signing of this order. FATHER is ORDERED to furnish MOTHER the insurance cards and any other forms necessary for use of the insurance within ten days of the signing of this order. FATHER is ORDERED to provide, within three days of receipt by him, to MOTHER any insurance checks, other payments, or explanations of benefits relating to any medical expenses for the children that MOTHER paid or incurred.

Pursuant to section 1504.051 of the Texas Insurance Code, IT IS ORDERED that if FATHER is eligible for dependent health coverage but fails to apply to obtain coverage for the children, the insurer shall enroll the children on application of MOTHER or others as authorized by law.

Pursuant to section 154.183(c) of the Texas Family Code, the reasonable and necessary health-care expenses of the children that are not reimbursed by health insurance are allocated as follows: MOTHER is ORDERED to pay 50 percent and FATHER is ORDERED to pay 50 percent of the unreimbursed health-care expenses if, at the time the expenses are incurred, FATHER is providing health insurance as ordered.

The party who incurs a health-care expense on behalf of a child is ORDERED to furnish to the other party forms, receipts, bills, statements, and explanations of benefits reflecting the uninsured portion of the health-care expenses within thirty days after the incurring party receives them. The nonincurring party is ORDERED to pay the nonincurring party's percentage of the uninsured portion of the health-care expenses either by paying the health-care provider directly or by reimbursing the incurring party for any advance payment exceeding the incurring party's percentage of the uninsured portion of the health-care expenses within thirty days after the nonincurring party receives the forms, receipts, bills, statements, and/or explanations of benefits. However, if the incurring party fails to submit to the other party forms, receipts, bills, statements, and explanations of benefits reflecting the uninsured portion of the health-care expenses within thirty days after the incurring party receives them, IT IS ORDERED that the nonincurring party shall pay the nonincurring party's percentage of the uninsured portion of the health-care expenses either by paying the health-care provider directly or by reimbursing the incurring party

for any advance payment exceeding the incurring party's percentage of the uninsured portion of the health-care expenses within 120 days after the nonincurring party receives the forms, receipts, bills, statements, and/or explanations of benefits.

These provisions apply to all unreimbursed health-care expenses of any child who is the subject of this suit that are incurred while child support is payable for that child.

4. Secondary Coverage—IT IS ORDERED that if a party provides secondary health insurance coverage for the children, both parties shall cooperate fully with regard to the handling and filing of claims with the insurance carrier providing the coverage in order to maximize the benefits available to the children and to ensure that the party who pays for health-care expenses for the children is reimbursed for the payment from both carriers to the fullest extent possible.

5. Compliance with Insurance Company Requirements—Each party is ORDERED to conform to all requirements imposed by the terms and conditions of any policy of health insurance covering the children in order to assure the maximum reimbursement or direct payment by any insurance company of the incurred health-care expense, including but not limited to requirements for advance notice to any carrier, second opinions, and the like. Each party is ORDERED to use "preferred providers," or services within the health maintenance organization or preferred provider network, if applicable. Disallowance of the bill by a health insurance company shall not excuse the obligation of either party to make payment. Excepting emergency health-care expenses incurred on behalf of the children, if a party incurs health-care expenses for the children using "out-of-network" health-care providers or services, or fails to follow the health insurance company procedures or requirements, that party shall pay all such health-care expenses incurred absent (1) written agreement of the parties allocating such health-care expenses or (2) further order of the Court.

IT IS FURTHER ORDERED that no surgical procedure, other than in an emergency or one covered by insurance, shall be performed on the child unless the parent consenting to surgery has first consulted with at least two medical doctors, both of whom state an opinion that the surgery is medically necessary. IT IS FURTHER ORDERED that a parent who fails to obtain the required medical opinions before consent to surgery on the child shall be wholly responsible for all medical and hospital expenses incurred in connection therewith and not covered by insurance.

6. Claims—Except as provided in this paragraph, the party who is not carrying the health insurance policy covering the children is ORDERED to furnish to the party carrying the policy, within fifteen days of receiving them, all forms, receipts, bills, and statements reflecting the health-care expenses the party not carrying the policy incurs on behalf of the children. In accordance with sections 1204.251 and 1504.055(a) of the Texas Insurance Code, IT IS ORDERED that the party who is not carrying the health insurance policy covering the children, at that party's option, or others as authorized by law, may file any claims for health-care expenses directly with the insurance carrier with and from whom coverage is provided for the benefit of the children and receive payments directly from the insurance company. Further, for the sole purpose of section 1204.251 of the Texas Insurance Code, MOTHER is designated the managing conservator or FATHER of the children.

The party who is carrying the health insurance policy covering the children is ORDERED to submit all forms required by the insurance company for payment or reimbursement of health-care expenses incurred by either party on behalf of [the/a] child to the insurance carrier within fifteen days of that party's receiving any form, receipt, bill, or statement reflecting the expenses.

7. Constructive Trust for Payments Received—IT IS ORDERED that any insurance payments received by a party from the health insurance carrier as reimbursement for health-care expenses incurred by or on behalf of a child shall belong to the party who paid those expenses. IT IS FURTHER ORDERED that the party receiving the insurance payments is designated a constructive trustee to receive any insurance checks or payments for health-care expenses paid by the other party, and the party carrying the policy shall endorse and forward the checks or payments, along with any explanation of benefits received, to the other party within three days of receiving them.

8. WARNING—A PARENT ORDERED TO PROVIDE HEALTH INSURANCE OR TO PAY THE OTHER PARENT ADDITIONAL CHILD SUPPORT FOR THE COST OF HEALTH INSURANCE WHO FAILS TO DO SO IS LIABLE FOR NECESSARY MEDICAL EXPENSES OF THE CHILDREN, WITHOUT REGARD TO WHETHER THE EXPENSES WOULD HAVE BEEN PAID IF HEALTH INSURANCE HAD BEEN PROVIDED, AND FOR THE COST OF HEALTH INSURANCE PREMIUMS OR CONTRIBUTIONS, IF ANY, PAID ON BEHALF OF THE CHILDREN.

No Credit for Informal Payments

IT IS ORDERED that the child support as prescribed in this order shall be exclusively discharged in the manner ordered and that any direct payments made by FATHER to MOTHER or any expenditures incurred by FATHER during FATHER's periods of possession of or access to the children, as prescribed in this order, for food, clothing, gifts, travel, shelter, or entertainment are deemed in addition to and not in lieu of the support ordered in this order.

Support as Obligation of Estate

IT IS ORDERED that the provisions for child support in this order shall be an obligation of the estate of FATHER and shall not terminate on the death of FATHER. Payments received for the benefit of the children, including payments from the Social Security Administration, Department of Veterans Affairs, or other governmental agency or life insurance proceeds, annuity payments, trust distributions, or retirement survivor benefits, shall be a credit against this obligation. Any remaining balance of the child support is an obligation of FATHER's estate.

Termination of Orders on Marriage of Parties but Not on Death of Obligee

The provisions of this order relating to current child support terminate on the marriage of FATHER to MOTHER unless a nonparent or agency has been appointed conservator of the children under chapter 153 of the Texas Family Code. An obligation to pay child support under this order does not terminate on the death of MOTHER but continues as an obligation to CHILD ONE and CHILD TWO.

Medical Notification

Each party is ORDERED to inform the other party within four hours of any medical condition of the children requiring surgical intervention, hospitalization, or both.

