NICHOLES FAMILY LAWYERS
FEATURE NEWSLETTER

## Introducing our International Family Law Specialist Group:

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# 7th World Congress on Family Law and Children's Rights

### Dublin, Ireland
### 4 – 7 June 2017

The 7th World Congress on Family Law and Children's Rights is being held in Dublin, Ireland from 4–7 June 2017. As Deputy Chair of the World Congress, Sally Nicholes (Managing Partner) will be attending together with Nadine Udorovic (Partner) and Claire Walczak (Associate). Nadine and Claire will be presenting their poster on forced marriage of children entitled "I Don't".

Sally Nicholes is chairing the Concluding Session of the World Congress focusing on the achievements of the World Congress, including initiatives in Cambodia and Indonesia. Delegates from around the world will be in attendance including those from countries such as the United States, Canada, the United Kingdom and Ireland, South Africa, Belgium, the Netherlands, New Zealand, Germany, Portugal, Sweden, Israel, Ghana, Hong Kong, Italy and Australia.

The patron for the World Congress is The Honorable Mr Michael Higgins, the President of Ireland. Other key note speakers will include:

- Ms Mata Santos Pais, the Special Representative of the Secretary-General of the United Nations on Violence against Children
- The Honorable Mr Justice Sean Ryan, President of the Court of Appeal of Ireland
- Ms Anne Lindbode, Child Ombudsman for Norway
- The Rt Hon. the Baroness Brenda Hale of Richmond DBE, Deputy President of the Supreme Court of the United Kingdom, and
- Ms Marsha Levick, Deputy Director and Chief Counsel of Juvenile Law Centre in Philadelphia.

The World Congress promises to be the leading international forum attended by world leading academics, practitioners, judges and law enforcement officers where issues concerning children and discuss best practice models from around the globe to help to improve the world for children will be discussed and examined.

A newsletter updating on the outcome of the World Congress will be prepared after the conclusion of the World Congress in June 2017.

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**ARTICLES**



# Forced Marriage: Does It Really Happen in Australia?

***Imagine being told at 17 years of age that you were being taken out of school, taken away from your friends and familiar environment to the non-Hague country of Lebanon to marry a man you had never met and without your consent.***

**Snapshot:**

- Forced marriage is illegal in Australia and has been since the Australian parliament enacted new laws in 2013 to amend the *Commonwealth Criminal Code Act 1995*.
- There has been an increase in forced marriage cases in Australia over the past five years, although it is still believed that these cases are heavily under-reported.
- This article examines how the Family Court of Australia deals with forced marriage and the various remedies available to those under 18 years of age.

Forced marriage is when a person gets married "without freely and fully consenting, because they have been coerced, threatened or deceived. This can include emotional pressure from their family, threats of or actual physical harm, or being tricked into marrying someone".

Section 270.7A of the *Commonwealth Criminal Code Act 1995* (the Code) defines forced marriage as one where there is not free and full consent. In March 2013, the Code was amended to criminalise forced marriage in Australia, however, there have been no cases where a parent or legal guardian of a child has been criminalised in Australia for forcing a child to marry another person.

Forced marriage is different from an "arranged marriage". An arranged marriage is a marriage where the extended family take an active role in organising the marriage. The major difference is that in these circumstances, both parties provide consent and there is no pressure or duress exerted over the person getting married.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has noted while women, men, boys and girls can all be victims of gender-based violence, women and girls are the main victims. This is supported by the case law in Australia that it (forced marriage) is a form of gender based violence, although there are still reported instances of underage males being forced to marry in Australia.

As we can see from a review of the Family Court of Australia cases, there are two scenarios that may arise:

- where the marriage has already occurred, the Family Court of Australia determines the issue of whether the marriage is valid under Australian law or whether it should be declared void due to lack of consent in accordance with s23B(1)(i) of the *Marriage Act 1961* (Cth) (*Marriage Act*)

- where the marriage is yet to occur but there is evidence from the child or another person that a forced marriage is likely to occur (usually in another country) and the Court has to determine whether they should make orders for an injunction to prevent the parents from taking the child out of Australia, place the child on the Airport Watch List and remove the child's passport from the parents.

Forced marriage can occur for a number of reasons including "to control unwanted behaviour or sexuality, to prevent relationships considered to be unsuitable, for financial gain, to promote family links and family honour".

Forced marriage is a culturally sensitive issue and according to the Department of Human Services primarily affects migrants from "South and East Africa, Africa, India, Bangladesh, Nigeria, Pakistan and Afghanistan".

