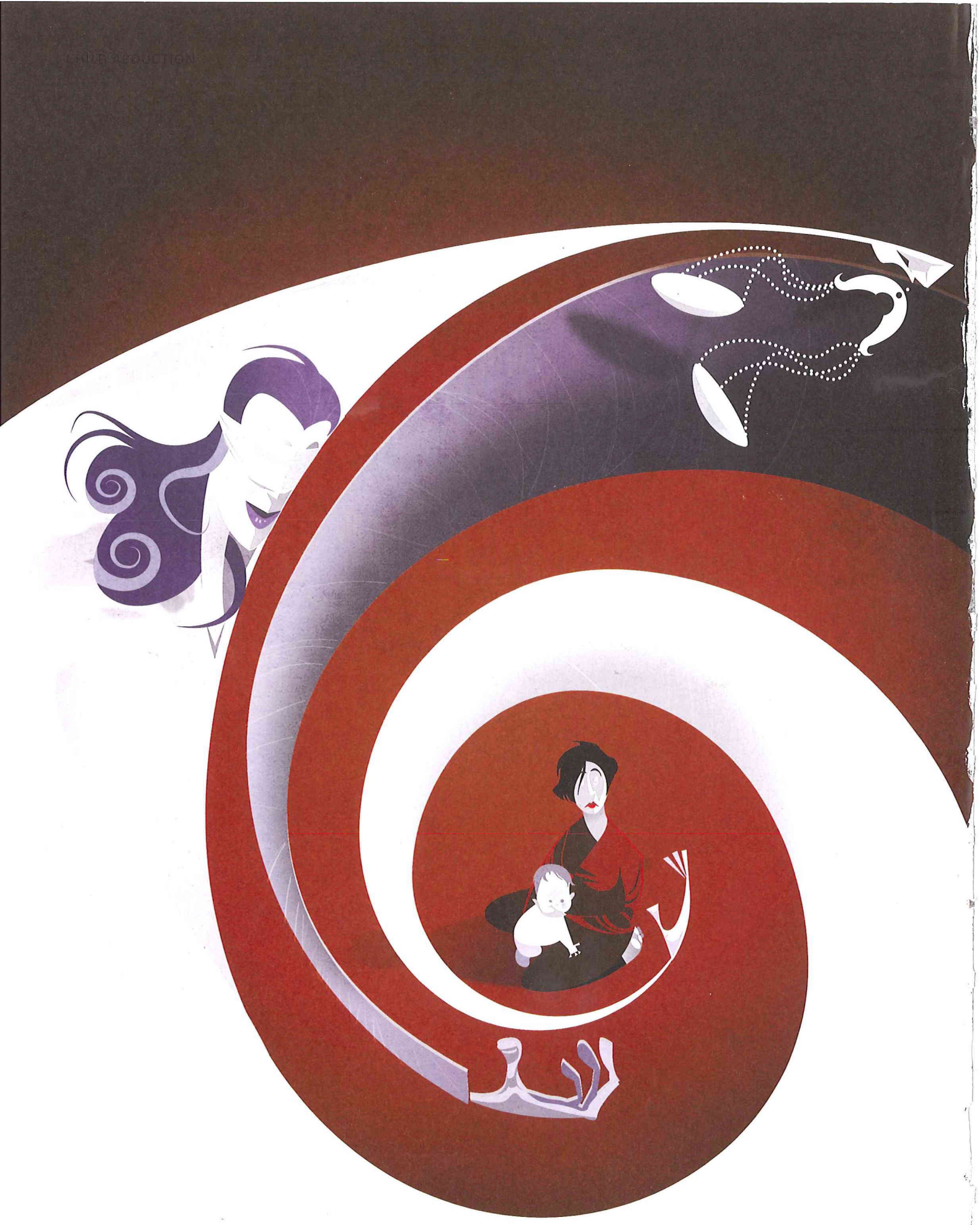

FAMILY COURT SPREADS CLOAK OF PROTECTION

The Family Court has found that grave risk of harm from ongoing family violence is sufficient to preclude the return of abducted children to their country of origin under the Hague Convention.

By Sally Nicholes

A significant new development in Australia's child abduction case law has been made through the matter of *State Central Authority & Papastavrou*[1] (*Papastavrou*). The Family Court's decision provided that the respondent mother in the case, who had moved with her children to Australia from Greece to escape family violence, did not have to return her children to Greece.

It is the first time that an Australian court has made findings in a Hague Convention application that the return country could not protect a victim of domestic violence.