Within tendays after the Court signs this order, each party is ORDERED to execute—

1. all necessary releases pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and 45 C.F.R. section 164.508 to permit the other conservator to obtain health-care information regarding the children; and

2. for all health-care providers of the children, an authorization for disclosure of protected health information to the other conservator pursuant to the HIPAA and 45 C.F.R. section 164.508.

Each party is further ORDERED to designate each other conservator as a person to whom protected health information regarding the children may be disclosed whenever the party executes an authorization for disclosure of protected health information pursuant to the HIPAA and 45 C.F.R. section 164.508.

Parent Education and Family Stabilization Course

IT IS ORDERED that MOTHER and FATHER shall each individually register to attend a parent education and family stabilization course with on or before December 31, 2018.

On completion of the course, MOTHER and FATHER shall each obtain a certificate of completion. The certificate must state the name of the participant; the name of the course provider; the date the course was completed; and whether the course was provided by personal instruction, videotape instruction, instruction through an electronic means, or a combination of those methods.

Within ten days after completion of that parent education and family stabilization course, MOTHER and FATHER are each ORDERED to file a certification of completion or other comparable proof of completion of the course with the clerk of this Court and to mail a copy to the other party.

IT IS ORDERED that each party shall pay for the costs of that party's own attendance at the course.

Coparenting Web Site Program

IT IS ORDERED that MOTHER and FATHER each shall, within ten days after this order is signed by the Court, obtain at his or her sole expense a subscription to the Our Family Wizard program. IT IS FURTHER ORDERED that MOTHER and FATHER each shall maintain that subscription in full force and effect for as long as any child is under the age of eighteen years and not otherwise emancipated.

IT IS ORDERED that MOTHER and FATHER shall each communicate through the Our Family Wizard program with regard to all communication regarding the children, except in the case of an emergency or other urgent matter.

IT IS ORDERED that MOTHER and FATHER each shall timely post all significant information concerning the health, education, and welfare of the children, including but not limited to the children's medical appointments, the children's schedule and activities, and requests for reimbursement of uninsured health-care expenses, on the Our Family Wizard Internet Web site. However, IT IS ORDERED that neither party shall have any obligation to post on that Web site any information to which the other party already has access through other means, such as information available on the Web site of the children's school.

IT IS FURTHER ORDERED that MOTHER and FATHER shall each timely post on the Our Family Wizard Internet Web site a copy of any e-mail received by the party from the children's school or any health-care provider of the children, in the event that e-mail was not also forwarded by the school or health-care provider to the other party.

For purposes of this section of this order, "timely" means on learning of the event or activity, or if not immediately feasible under the circumstances, not later than twenty-four hours after learning of the event or activity.

By agreement, the parties may communicate in any manner other than using the Our Family Wizard program, but other methods of communication used by the parties shall be in addition to, and not in lieu of, using the Our Family Wizard program.

Required Information

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name: MOTHER

Social Security number:

Driver's license number and issuing state:

Current residence address:

Mailing address:

Home telephone number:

Name of employer:

Address of employment:

Work telephone number:

Name: FATHER

Social Security number:

Driver's license number and issuing state:

Current residence address:

Mailing address:

Home telephone number:

Name of employer:

Address of employment:

Work telephone number:

Required Notices

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the clerk at [**address**]. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Contract Services Section, MC046S, P.O.

Box 12017, Austin, Texas 78711-2017.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

THE COURT MAY MODIFY THIS ORDER THAT PROVIDES FOR THE SUPPORT OF A CHILD, IF:

(1) THE CIRCUMSTANCES OF THE CHILD OR A PERSON AFFECTED BY THE ORDER HAVE MATERIALLY AND SUBSTANTIALLY CHANGED; OR

(2) IT HAS BEEN THREE YEARS SINCE THE ORDER WAS RENDERED OR LAST MODIFIED AND THE MONTHLY AMOUNT OF THE CHILD SUPPORT AWARD UNDER THE ORDER DIFFERS BY EITHER 20 PERCENT OR $100 FROM THE AMOUNT THAT WOULD BE AWARDED IN ACCORDANCE WITH THE CHILD SUPPORT GUIDELINES.

Warnings

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

Costs

IT IS ORDERED AND DECREED that costs of court are to be borne by the party who incurred them.

Discharge from Discovery Retention Requirement

IT IS ORDERED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with rule 191.4(d) of the Texas Rules of Civil Procedure.

Relief Not Granted

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

Date of Order

This order judicially PRONOUNCED AND RENDERED in court at [**city, county**] County, Texas, on May 14, 2018 and further noted on the court's docket sheet on the same date, but signed on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

MYRES & ASSOCIATES, PLLC

_____
Becca Weitz
State Bar No. 24087494
One Greenway Plaza, Suite 450
Houston, Texas 77046
bweitz@myresfamilylaw.com
E-Service:service@myresfamilylaw.com
Tel: 713-622-1600
Fax: 713-622-1610
Attorney for Petitioner

_____
Attorney
State Bar No.
Address
Houston, Texas 77046
E-Service:
Tel:
Fax:

Attorney for Respondent

APPROVED AND CONSENTED TO AS TO BOTH FORM AND SUBSTANCE:

_____

Petitioner

_____

Respondent

International Academy of Family Lawyers

SESSION 5

International Relocation of Children: A comparative overview of child relocation cases

INTERNATIONAL RELOCATION OF CHILDREN – TEXAS AND U.S.A.

A. RELOCATING FROM TEXAS

- In Texas, public policy weighs against relocation:
    - The Texas Family Code mandates that the "best interest of the child shall always be the primary consideration of the court in determining issues related to conservatorship and possession of and access to the child." TEX. FAM. CODE §153.002.
    - Texas law assumes that it is in the child's best interest to live near both parents.
    - It is the public policy of the State of Texas that "children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child" and to "encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage." TEX. FAM. CODE §153.001.
    - Under Texas law, there is no definition of "best interest," but the Texas Family Code and courts have provided a nonexhaustive list of factors and examples that courts should consider. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976); TEX. FAM. CODE §153.134.
    - There is a rebuttable legal presumption that the parents will be appointed Joint Managing Conservators and that all decisions regarding the child's education and care must be made jointly. TEX. FAM. CODE §153.134.
    - Consistent with the state's public policy and Joint Managing Conservatorship, Texas law favors the imposition of a "geographical restriction" on the child's residence, which can make it difficult for one parent to relocate from Texas to another country, another state, or even to a neighboring county within Texas.
- Texas law regarding visitation weighs against international relocations:
    - Under the Texas Family Code, there is a rebuttable legal presumption that the non-primary parent will have a "Standard Possession Order," which provides a very precise visitation schedule. This visitation schedule is the "default" and can be an obstacle to international relocation. There is a Standard Possession Order for parents who live less than 100 miles apart and a Standard Possession Order for parents who live over 100 miles apart.

Even the Standard Possession Order for parents who live over 100 miles apart assumes that parents will live relatively near to each other; the schedule allows the nonprimary parent to have visitation on the 1st, 3rd and 5th weekends of each month and, if this is a hardship, the visiting parent can elect to visit one weekend each month.

- However, if the court finds that relocation is in the best interest of the child and that a Standard Possession Order is "unworkable or inappropriate" due to the "special circumstances" of the family, the court can deviate from the Standard Possession Order. TEX. FAM. CODE §153.253.