Justice Cronin noted in the case of *Kreet v Sampir* that "although cultural practices are sensitive issues, the law to be applied is that of Australia. If a cultural practice relating to a marriage gives rise to the overbearing of a mind and will so that it is not a true consent, the cultural practice must give way".

## Applicable legislation

A person must be 18 years of age to be married in Australia. It is possible for a person who has attained the age of 16 years to apply to the Family Court for authorisation to be married if they can show exceptional and unusual circumstances to warrant the making of an order. Consent is also required from both parents. Child marriage without the prior consent of the Family Court will therefore always be forced and illegal in Australia.


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According to the United Nations Special Rapporteur on Trafficking in Persons, child marriage "violates fundamental human rights standards and must therefore be strictly prohibited".

The case law shows that children are at the highest risk of forced marriage from adolescence until early teenage years.

Pursuant to s23B(1)(d)(i) of the *Marriage Act* a marriage is void where the consent of either of the parties is not a real consent because it was obtained by duress or fraud.

## Australian Family Case Law Analysis

### Madley v Madley and Anor

*Madley v Madley and Anor* [2011] FMCAfam 1007 involved a 16 year old girl who became aware of her parents plan to have her married to another minor in the non-Hague country of Lebanon. In fear of being forced to travel to Lebanon and marry this boy, Ms Madley contacted the Australian Federal Police (AFP). With the assistance of NSW Legal Aid, Ms Madley made an ex parte application to the NSW Family Court for the following orders:

- to be placed on the Airport Watch List
- to get an injunction to prevent her parents from removing her from Australia.

The Family Court of Australia granted both these orders.

An order was also made which required the parents to surrender the child's passport to the AFP. The Family Court placed significant weight on the child's views in this case as she made clear her own views in a mature manner before the Family Court and due to the conflict and difficulties in expressing them because they were contrary to her parents expectations and her cultural and religious obligations to obey her parents.

### Kreet & Sampir

In *Kreet & Sampir* [2011] FamCA 22 Ms Kreet was forced to marry a man in India when she turned 18 years old. Ms Kreet had lived in Australia for the majority of her life. Ms Kreet intended to marry Mr U whom she had met in Australia and moved in with when she was 18 years of age against her parent's wishes.

Ms Kreet's parents were extremely strict and objected to this relationship as the man was not from a caste deemed to be appropriate. Ms Kreet agreed to travel to India with her parents on the basis that she thought she was marrying Mr U. Upon her arrival in India, Ms Kreet was forced to marry another man whom her parents considered suitable. The evidence in this case showed that Ms Kreet's father had threatened Ms Kreet that Ms Kreet's mother and sister would be raped if she did not go through with the marriage.

Ms Kreet went ahead with the wedding. However, she withdrew her new husband's visa application once she had returned home to Australia and made an application to the Family Court of Australia for an annulment of the marriage.

Justice Cronin found that the marriage was invalid due to lack of consent in accordance with the *Marriage Act* and the marriage was declared void under s51 of the *Family Law Act 1975*.

### DHS & Brouker & Anor

In *Department of Human Services & Brouker & Anor* [2010] FamCA 742 DHS received a report which suggested that the female child of the respondents then aged nearly 14 years old, was not attending school and that the child's enrolment had been terminated as she was being taken overseas to marry a 17 year old boy in a Muslim country.

DHS interviewed the child and then applied to the Family Court for orders preventing the child from being taken outside Australia. The Family Court made orders placing the child on the Airport Watch List and the parents were restrained by injunction from removing the child from Australia and also from applying for a passport for their child.

Justice Mushin found that as neither party was of marriageable age, that marriage could not be celebrated in Australia and that "this fact in itself is reason for not permitting a child who is resident in Australia and subject to this Court's jurisdiction, to be taken out of the country".

### In the Marriage of S

In *the Marriage of S* (1980) FLC 90-820 a 17-year-old Egyptian girl made an application to the Family Court of Australia to nullify her marriage having married at age 16 in a Coptic Orthodox Church in Australia. It came out in evidence that the child was "caught in a psychological prison of family loyalty, parental concern, sibling responsibility, religious commitment and a culture that demanded filial obedience". The decree of nullity was ultimately granted on the basis that the child's consent was not real consent because it was obtained by duress.


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### Nagri v Chapal

In *Nagri v Chapal* [2012] FamCA 464 the applicant was a male born in India who came to Australia in August 2008 when he was 21 years of age. At that time, he was financially supported by his uncle, Mr S, who posted a bond for him and who had given him further financial assistance and employment since he lived in Australia.