Facts of the case

The respondent mother in this case was an Australian citizen who moved to Greece in 1996 and married a Greek man in 1999. The couple remained living in Greece and had two children together there. The mother alleged that during the marriage the father became increasingly violent towards her, often in the presence of the children. These acts of violence not only caused physical bruising and emotional trauma, but also resulted in the mother developing a medical condition called "positional vertigo" which made her dizzy, nauseous and vulnerable.

The mother eventually asked the father to leave the family after this violence had continued for nearly three years. After several days the father complied with this request, and during the parties' separation the father spent time with the children weekly at a public meeting point. Then late in 2007, the father drove the mother and children to the hospital so that she could have some diagnostic tests done. On the way home, the father began to verbally abuse the mother, and when they reached the family home he seriously abused both the mother and the older child.

When the father eventually left the house, the mother called the Greek police to try to protect herself and her children from the father. However, the police informed the mother that as the father had already left the house, there was little they could do besides talk to the father. The following day the mother visited her GP, who recommended that she should return to Australia as she required the physical and emotional support of her family.

Before leaving Greece, the mother claimed, she informed the father of her intention to take the children to reside in Australia until she recovered her health. She claimed that the father replied that he did not care, or words to that effect. The father, however, denied that he had any prior knowledge of the mother's travel plans. Several weeks after the mother and children arrived in Australia, the father lodged an application with the Greek government for the children to be returned to Greece.

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Relevant law

The Hague Convention on Civil Aspects of International Child Abduction (the Hague Convention) establishes the international law and protocols regarding international child abduction. The Hague Convention is in operation between states that are signatory to it, and there are currently 81 such "contracting states". The *Family Law (Child Abduction Convention) Regulations* 1986 (Cth) (the Regulations) enact the Hague Convention into Australia's domestic law. Hague abduction matters are heard in Australia by the Family Court.

For the purpose of the Hague Convention, "child abduction" takes place where a child is removed from or retained in a country in breach of a parent or body's rights of custody over the child. The Regulations further define "rights of custody" as rights in force under law in Australia or the child's country of habitual residence, including those relating to the care, and particularly the right to determine the place of residence, of the child. The Hague Convention establishes that where a child has been abducted to another contracting state, the parent who is left behind can make an application for the return of the child. On their doing so, the State Central Authority (for example, the commonwealth Attorney-General's Department in Canberra) in the country the children have been taken to must apply to the court in that country for the return of the child. The parties to Hague Convention abduction court cases are therefore the State Central Authority as the applicant and the abducting parent as the respondent. Under the Hague Convention, the court hearing the case must order that the children be returned to their home country (a "return order") unless certain narrow exceptions or defences can be proven. This includes the "grave risk" exception, which requires proof that returning the children would expose them to grave risk of physical or psychological harm or otherwise place them in an intolerable situation. Even where a grave risk exception has been proven by the applicant, the court retains the discretion to nevertheless make a return order.

Before dealing with the parties' arguments in this case, Bennett J set out several principles regarding the grave risk exception, "gleaned" largely from the High Court decision in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services*[2] (*DP & JLM*). These include confirming that the abductor bears the onus of proving on the balance of probabilities that return will pose a grave risk of harm to the children. Bennett J confirmed (at [39]) that this will involve an element of prediction of what will happen when the child is returned, based on the evidence. Moreover, what is required is not certainty of harm, but rather that there is a risk of harm that can be qualitatively described as "grave". Bennett J considered that there may well be a requirement that the abductor must present clear and compelling evidence of this risk, rather than a bare assertion. The disruption, uncertainty and anxiety that will likely occur where children are made to return to their former country are not sufficient to prove a grave risk of harm.

The significance of family violence in establishing a grave risk of harm is a vexed area in Hague Convention case law.

Argument on family violence

In this case, the mother argued that return to Greece would place the children in an intolerable situation on several grounds, relating to both the family violence perpetrated by the father and Greek criminal proceedings issued by the father against the mother in regard to the abduction.