- In deciding whether to allow a child to relocate, there is not a precise legal test or an exhaustive list of factors, but courts should consider the following factors deemed to be relevant to the best interest of children in relocation cases:
  - the ability of the parents to give first priority to the welfare of the child and reach shared decisions with the other parent for the child's best interest;
  - whether a parent can encourage and accept a positive relationship between the child and the other parent;
  - whether both parents participate in the rearing of the child;
  - the geographical proximity of the parents' residences;
  - a conservator's improved financial or job situation and ability to provide a better standard of living;
  - the motive for the move or for opposing the move;
  - the presence of the child's friends;
  - the positive impact on the primary conservator's emotional and mental state and its effect on the child;
  - the nonprimary conservator's ability to relocate to maintain the parental relationship.

  Lenz v. Lenz, 79 S.W.3d 10, 15-16 (Tex. 2002).

B. RELOCATING FROM OTHER STATES IN THE UNITED STATES

- In all states in the United States, the best interest of the child is central to decisions regarding child custody and visitation.

- Alabama:

  - Under the recent Alabama Parent-Child Relationship Protection Act, there is an explicit, codified presumption that relocation of more than 60 miles is not in the best interest of the child.

WENDY BROOKS CREW, INTERNATIONAL RELOCATION OF CHILDREN: A GLOBAL GUIDE FROM PRACTICAL LAW 299 (Thomson Reuters, 1st ed. 2016); Alabama Parent-Child Protection Act, Section 169.4 (2016).

- Florida:

    - There is no presumption in favor or against a request to relocate.

    - Courts must evaluate the following factors: (1) the nature, quality, extent of involvement, and duration of the child's relationship with the relocating parent, the non-relocating parent, siblings, and other significant persons in the child's life; (2) the age and developmental stage of the child, the needs of the child and the likely impact the relocation will have on the child; (3) the feasibility of preserving the relationship between the non-relocating parent; (4) financial circumstances of the parties; (5) likelihood of compliance by the relocating parent once he or she is out of the jurisdiction; (6) whether the relocation will improve the quality of life of the child and the parent, including educational, financial or emotional benefits; (7) the reason each parent is seeking or opposing relocation; (8) the current employment and economic circumstances of each parent; (9) the extent to which the non-relocating parent has fulfilled his or her obligations to the relocating parent, including child support, spousal support, and marital property obligations; (10) career opportunities; (11) a history of substance abuse or domestic violence; the child's preference, considering the age and maturity of the child; (12) any other factor affecting the best interest of the child.

  JORGE M. CESTERO AND THOMAS SASSER, INTERNATIONAL RELOCATION OF CHILDREN: A GLOBAL GUIDE FROM PRACTICAL LAW 306 (Thomson Reuters, 1st ed. 2016).

- Pennsylvania:

    - Under the Pennsylvania Relocation Act, courts decide whether to allow a child to relocate based on factors nearly identical to those outlined by Florida and Texas.

  LINDA SHAY GARDNER, INTERNATIONAL RELOCATION OF CHILDREN: A GLOBAL GUIDE FROM PRACTICAL LAW 331-32 (Thomson Reuters, 1st ed. 2016).

C. RELOCATING TO THE UNITED STATES

- All states, except for Massachusetts, have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

- Under the UCCJEA, there are specific procedures to register and enforce foreign custody orders.

- The UCCJEA provides that the courts of each state "shall recognize and enforce a child custody determination of a court of another state [or country] if the latter court exercise jurisdiction in substantial conformity" with the UCCJEA and does not violate fundamental principles of human rights. In "substantial conformity" usually means that the children were living in a country for at least six months when a custody order was issued by a court of that country.

- Example: An Australian husband and wife were living in Singapore with their two children. The children were born in Australia, but had been living in Singapore with their parents for the past five years. The husband and wife divorced in Singapore. In the divorce, the Singapore court allowed the wife to relocate with the children to Texas for her job and awarded the husband a visitation schedule with the kids. Upon the request of either parent, the Texas court is required to register and enforce the visitation schedule ordered by the court in Singapore. Upon registration in Texas, the Singapore order is given the same weight and treated as the equivalent of a Texas court order. If the mother fails to follow the visitation schedule, the Texas court can hold her in contempt of court.

- Except in rare cases, the UCCJEA forbids our courts from issuing any final custody orders regarding children who have been abducted to the United States. Under the UCCJEA, a court is *required* to decline jurisdiction to make any custody orders if the child is only present due to "unjustifiable conduct," such as international child abduction. In such cases, a court can only exercise temporary emergency jurisdiction, if the parent who files suit can prove that emergency orders are necessary to protect the immediate safety of the child. If there is a court in another country that has proper jurisdiction over the children, the court in the United States must set a date on which its temporary emergency order expires and it loses emergency jurisdiction.

International relocation of children from Australia

A summary of key principles

- The best interests of the child are the paramount but not the sole consideration: *A v A: Relocation Approach* (2000) FLC 93-035 *("A v A")*
- The applicant is not required to demonstrate a "compelling reason" for the relocation: *A v A*
- The court is required to evaluate each of the proposals advanced by the parties: *A v A*
- The evaluation of the issue of relocation cannot be separated from the issues of residence and best interests of the child. There is not a primary issue of with which parent a child should live and a separate issue of if the relocation should be permitted: *A v A*
- The competing proposals are to be properly identified and the court is then to weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests: *A v A*
- The court is not limited to considering the proposals of the parties. It can consider other alternatives, subject to the parties being informed and offered an opportunity to respond: *U v U* (2002) FLC 93-112 *("U v U")*
- Consideration is also to be given to the respondent's ability to relocate: *U v U*
- The applicant's right to freedom of mobility is a relevant consideration, although the child's best interest is the paramount consideration: *U v U;* and *Bolitho & Cohen* (2005) FLC 93-224
- If the applicant's position is she or he will stay in Australia if not permitted to relocate with the children, that is not determinative: *U v U*
- The court must look beyond tactical elements within the approach of either party and evaluate the proposals: *Morrall & Olmos* [2017] FamCAFC 2 [43] referring to *Payne v Payne* [2001] 2 WLR 1826
- The court is required to consider if a respondent's proposals for equal time or substantial and significant time are reasonably practicable. This includes, for example, consideration of current and future accommodation and employment opportunities for the applicant: *MRR v GR* (2010) FLC 93-424
- Enforceability of parenting orders in an international jurisdiction is an important consideration: *McCall v Clark* (2009) FLC 93-405 [11]; *Curzon & Curzon* [2017] FamCA 575 [32 to 33]
- The Australian *Family Law Act* aspires for children to benefit from meaningful relationships with both parents, not optimum relationships: *Godfrey & Sanders* (2007) FamCA 102; *Curzon & Curzon* [2017] FamCA 575

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MST LAWYERS

Amanda Humphreys
MST Lawyers, Melbourne, Australia
amanda.humphreys@mst.com.au
www.mst.com.au

More information -
How the Family Court of Australia determines relocation cases

Legislation

- The Australian *Family Law Act* 1975 (FLA) is the principal statute in this context.
- Applies to all children in Australia – nuptial and ex-nuptial children.

Key terms

Concepts of “custody”, “access”, “residence” and “contact” are not used in Australia.

- **Parental responsibility** means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. (Similar to the concept of "guardianship" in some jurisdictions.)
- **A parenting order** may provide for:
    - The person(s) with whom a child is to **live**, **spend time with** and **communicate**;
    - The allocation of parental responsibility for a child, or any other aspect of parental responsibility;
    - Any aspect of the care, welfare or development of a child.