The applicant's uncle informed the applicant that he had found a girl that he should marry. The parties then met on 11 September 2011. Despite the applicant informing his uncle and mother that he was in love with somebody else and did not wish to go ahead with the marriage, his uncle said that it would be impossible for the marriage not to occur. The marriage went ahead in November 2011. In December 2011, the applicant confessed to the respondent that he had married her under compulsion and out of sense of duty to his family. He was remorseful and apologised to her.

The applicant subsequently applied to the Family Court and the marriage was declared null and void on the grounds of duress of consent. Judge Collier found that the applicant was under duress of his uncle and family as well as religious and cultural pressures. The marriage was found to be void.

### Kandal & Khyatt & Ors

In *Kandal & Khyatt & Ors* [2010] FamCA 508 a 17 year old girl who made an application to the Family Court of Australia after being told by her parents that she would be flown to Lebanon to marry someone against her will. The child telephoned the AFP and informed them that she was being taken to Lebanon against her will and that a flight had been booked for 19 May 2010. The child indicated that she was aware of the Airport Watch List provisions and that she wished to be placed on the Airport Watch List. The AFP notified the Department of Human Services and appropriate cultural organisations, each of which indicated they would assist and provide emergency housing.

Legal Aid New South Wales appeared on behalf of the child and appeared on an amicus and duty basis in respect of the child.

In this instance, ex-parte orders were made placing the child on the Airport Watch List and an Injunction was also made stopping her parents from being able to remove the child from Australia. The Family Court placed significant weight on the child's wishes in this matter.

### Conclusion

A review of the Family Court of Australia cases shows that judges will take into account what is in the child's best interests, while the main focus of the case law looks at lack of consent and duress to the marriage involving a minor, which is in all cases found to not be in the child's best interests.

Anti-Slavery Australia has developed a useful list of signs that someone is likely or at risk of forced marriage:

- a sudden announcement that they are engaged and they don't seem happy about it
- they suddenly stop attending school, university or work
- they spend a long time away from school, university or work with no reason
- they are never allowed out or always have to have somebody from the family with them
- their older brothers or sisters stopped going to school or were married early
- there is evidence of family violence or abuse
- they have run away from home
- they show signs of depression, self-harming, drug or alcohol abuse
- they seem scared or nervous about an upcoming family overseas holiday.

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# International Relocation Cases

There are an increasing number of parents who want to move overseas with their children for a variety of reasons including for a new relationship, employment or to be closer to their family. Where the other parent opposes the children's relocation, the relocating parent must make an Application to the Family Court of Australia to obtain Final Orders permitting the relocation.

The *Family Law Act* 1975 ("the Act") applies to all proposed relocation cases including international relocations which will be examined below however there are some different principles applied in international relocation cases that will also be explored.

Nicholes Family Lawyers have been involved in a number of international relocation cases including to New Zealand, the United Kingdom, France, Singapore, and the United States of America.

## Relocation pursuant to the *Family Law Act* 1975

The issue of whether a child should be allowed to relocate with one parent is governed by Part VII of the *Act* 1975 ("the Act") which specifically deals with parenting matters. There is no separate set of legislative guidelines that deal with the issue of relocation. Orders concerning who the children should live with and spend time with are "parenting orders." These cases are dealt with on a case-by-case basis.

The Family Court must follow a statutory and intellectual pathway.

The "best interests of the child" remains the paramount consideration, although it is not the sole consideration in determining the issue of relocation. In determining what is in the best interests of the child the Family Court have regard to the factors set out in section 60CC of the Act.

## Considerations in determining Relocation

A Judge is required to have regard to the two primary considerations of protecting a child's meaningful relationship with both parents and protecting children from harm. Pursuant to section 60CC(2A) of the Act, the Family Court is now required to give greater weight to the need to protect children from harm than the need to protect a meaningful relationship with both parents.

The relevant additional considerations of section 60CC(3) must also be considered in determining the issue of relocation and what is in the child's best interests.

## Relevant Case Law

The Full Court of the Family Court in *A v A: Relocation Approach* (2000) FLC, formulated a guideline judgment to be applied when determining relocation cases:

1. The Court cannot proceed to determine the issues in a way that separates the issue of relocation from that of residence and the best interests of the child.

2. Compelling reasons for, or indeed against, the relocation need not be shown.

3. The best interests of the child are to be evaluated taking into account considerations including the legitimate interests of both the residence and non-residence parent.