Parental responsibility

- In the absence of court orders, parents each have parental responsibility for their children and can exercise that authority independently from the other parent. This is not changed by separation, only by the making of court orders.
- When making orders in relation to children there is a presumption it is in a child’s best interest for his or her parents to have **equal shared parental responsibility**. (The presumption does not apply in cases of child abuse or family violence or where it is not otherwise in a child’s best interests.)
- Where parents have equal shared parental responsibility there is an obligation for them to consult and make joint decisions in relation to decisions about major long-term issues for children. This includes decisions about a child’s name, current and future education, health and religious and cultural upbringing and also **changes to a child’s living arrangements that make it significantly more difficult for a child to spend time with a parent.**

Sections 65Y and 65Z *Family Law Act*

- It is an offence (punishable by imprisonment) for a party to take or send a child who is the subject of pending family law court proceedings or of a family law order, outside Australia unless permitted by a court order or with the authenticated consent of the other party.

***Hague Convention on the Civil Aspects of International Child Abduction* (1980)**

- Australia is a party to the *Hague Convention on the Civil Aspects of International Child Abduction* (1980) ("the Child Abduction Convention").
- There is an expectation that children wrongfully removed from Australia by a parent to another convention country will be returned to Australia under the Child Abduction Convention unless one of the limited exceptions to mandatory return are established.

Permission of the court is required for international relocation

- If parents do not agree to a child's relocation overseas, the appropriate course is to apply to the Family Court of Australia (Australia's superior family law court) for a parenting order giving permission for a parent to relocate and live with the child overseas.

Considerations to guide the court

- There is no separate provision for relocation cases in the FLA and there is no presumption for or against relocation. Relocation cases are to be determined following the same legislative pathway as all other parenting cases.
- The **best interests of the child** are the **paramount** consideration.
- Also relevant are the **objects** of the FLA, which include:
    - Ensuring children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of a child;
    - Protecting children from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence;
    - Ensuring children receive adequate and proper parenting to help them achieve their full potential; and
    - Ensuring parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children.
- The **principles underlying these objects** are that (except when it is or would be contrary to a child's best interests):
    - Children have the right to know and be cared for by both their parents;
    - Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);
    - Parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
    - Parents should agree about the future parenting of their children; and
    - Children have a right to enjoy their culture.

How a court determines what is in a child's best interests?

When deciding whether to make a particular parenting order, in determining the particular child's best interests the court must consider a range of primary and additional consideration listed in section 60CC:

The *primary* considerations are (with greater weight to be given to the second of these considerations):

- The benefit to the child of having a meaningful relationship with both of the child's parents; and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Additional considerations include:

- Any views expressed by the child and any factors (such as the child's maturity or level of understanding) the court thinks are relevant to the weight it should give to the child's views;
- The nature of the relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child);
- The extent to which each of the child's parents has:
    - Taken, or failed to take the opportunity to participate in making decisions about major long-term issues in relation to the child; to spend time with the child; and to communicate with the child; and
    - Fulfilled, or failed to fulfil, the parent's obligations to maintain the child. (This may include, for example, the provision of financial support for a child).
- The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of his or her parents;
- The practical difficulty and expense of a child spending time with and communicating with a parent (for example, the cost of international travel) and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- The capacity of each of the child's parents to provide for the needs of the child, including emotional and intellectual needs;
- The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- Additional considerations for Aboriginal or Torres Straight Islander children;
- The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- Any family violence involving the child or a member of the child's family, and other considerations where a family violence order has been made;
- Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; and
- Any other fact or circumstance that the court thinks is relevant.

Time to be spent by children with parents

- If a parenting order provides that a child's parents are to have equal shared parental responsibility, the court must consider:
    - If the child spending **equal time** with each parent would be in the child's best interests and reasonably practicable; and
    - If not, then whether a child spending **substantial and significant time** with a parent is in the child's best interests and reasonably practicable. (This includes time on weekends, school days and holidays, times enabling each parent to be involved in the child's daily routine, and for special occasions and events of significance.)
- In international relocation cases, because of Australia's geographical distance from much of the world, the Australian court is usually required to consider proposals where neither equal time nor substantial nor significant time will be practicable and a child may only see one parent during school holiday periods.

Family report

- Often a court is assisted by an expert "family report" prepared by a family consultant, psychologist or other social science professional.
- However, a judge is not bound by a recommendation made in a family report nor bound to accept or reject the whole, or any part of, the evidence of such a witness: *U v U*

Independent children's lawyer

- A lawyer may be appointed by the court to represent a child's interests - an independent children's lawyer (ICL).
- An ICL does not represent the child but rather the child's *interests*.
- The ICL's role includes gathering information and putting evidence before the court, making submissions in respect of the child's interests and sometimes speaking with children.

Interim relocation

- Relocation applications are rarely granted on an interim basis, without a full testing of the evidence.
- A relocation case may be heard on an expedited basis if there are grounds for urgency.

Common features of relocation cases

- The applicant (most often the mother, being the children's primary caregiver) seeks to return to his or her home of origin often for family support; to live overseas with a new spouse or partner; or for improved employment prospects.
- The applicant feels isolated and unhappy in Australia following separation (commonly depressed and/or anxious) and feels her/his parenting capacity is compromised and will be enhanced upon the proposed relocation.
- The applicant has a lack of financial support and employment prospects in Australia.
- Family violence.
- High parental conflict.

Common features of <u>successful</u> relocation cases in Australia	**Common features where relocation is refused**
Children have established a meaningful relationship with the other parent; one that can be sustained long distance.	Young children who would likely have difficulty maintaining a meaningful relationship with the other parent long-distance.
Court is satisfied the applicant has the intention and capacity to promote a meaningful relationship between the child and other parent following their relocation.	Applicant parent has not demonstrated (eg. by past conduct or attitude) she or he will support a meaningful relationship between the children and the other parent.
Expert evidence from mental health professionals about the likely benefits of relocation to the applicant parent's mental health and his or her parenting capacity.	Court is not satisfied the applicant parent's parenting capacity would improve upon relocation (eg. the parent may not be happier upon moving; or may be happier but that is unlikely to translate to better parenting capacity).
	If the applicant parent's parenting capacity does not improve upon relocation, the other parent will not be readily available to support the children.
Practical proposals and financial resources to support regular travel in order for the children to spend time with the other parent.	Impracticable proposals and a lack of resources to support the travel required to maintain relationships between the children and the other parent and family members.
Mature views expressed by older children who wish to relocate.	Children's views are of insufficient maturity or found to be influenced by the applicant parent.
Inadequate financial provision in Australia, including inadequate child support.	
Enforceability of Australian orders in the country to where it is proposed the children relocate.	Inability to enforce Australian parenting orders in the country where it is proposed the children will live.

Recognition, registration of Australian parenting orders overseas

- Australian orders may be registered overseas under the FLA with reciprocating jurisdictions identified in the *Family Law Regulations 1984* including New Zealand, Austria, Papua New Guinea, Switzerland and listed USA states.
- The *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996)* ("the Child Protection Convention") enables advance recognition, registration and enforcement of parenting orders between member states.

Judicial discretion

- Evaluating and weighing the above considerations is a matter for judicial discretion.
- *"A discretionary judgment concerning parenting orders necessarily involves, because of the focus upon the future, significant elements of value judgments; assumptions; necessarily uncertain predictions and intuition"*: *Grella & Jamieson* [2017] FamCAFC 21 referring *U v U* and *CDJ v VAJ* (1998) 197 CLR 172
- Courts (including the Full Court hearing appeal cases) often comment that particular relocation cases are "finely balanced".
- Because of this discretion and balancing exercise, it is very difficult to predict the outcome of a relocation case in Australia.

Snapshot of some recent Family Court of Australia decisions in international relocation cases

	Relocation to…	Age of children	High parental conflict identified	Family violence identified or alleged	Mental health issues for applicant (depression/ anxiety)	Difficulties with child support	Shared parental responsibility ordered	Relocation allowed
Family Court of Australia – some cases from the second half of 2017								
Milburn & Milburn [2017] FamCA 490	UK	6 & 8	✓	✗	✗ (although risk of deterioration in father's mental health in this case if relocation allowed)	✗	✓	✗
Cord & Cord (No 2) [2017] FamCA 494	USA	12 & 16	✓	✓	✓	✗	✓ (already in place by consent)	✗
Curzon & Curzon [2017] Fam CA 575	USA	11, 12 & 16	✓	✗	✓	✓	✗	✓
Reid & Molloy [2017] FamCA 760	NZ	5, 8 & 9	✓	✓	✓	✗	✓	✗
Spengler & Thomas [2017] FamCA 747	Country V, Europe	6	✗	✗	✓	✗	✓	✓
Bowen & Short [2017] FamCA 939	Canada	7 & 9	✓	✓	✓	✓	✗	✓
Petrov & Rudetsky [2017] FamCA 947	Country W	7	✓	✓	✓	✓	✗	✓
Pallas & Pallas [2017] FamCA 867	Country O	9, 13 & 15	✓	✓ (not identified as family violence, but controlling conduct described)	✗	✓	✗	✓

Amanda Humphreys
MST Lawyers, Melbourne, Australia
amanda.humphreys@mst.com.au
www.mst.com.au

	Relocation to…	Age of children	High parental conflict identified	Family violence identified or alleged	Mental health issues for applicant (depression/ anxiety)	Difficulties with child support	Shared parental responsibility ordered	Relocation allowed	Relocation allowed on appeal
Full Court of the Family Court (appeal cases) from 2017									
Morrall & Olmos [2017] FamCAFC 2	Germany	6	✓	✗	✓	✓	✓	✓	✓
Grella & Jamieson [2017] FamCAFC 21	Europe	4	✓	✓	✗	(father has had substantial periods of unemployment, reliant on social security benefits)	✗	✗	✗
Lambton & Lambton (No 2) [2017] FamCAFC 230	UK	3 ½	✓	✗	✓	✗	✓	✗	✗

Anonymised Australian judgments are available at www.austili.edu.au

Amanda Humphreys
MST Lawyers, Melbourne, Australia
amanda.humphreys@mst.com.au
www.mst.com.au

Should I stay or should I go?

Leave to remove cases in England and Wales

If a parent wants to move permanently to another country with her or his children, that parent needs the consent of the other parent who holds parental responsibility[1] in respect of the children, or in the absent of consent, an order from the Court where the children are habitually resident granting permission. To remove a child from the country where he or she is habitually resident without the consent of the other parent or a Court order is a criminal offence.

In practice we see these applications mainly from families formed by parents from different nationalities. Following a separation one of the parents, more often the mother, wishes to return to the country where she is originally from.

The Law

The Court's approach to this kind of application has moved from more parent centred, to more child centred. The Court needs to take into consideration the reasoning behind the application and the plan for living in the other country proposed by the applicant, but overall the decision needs to be made based on the child's welfare.

It was in 2001 when the Court of Appeal heard the case of Payne v Payne[2], the case which established what was referred to as the 'test' you had to pass to succeed in an application for leave to remove a child permanently to another jurisdiction. In Payne, Lord Justice Thorpe sitting in the Court of Appeal laid down a four-point guide as follows:-

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[1] "Parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his or her property (*section 3(1), Children Act 1989*). Both parents have parental responsibility for a child born to them during the marriage. If they are not married, the mother has parental responsibility for a child born to her, but the father will only have parental responsibility for that child if he is registered as the child's father (*section 4(1)(a), Children Act*). If he is not registered, he does not have parental responsibility but can acquire it by entering into a parental responsibility agreement with the mother (*section 4(1)(b) , Children Act*) or obtaining a parental responsibility order (*section 4(1)(c), Children Act*). If the parents are unmarried at the time of the child's birth but subsequently marry, the father will acquire parental responsibility by the marriage.

[2] *Payne v Payne [2001] EWCA Civ 166*

Carolina Marín Pedreño
cmp@dawsoncornwell.com

1. Is the application genuine or motivated by a desire to exclude the other parent from the child's life?

2. Is the proposal practical both financially and in terms of educational and health provision for the child?

3. What would be the impact on the parent if their application for leave to remove was refused?

4. What would be the impact on the other parents and their child's relationship with them if the application for leave to remove was granted?"

This test looked at the motivation of the parent making the application and the impact on that parent if the application was refused. It also considered the impact of the relationship between the 'staying behind' parent and the child if the application was granted.

It was in 2011 when the court moved away from Payne in the case, MK v CK[3], finding that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations. The court held that the Payne factors should be applied only as guidance in determining the welfare paramountcy.

Further, what has become the leading authority on the question of international relocation, the case of *K v K*[4] *(Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793, emphasised that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction is that the welfare of the child is paramount.

K v K considers at length the status of the guidance given by Thorpe LJ in *Payne v Payne*:

"(a)Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

[3] *MK v CK* [2011] EWCA Civ 793

[4] *K v K (Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793

(b)If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c)What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?..."

Although the Court of Appeal emphasised that this *guidance* must not take priority over the statutory principle that the child's welfare was paramount, it concluded that guidance which directed the exercise of the welfare discretion remained valuable in so far as helping the court to identify which factors are likely to be the most important and the weight which should generally be attached to them. Such guidance should be heeded by the court, but not be applied rigidly as if it contained principles from which no departure was permitted [ref. paragraph 86 of the judgment of Moore-Bick LJ, and paragraph 142 of the judgment of Black LJ].

As summarised by Black LJ at paragraph 144: *"Payne v Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision, but it does not dictate the outcome of the case."*

The Court of Appeal undertook a further review of the leading authorities in *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 88. The Court emphasised the need for a 'holistic' approach to the welfare analysis, *"in which each and every relevant factor relating to a child's welfare is weighed, one against the other, to determine which of a range of options best meets the requirement to afford paramount consideration to the welfare of the child"* [per McFarlane LJ at paragraph 48].

The Court also concluded that *"... a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plan be scrutinised and evaluated by reference to the proportionality of the same"* [per Ryder LJ at paragraph 31].

Lord Justice Ryder made it plain that under the statute at s.1(4) Children Act 1989, consideration of the welfare checklist is not obligatory in relocation cases, however case law commends its use. An "holistic evaluative analysis" is the appropriate approach to be taken in relocation cases. He set out:

"The judicial task is to evaluate all the options, undertaking a global, holistic and . . . multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option."

[30] That approach is no more than a reiteration of good practice. Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (ie an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or "left behind" parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.