4. Neither the applicant or respondent bears an onus.

5. Treating the welfare or best interests of the child as the paramount consideration does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations, priority must be accorded to the child's welfare rights.

6. If a parent seeks to change arrangements affecting the residence of, or contact with the child, he or she must demonstrate that the proposed new arrangement, even if that new arrangement involves a move overseas, is in the best interests of the child.

## Equal Shared Parental Responsibility

In determining the issue of relocation, the Family Court must determine whether the presumption of equal shared parental responsibility applies under section 61DA of the Act.

Where there is an order for equal shared parental responsibility, the next step under section 65DAA of the Act is to consider whether equal time, or substantial and significant time is appropriate.

## Section 65DAA of the Act

The High Court decision of *MRR v GR* [2010] HCA 4, considered section 65DAA of the Act in relation to


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relocation and held that section 65DAA(1) is concerned with "the reality of the situation of the parents and the child" and "not whether it is desirable that there be equal time spent by the child with each parent". The presumption in section 61DA(1) is not determinative of the questions arising under section 65DAA(1). What section 65DAA (1)(b) requires is "a practical assessment" of whether equal time parenting is feasible. Thus, "reasonable practicability" of the circumstances will be taken into consideration.

In an international relocation case, equal time is impossible.

### Substantial and significant time

The Family Court is then required to consider whether substantial and significant time spent by the child with each parent is in the child's best interests and whether that is "reasonably practicable".

While section 61DA of the Act requires a consideration of the section 60CC factors, it is clear from the relevant case authorities that the issue of "reasonable practicability", is not solely determined by a consideration of the section 60CC factors. There are a number of other factors which are relevant including, availability and desirability of housing opportunities, the ability to derive gainful income through employment opportunities, extended family support and the emotional health and wellbeing of the primary parent, including whether they have re-partnered.

In international relocation cases, the very nature of the relocation means that it will be impossible for the non-relocating parent to spend substantial and significant time with the children.

### International relocation cases- principles

In international relocation cases it is important that the "parental relationship" can be preserved notwithstanding a physical separation for lengthy periods of time between parent and child. The continuation of the parental relationship in an undamaged form, in a form, which enables regeneration within a short time of the re-introduction of face to face time following lengthy absences, is frequently the focus of attention. Phone calls, Skype and/or Facetime become even more important as a means to facilitate to communication between the non-relocating parent and the children and should form part of the overall proposal to relocate.

It is also important to consider the costs of travel and practically how often the non-relocating parent will be able to spend with the children taking into account school holidays.

### Conclusion

These types of cases raise important public policy issues regarding the relocating parent's right to freedom of movement versus the other parent's right to spend time with their child. They are difficult cases and must be prepared properly so if you are considering an international relocation, specialist family law legal advice is essential.

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## How Effective Are Overseas Orders for Child Support?

Australia is party to various international agreements that enable participating countries to recognize maintenance liabilities for child support. These agreements mean the Child Support Agency ("CSA") will work with the authorities in a number of reciprocating jurisdictions to set up child support payments according to local laws. The CSA will also register overseas maintenance liabilities made in these reciprocating jurisdictions. An overseas maintenance liability could be a court order, a registered maintenance agreement or a maintenance assessment by a local authority. In Australia these take the form of Family Court orders, Binding or Limited Child Support Agreements and/or an assessment by the CSA.

While registration of a maintenance liability with the CSA is possible for Australian ex-pats and overseas nationals who have separated from their partner while living overseas and obtained orders for child support or child maintenance, those parties need to be aware that such orders may not be automatically enforceable in Australia. Perhaps of greater concern is that such maintenance liabilities can be superseded by an Australian Child Support Assessment in some common circumstances.

The issue of an overseas maintenance liability being superseded can arise when one parent moves to or back to Australia subsequent to an overseas maintenance liability having been made. Once the parent has established residence they are able to apply to the CSA for an assessment providing the child(ren) is either present in Australia on the day the application is made or is an


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Australian citizen or is ordinarily resident in Australia. Where an overseas maintenance liability has already been registered and one parent remains a resident of a reciprocating jurisdiction the CSA may choose not to accept the application for assessment and maintain the liability of the registered overseas maintenance liability.

Of particular concern is where the overseas maintenance liability has not been registered with the CSA and subsequently a child support assessment is made and registered. The CSA are then no longer able to register the overseas maintenance liability other than for the collection of arrears thus rendering the overseas maintenance liability irrelevant for the future.

This means that where one parent returns to Australia, if either parent wants the overseas maintenance liability to remain effective they should immediately apply to register the liability. While the CSA normally contacts both parents prior to registering a child support assessment and thus an opportunity may be provided to register the existing overseas maintenance liability, this should not be relied upon.