In an assenting Judgment Christopher Clarke LJ commented in one helpful paragraph:

"*I agree. Reduced to the barest essentials the guiding principles and precepts are as follows. The welfare of the child is the paramount consideration. That is the only true principle. In deciding, in a case such as this, where a child should be located it is necessary for the court to consider the proposals both of the father and of the mother in the light of, inter alia, the welfare check list (whether because it is compulsorily applicable or because it is a useful guide) and having regard to the interests of the parties, and most important of all, of the child. Such consideration needs to be directed at each of the proposals taken as a whole. The court also needs to compare the rival proposals against each other since a proposal, or a feature of a proposal, which may seem inappropriate, looked at on its own, may take on a different complexion when weighed against the alternative; and vice versa. [45]*

Ryder LJ made it plain that the decision in *Payne* was nuanced, and the questions at paragraph [40] were always intended to be part of a welfare analysis and were not intended to be elevated into principles or presumptions. It should be read in the context of *K v K* and *Re F*;

"Selective or partial legal citation from Payne without any wider legal analysis is likely to be regarded as an error of law. In particular, a judgment that not only focuses solely on Payne, but also compounds that error by only referring to the four point "discipline" set out by Thorpe LJ at para 40 of his judgment in Payne is likely to be wholly wrong. There are no quick fixes to be had in these important and complicated cases; the para 40 "discipline" in Payne may, or may not, be of assistance to a judge on the facts of any particular case (whether there is a "primary carer" or not) in marshalling his or her analysis of the evidence prior to the all important analysis of the child's welfare."

And that:

"Finally, international relocation cases, where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged, require that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same when weighed against the parties' article 8 rights".

It is clear from considering all these cases that there some essential propositions. The welfare of the child remains the court's paramount consideration, as per s1(1) of the Children Act 1989.

In considering the child's welfare, that should be done by way of reference to the welfare checklist set out in s1(3) of the Children Act 1989. Further the court should not categorise cases in accordance with the concepts of primary or shared care.

It is noted that the question of whether or not a proportionality evaluation is required in every relocation case was subsequently considered by the Court of Appeal in *Re C (Internal Relocation)* [2015] EWCA Civ 1305. Black LJ expressed the view that because many relocation cases involve the interference with one party's Article 8 rights[5], whichever

[5] Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

decision is made, it was not easy to see how a proportionality evaluation *"could be made to work in practical, real life terms"* [paragraph 61]. Instead, she endorsed an approach in line with ECtHR jurisprudence, that the court should strike a fair balance between the interests of the child and those of the parent, and that if those interests conflicted, the best interest of the child dictates the outcome [paragraph 59 and 60].

Procedure

The parent who wishes to relocate, in the absence of consent from the other parent with parental responsibility, could make an application under the Children Act 1989 for permission to relocate to a particular jurisdiction.

The parent who wishes to relocate must attend a mediation information and assessment meeting known as MIAM with a mediator before an application is issued. The mediator would explore whether mediation can assist the parents to reach an agreement about the future arrangements of their children. If the parents do not wish to mediate or mediation is concluded because no agreement can be reached, the parent can proceed with an application for either:

- Leave to remove under section 13(1)(b) on Form C2 (with Form C1A if required) when there is an existing Child Arrangements order, or
- a specific issue order or a child arrangements order with permission under section 8 on Form C100 (with Form C1A if required) when there is not an existing Child Arrangements order.

The application will usually be listed for a first hearing dispute resolution appointment (FHDRA) around five to six weeks from the date of the application is issued. Both parties will be required to attend this hearing. Prior to the hearing, safeguarding checks will be carried out by CAFCASS[6]. At the hearing, a CAFCASS officer should be present to speak to the parents, and the Judge should try to assist the parents to reach an agreement.

The Judge will make directions for the filing and serving of:

[6] The Children and Family Court Advisory and Support Service

- A welfare report to be prepared by a CAFCASS officer or Independent Social Worker.
- Statements from the parents and any witnesses.

The Judge will list a Dispute Resolution Appointment and the final hearing.

The Dispute Resolution Appointment will be listed for after the welfare report has been filed. If the report is prepared by CAFCASS it could take up to 12 to 16 weeks. This hearing is an opportunity to the parties to consider whether an agreement can be reached having taken into account the recommendations made in the welfare report.

The final hearing would normally be listed for at least two days, depending on whether any of the parties would need an interpreter. The parties and the author of the welfare report would give oral evidence.

This application is issued in the Family Court where the child subject of the application resides, however if the proposed country where the applicant wishes to relocate is a non signatory country of the Hague 1980 Convention, the application can be issued in the High Court or it would be transferred to the High Court in the FDRH.

Overall an application for leave to remove a child from the jurisdiction would be determined within 6 to 7 months of the application being issued by the Court.

Carolina Marín Pedreño
Dawson Cornwell Solicitors
cmp@dawsoncornwell.com

Overview of the substantive and procedural laws in Singapore governing international relocation of children

Substantive laws

In answering the question of under what circumstances a parent should be allowed to relocate internationally with his/her children, the Singapore courts have constantly reiterated that their paramount consideration is the welfare of the children involved. However, different cases have taken different approaches in the practical outworking of this paramount consideration. Over the years, the cases in Singapore have highlighted a clear swing of the pendulum from a pro-relocation stance to one that was reserved and almost conservative towards relocation applications. In recent months however, the courts have seemingly adopted a softer stance.

Pro-Relocation: Reasonableness of Application to Relocate

In the earlier years, Singapore courts adopted a stance that was highly accommodating of relocation applications as the Courts' primary concern was the reasonableness of the application to relocate. In fact, in **Re C (an infant),**[1] the Singapore Court of Appeal held that the reasonableness of the party having custody to want to take the child out of the jurisdiction would be determinative in the question of whether a relocation application should be granted. While the Court did qualify that statement by saying that the paramount consideration will be the welfare of the child, it also stated that as long as the application was not unreasonable or in bad faith, the application should only be denied if the interests of the child would be compromised. As a result there seemed to exist a presumption in favour of granting a relocation application, only to be rebutted by the argument of the welfare of the child.

[1] [2003] 1 SLR(R) 502

Thus, the Courts gave heavy weight to the primary caregiver's reasons for relocation. In fact, in **AZB v AYZ,**[2] the Singapore High Court held that since the long-term interests of the child are so inextricably intertwined with the emotional and psychological well-being of the primary caregiver, the Court will give considerable weight to the primary caregiver's application to relocate as long as it is reasonable and not made in bad faith.[3]

Reservation towards Relocation: Loss of relationship with non-relocating parent

However, there was a change in tide heralded by the 2015 Singapore Court of Appeal case of **BNS v BNT**[4] and the case of **TAA v TAB,**[5] where the courts made a conscientious move away from placing importance on the primary caregiver's reasons for relocation and moved towards placing heavy importance on the loss of the relationship of the children with the non-relocating parent instead. In **TAA v TAB,** Ong JC expressly held that "BNT v BNS serves as an important reminder not to focus on the reasonable wishes of the primary carer to the extent that there is practically a presumption in favour of relocation once it is found that the primary carer's decision is not unreasonable". [6]

In the seminal Court of Appeal decision of **BNS v BNT,** upon the parties' divorce, the mother asked for permission to relocate to Canada, the parties' native country. The application was granted by the District Judge but subsequently the High Court allowed the father's appeal against the District Judge's decision. This was affirmed by the Court of Appeal. In arriving at its decision, the Court stated that the relocating parent's wish to relocate would only be relevant insofar as he or she would transfer insecurity and negative feelings to the children.[7] It placed primary importance on the child's loss of relationship with the left-behind parent

[2] [2012] SGHC 108
[3] At [20]
[4] [2015] SGCA 23
[5] [2015] 3 SLR 973
[6] TAA v TAB [2015] 2 SLR 879 at [9]
[7] At [20]

and stated that a strong bond between the non-custodial parent and the child would weigh in strongly against relocation. On the facts, given that the father had actively tried to be involved in his children's lives and they had a good and close relationship, the Court denied the relocation application. The Court also found that it was not realistic to expect the father to seamlessly relocate back to Canada as he had been practising in Singapore as a corporate lawyer for more than a decade, and had thus acquired a depth of regional expertise not readily transferable to his home country.