If both parents return to Australia then the overseas maintenance liability (registered or not) will cease to have effect once a child support assessment is completed by the CSA and subsequently registered. As part of this process the CSA may also undertake an assessment of whether a parent is resident in Australia to ensure such a residency claim is not being made purely for child support purposes. Should you need assistance with child support issues while you or your former partner are living overseas or have recently returned from overseas and have an overseas child maintenance order, please do not hesitate to contact Nicholes Family Lawyers to provide specialist advice.

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## Anti-Suit Injunctions

Nicholes Family Lawyers were recently successful in defending an appeal in relation to an anti-suit injunction before the Full Court of the Family Court of Australia in the matter of *Cole & Abati* [2016] FamCAFC 78.

The appellant husband is an Australian citizen who owns assets in Australia, New Zealand and Indonesia which are worth approximately $63 million. The respondent wife is an Indonesian citizen who owns assets in Indonesia worth approximately $3 million acquired with money the husband gave her prior to their marriage.

The parties married in 2012 and executed a binding financial agreement on their wedding day in which both parties agreed inter alia that they would each retain the assets held by them prior to the marriage and that the husband would not seek relief in Indonesia in relation to the wife's assets.

The parties separated in 2012 and divorced in 2014. In 2013, the wife filed proceedings in the Family Court of Australia seeking a declaration that the Binding Financial Agreement was binding and an order restraining the husband from seeking relief in Indonesia in regard to her assets. Throughout the course of the proceedings, the husband conceded that he would commence proceedings in Indonesia if an anti-suit injunction was not made in Australia.

Justice Macmillan granted the anti-suit injunction at first instance in the Family Court of Australia in 2015 on the basis that the husband's intention to pursue the proceedings in Indonesia "flies in the face" of the Binding Financial Agreement signed by both the husband and the wife.

The husband appealed the Order made in the Family Court of Australia in 2015 which prevented him from issuing legal proceedings in Indonesia relating to property owned by the respondent wife. Counsel for the husband argued that the primary judge erred in her construction of the Binding Financial Agreement, that the primary judge failed to give adequate reasons and the primary judge failed to have regard to the principles of international comity of courts noting that an injunction restraining proceedings in a foreign court may be perceived as a breach of comity by that court. The Full Court found that Justice Macmillan had not erred at first instance and dismissed the husband's appeal and ordered that the husband pay the wife's costs in regard to the appeal.

In the matter of *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 the High Court held that a party who has properly commenced proceedings in Australia has a prima facie right to have the proceedings decided by an Australian court save and except for when Australia is the clearly inappropriate jurisdiction. However, in the matter of ZP v PS (1994) FLC 92-480 the High Court held that the rule in *Voth* does not apply to proceedings in relation to children. In cases involving children, the best interests of the child are the paramount consideration and a party who has properly commenced proceedings in Australia has a prima facie right to have the proceedings heard by an Australian court *unless* the best interests of the child require otherwise.

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# Enforcing Child Support Payments when a Paying Parent lives Overseas

The Australian Child Support Agency is able to collect regular child support payments in particular circumstances, even when the paying parent lives overseas.

This arrangement is most effective when the paying parent agrees to make the payments voluntarily however, if the paying parent refuses to do so and lives in a country listed as a reciprocating jurisdiction to Australia such as the United States of America or Ireland then the Australian Child Support Agency can intervene.

In these circumstances the Australian Child Support Agency can forward the child support assessment to the country where the paying parent lives for recognition and enforcement.

Once the assessment is forwarded overseas the Australian Child Support Agency is not responsible for the collection process and is reliant on the cooperation of the overseas authorities to collect the child support payments on their behalf.

Child support schemes can vary considerably between different countries overseas depending on whether the system is administratively based or Court based.

In countries where there is a Court based child support system the debt is often required to be recognised by Court Order before it can be enforced which in certain circumstances can delay the process and receipt of payments in addition to costing funds in further Court litigation.

If the Australian Child Support Agency is not successful in having the Australian child support assessment recognised and enforced in an overseas country, it may be possible for that country to establish its own liability to be enforced.

If you have enquires regarding enforcement of child support payments it is important to contact the Child Support Agency or a family lawyer. Nicholes Family Lawyers are highly skilled and knowledgeable in all types of child support matters including enforcement in overseas jurisdictions.

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***If you have any family law queries or questions arising from the Newsletter, please do not hesitate to contact our office.***

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