Similarly, in **TAA v TAB,** which concerned a Singaporean father's application to relocate to Spain with his 3 children, the Court stated the importance of giving weight to the loss of the child's relationship with the left-behind parent. This was a case where the father who had sole custody, care and control of the children had remarried a Spanish wife and desired to relocate with his children to Spain. While the Court did mention that consideration must be given to the genuine difficulties of the parent wishing to relocate and the Court ought to balance the wishes of the custodial parent to relocate with the need for the children to benefit from the presence of both parents in their lives, ultimately the importance of preserving the bond with the left-behind parent trumped over all other considerations. As a result, even though the non-relocating mother in **TAA** did not have a pre-existing good relationship with their children, the Court was of the view that the parent was actively trying to rebuild her relationship with the children and thus denied the relocation application by the father of the children.[8] Another factor that weighed heavily against relocation was the Court's finding that relocation would be incompatible with the children's interests as they would have been uprooted from their very stable living and education arrangements in Singapore for a possibly non-permanent relocation to Spain, which was an unfamiliar environment to the young children.

[8] TAA v TAB [2015] 2 SLR 879

Post **BNS** and **TAA,** it appeared that the Singapore courts took a stance almost diametrically opposed to granting relocation applications. In **TAT v TAU,**[9] the Court cited **BNS** and **TAA** about the importance of taking into account the bond with the left-behind parent and then held that since the father loved the child and wants the best for her, relocation will affect the relationship and thus should not be granted. [10]

Similarly, in **TEU v TEV,**[11] the Court was faced with an application by the mother to relocate with her child to Germany as she had lost her job in Singapore and had been offered a new position in Frankfurt by her employers. In support of her application, the mother adduced evidence of how her parents could care for the child in Germany, how the working hours in Germany are shorter and thus she would be able to spend more time with the child and how the child would benefit from free education and healthcare in Germany. In refusing her application, the Court stated that the mother had not proven that she had exhausted all avenues to stay in Singapore as she had not shown evidence of attempting to look for a job in Singapore. Furthermore, the Court was of the view that based on her income, the mother would be able to finance the child's education and healthcare. However, in this regard, the Court did not give sufficient heed to the fact that the mother had lost her job in Singapore and that one of the primary reasons of her seeking to relocate was to finance hers and her child's lives.

In placing great emphasis on the potential loss of the child's relationship with the non-relocating parent even where the bond between the non-relocating parent and the child was one that was only fledgling, it resulted in a situation where trailing spouses, most often women, were stuck in a country far away from home following the breakdown of their marriage simply to facilitate access. In most cases, the primary motivation behind a mother's

[9] [2015] SGFC 19
[10] At [48]
[11] [2016] SGFC 33

desire to relocate is to move back to her home country and receive support from her friends and family following the breakdown of her marriage or to move to a country where she would be able to restart the career that she had put on hold in order to follow her husband overseas and support his career aspirations. However, the state of law following **BNS** unfortunately did not accord much support for such women.

Softening of Stance Towards Relocation?

Surprisingly, the Singapore High Court case of **UFZ v UFY [2018] SGHCF** highlights a relaxation of the strictness with which relocation applications have been treated. In this case, Debbie Ong J allowed the relocation to the UK of three children aged 9, 11 and 14, who had become Singapore citizens and who had spent either all, or the majority of their lives in Singapore. This was so even though allowing a relocation meant that the children would be uprooted from their familiar and settled way of life in Singapore. In arriving at her decision, Justice Ong rationalised how while the children may have to transition back to life in the UK, the transition would be made easier by their maternal family in the UK. Notably, the Judge also interviewed the children and found that they had "expressed a strong desire" to return to the UK, which arguably helped to tilt the balance in favour of relocation.

The court's apparent softening of stance towards relocation should however not be construed as one that is necessarily inclined towards relocation, and it has to be borne in mind that the child's welfare remains the paramount consideration of the court. Following **UFZ v UFY**, a subsequent case of **UKZ *v* ULA [2018] SGFC 32** saw a Singaporean mother's application to relocate to London with her son being dismissed. The Court found that the mother's desire for relocation stemmed primarily, if not solely, from her professional ambition and that there was no indication that a move to London would promote the child's best interests. The mother also did not satisfy the court with an adequate parenting plan for the child including

setting out the support that would be available for the child in London, and the real risk of loss of relationship between the child and his father was a red flag for the Court.

Nonetheless, what has certainly been instructive from the recent cases before the Singapore courts is a surfacing of factors that may be considered by the court in determining a relocation application, which include:

- The children's wishes regarding relocation, where this is available;

- Reasonable wishes of the primary caregiver (assuming for these purposes that the primary caregiver is the parent applying for relocation with the children);

- Possibility of settledness and kinship support for the children in the country of relocation;

- Strength of existing relationship between left behind parent and children;

- Whether there is a real option for the parent who is opposing the relocation application (for these purposes, the parent shall hereinafter be referred to as the "left behind parent") to also relocate to the same country; and

- If the left behind parent does not relocate, whether there is a real option for him / her to meet the children relatively frequently – including the left behind parent's means to travel & access arrangements that are in place.

Procedural laws

An application for international relocation can either be made as part of the ancillary relief in ongoing divorce proceedings or if there are no such proceedings or parties are not married, as an application under either the Women's Charter or the Guardianship of Infants Act.

Application under the Women's Charter

Under Section 126(3) and (4) of the Singapore Women's Charter, if there is an order for custody and or care and control in force, an application can be made for leave to be granted for the relocating parent to take the child, who is the subject of the order, out of Singapore for a period of one month or more.

126.— *(3) Despite subsections (1) and (2A), where an order for custody, or an order for care and control, is in force, a person must not take the child who is the subject of the order out of Singapore, except with the written consent of both parents or the leave of the court.*

(4) Subsection (3) does not prevent the taking out of Singapore for a period of less than one month of the child by the person given custody, or care and control, of the child or by any other person who has the written consent of the person given custody, or care and control, of the child to take the child out of Singapore.

Application under the Guardianship of Infants Act

If there is no order for custody and or care and control in force, an application would have to be made under sections 3 & 5 of the GIA for leave for a relocating parent to relocate with his or her child.

The Family Justice Courts have jurisdiction to hear such applications for relocation under section 5 of the GIA even if there are no existing orders on custody and or care and control in force for the children. The paramount consideration of the court will be the welfare of the child (as it is enjoined to do under section 3 of the GIA), and the relocating parent can also apply for the non-relocating parent's access to the child to be dealt with.

Sections 3 & 5 GIA

Welfare of infant to be paramount consideration

3. *Where in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.*

5. *The court may, upon the application of either parent or of any guardian appointed under this Act, make orders as it may think fit regarding the custody of such infant, the right of access thereto and the payment of any sum towards the maintenance of the infant and may alter, vary or discharge such order on the application of either parent or of any guardian appointed under this Act.*

In the event that a child is removed without leave of court or the other parent's consent, then the abducting parent could well commence an application for child abduction under the International Child Abduction Act (Cap 143C) (ICAA).

Conclusion

The recent trend in case law on relocation in Singapore is some indication that the Singapore Courts, rather than swinging between two extremes of either giving substantial weight to the wishes of the parent seeking to relocate or giving substantial weight to the bond between the children and the parent left behind, are adopting a more nuanced and balanced approach that holistically considers and weighs the interests of all the parties involved. The assessment of whether relocation is in the welfare of the children is an intensely fact-centric exercise and no one factor should trump the others, whether it be the reasonable wishes of the primary caregiver or the potential loss of relationship between the child and the left behind parent.

POONAM MIRCHANDANI [MS]
M/S MIRCHANDANI & PARTNERS

International Academy of Family Lawyers

SESSION 6

Religious Courts: An overview of divorce and custody issues in non-secular judicial systems

Matrimonial Law in Israel: A Tale of Two Courts

The Israeli legal system, as it pertains to matrimonial matters, is unique among democratic countries based on the rule of law. While counting itself among those jurisdictions with an enlightened approach to the rights of women and same sex couples, it simultaneously preserves an antiquated religion based approach to matters involving marriage and divorce. Matters of personal status are determined by the recognized religious community into which the individual is born, even if he or she is a sworn atheist.

The creation of a dual system of civil and religious courts is based on legislation enacted during the time of British Mandatory Rule. Article 51 of the Mandatory Period Order in Council grants religious courts of certain designated communities' jurisdiction over family law matters. Due to Israel's fractured political system, the relatively small religious parties have been able to preserve this system whereby religious laws determine matters of personal status.

As a result, there is no provision for civil marriage in Israel. All marriages must be performed by an authorized religious functionary. For those who are not recognized as belonging to any of the designated religious communities, there is simply no possibility for them to marry in Israel. Similarly, as the various religious institutions do not recognize marriage between its members and those of another faith, there is no religious inter-marriage in Israel.

Those caught in this legal no-man's land, along with the growing number of secular Israelis who refuse to enter into matrimony through the gates of religious coercion, have created a booming marriage tourism industry for Cypress. Due to the rulings of the Israeli Supreme Court, marriages performed abroad that are recognized by the law of the state where the ceremony took place, must be recognized by the Interior Ministry as a legal marriage. However, the registration by the civil authorities in Israel of a marriage performed abroad does not obligate the religious authorities. Thus, Israeli couples who are legally recognized as married in the Population Registry, can request and receive permission from the religious courts to marry a different spouse without the inconvenience of a divorce. As the religious courts view the civil marriage as void *ab initio*, the parties to that union are not considered to be married under their laws.

This leads to some excruciating legal consequences. Although the spouse who has been legally married in the religious court without the benefit of a divorce from his or her civil law spouse may have acted in good faith according to the applicable personal status law, the second marriage still constitutes bigamy under the laws of Israel. Aside from the obvious criminal offense, this situation can create a myriad of legal headaches, both in divorce and estate proceedings.

The granting of a divorce decree is within the exclusive jurisdiction of the religious courts. As the overwhelming majority of Israel is either Jewish or Muslim, the primary religious courts are the Rabbinical Courts and the Sharia Courts. Those who are appointed as judges in these courts have been certified by their respective religious institutions as qualified to issue religious rulings, but with rare exception, are not graduates of a law

school. The granting of a divorce decree is within the exclusive jurisdiction of religious courts for those who are considered a member of one of the designated religious communities. However, unlike those who wish to enter the halls of matrimony, those who are not a member of one of the designated religious communities do not need to make a trip abroad in order to divorce. Israeli law grants jurisdiction to the Family Courts to issue a decree of divorce for those who have no religious legal recourse in Israel.

There is a common misconception that because divorce in Israel is declared by a religious court, divorced couples need to go through a civil divorce as well if they relocate abroad and wish to remarry. Religious divorce decrees in Israel are recognized by the state, as that is the only kind of divorce decree available. Therefore, a couple divorced in Israel is divorced anywhere in the world as their marital status is determined by the laws of their domicile at the time of the divorce.

Aside from the actual divorce decree, all related issues, including child custody, spousal and child support and distribution of marital assets, are within the concurrent jurisdiction of the religious and Family Courts. Jurisdiction is determined by the first in time rule. The court in which the initial proceeding is filed becomes the court of jurisdiction. This creates a veritable nightmare for those contemplating divorce, while keeping lawyers constantly on their toes, less they come in second place in the race to the court house. A recent Supreme Court ruling has further defined this footrace to be not just one of days or even hours, but of minutes. By filing with the Family Court 15 minutes before the other party did the same in the Rabbinical Court, the attorney who initiated the action first secured jurisdiction in all related matters in the forum of his choosing.

In general, religious courts tend to be more favorable to the husband while the civil courts are more responsive to the claims of the wife. There are circumstances, however, where the wife will choose to litigate the Rabbinical Court, for instance where the majority of the assets are registered in her name alone. Both the Sharia and Rabbinical Courts have their own rules of procedure and distinct laws. In addition, they both have an appellate system with their own high courts. These supreme religious courts are the final interpreter of the religious laws and there is no appeal from them.

However, the Supreme Court of Israel, in its capacity as a court of equity, does have oversight of any rulings issued by a religious court where there is a claim that the religious court has exceeded its jurisdiction or violated a fundamental right of due process. Using a very broad interpretation of its capacity, the Supreme Court has significantly limited the ability of the religious courts to divert from the fundamental principles of Israeli civil law.

As an example, the Supreme Court has created an entire body of jurisprudence regarding the issue of obtaining jurisdiction, a key component in the struggle between the family and religious courts. The Court has ruled that if the husband has filed for divorce in the Rabbinical Court prior to the filing of the wife in the Family Court, not all divorce related issues will necessarily be within the jurisdiction of the religious court.

First, the court will examine whether the petition for divorce was made in good faith or simply as a tactic to prevent the wife from securing the jurisdiction of the Family Court. It has been held that a husband who filed for divorce first in the Rabbinical Court but did not

serve his wife until several months later when she opened a file in the Family Court, did not actually seek a divorce but rather a tactical advantage. As a consequence, it was held that the Family Court had jurisdiction even though the husband's petition was first in time.

Second, there must be a specific request to litigate the related issues, such as division of assets, in the divorce proceeding. If the divorce petition does not request that the religious court determine, for example, the division of assets within the divorce proceeding, then that issue can be litigated by the Family Court, even though that proceeding was commenced at a later date. Third, even if the husband has specifically asked the religious court to determine the division of assets in the divorce proceeding, but has not done so in good faith, the court will still not recognize the first in time rule regarding jurisdiction. Not citing all of the assets in his possession has been held to be a lack of good faith by the husband for purposes of jurisdiction.

It is agreed by those in both the religious and civil courts, as well the legal community, that the present system encourages litigation, is cumbersome and wasteful and most of all, discourages parties from seeking a peaceful solution to their marital problems. Some recent changes in the law have reduced some of this jurisdictional nightmare, but despite efforts of the legal community, no solution is in sight.

Edwin Freedman
Law Offices of Edwin Freedman
Tel Aviv, Israel

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