It was first argued that a grave risk of harm was posed to the children by the harmful effects of the direct physical and psychological abuse against the mother and older child, as observed by the younger child, and the likelihood that this would reoccur if the children returned to Greece. Accordingly, Bennett J's first step was to consider which of the contrary accounts of violence submitted by the mother and the father should be accepted. The mother's allegations of extensive family violence were supported by affidavit evidence provided by her mother and sister as witnesses. Counsel for the mother accepted that the mother's medical practitioners could not support the mother's allegations, since their information regarding the violence was provided by the mother herself; however Bennett J did note medical evidence that the mother's condition was consistent with her sustaining blows to the head, and that the evidence provided no alternative explanation for the source of the blow (at [58]). The father's response to the mother's allegations was contained in a single paragraph of an affidavit, in which he stated that he had never exerted violence on the mother or children. This evidence was not able to be tested in cross-examination.[3]

In assessing the evidence, Bennett J considered the affidavits provided by the mother, her sister and her mother to be detailed and compelling (at [58]). Her Honour was satisfied that, on the totality of the evidence, it was more likely than not that the father inflicted family violence on the mother and older child, in the presence of the younger child, in the manner alleged by the mother.

Bennett J also made the significant comment that the fact that the mother had not reported the family violence to the police earlier should not be held to weaken her arguments regarding the risk of harm due to violence. Her Honour found that there are many reasons why victims of family violence may choose not to make a report, including "pressure from a dominant spouse or related persons, a perception of no alternative means of support, a desire not to disrupt care arrangements for the children, illness, fear and even shame and embarrassment" (at [57]).

The mother further used expert medical evidence to argue that her positional vertigo condition would increase her vulnerability to greater injury if she was exposed to further domestic violence. Bennett J accepted that this condition would make the mother more vulnerable to sustaining secondary injury if she was knocked over (at [123]).

Findings on family violence

The significance of family violence in establishing a grave risk of harm is a vexed area in Hague Convention case law. Australian courts have been hesitant to accept the argument, preferring the line of reasoning that a return order requires return to the country of habitual residence, not to any particular person or living arrangement. Therefore the risk posed by family violence can be avoided by the abductor remaining estranged from the perpetrator and obtaining parenting or intervention orders from the courts in the country of habitual residence that will protect the children from future violence.[4] The High Court in *DP & JLM* held that return orders could be formulated with conditions, such as judicial proceedings on return, that would alleviate the risk of harm and allow return orders to be

made, notwithstanding that grave risk may otherwise have been established.[5] In other cases raising concerns regarding the children's welfare on return, the Family Court has nevertheless made return orders on the basis of the concept of international comity – that is, the assumption that the courts and authorities in the country of habitual residence are able to protect the child from risks such as family violence. In *Gsponer v Director General, Department Community Services Victoria*, the Family Court held:

"There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect".[6]

Similarly, in *Murray v Director, Family Services, Australian Capital Territory* (*Murray*), the Court asserted:

"It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts".[7]

This principle was most recently affirmed in the 2004 case of *State Central Authority v LJK*.[8]

Therefore a cogent aspect of the mother's submissions in *Papastavrou* was that her argument regarding the risk of future family violence was reinforced as this risk could not be alleviated by reliance on the Greek authorities. The mother submitted significant expert evidence that the laws and policing regarding family violence in Greece were inadequate and unable to protect the mother and children. Solicitors for the mother submitted evidence from a Greek legal professor and Greek legal practitioner asserting that there is inadequate protection for family violence victims in Greece. Despite there being laws purporting to protect victims of violence, such legislation has not been properly implemented as the culture of the police and their lack of resources make them reluctant to enforce the laws. Further, in reality, cases against family violence can take up to two years to be heard, and there are no refuges for abused women and children (at [87]–[92]). Bennett J found that the State Central Authority left this evidence largely unanswered. Her Honour found that while the mother bore the onus of proof regarding the exception as the respondent, once she had raised evidence supporting her contention, the applicant State Central Authority was required to meet her case with "evidence rather than general propositions or assumption" (at [99], [102]). Accordingly, her Honour held that on the available evidence the mother had established that if a return order was made, the Greek authorities were not equipped or likely to provide adequate protection for the mother and children against family violence (at [106]). These unique and unusual circumstances led Bennett J to distinguish the matter from previous case law such as *Murray;* nevertheless she expressed agreement with the sentiment of such cases by remarking how "unpalatable" it would ordinarily be for a court to "examine and pronounce upon the ability of a foreign court or legal system to protect its citizens" (at [106]).

Argument on incarceration

A final argument raised by the mother, apart from family violence, was that the father had issued criminal charges against her in relation to the child abduction and there was a risk that she would be incarcerated on return to Greece. The mother contended that this posed a grave risk of harm to the children as they would have to reside with the father who had exposed them to physical and psychological harm if the mother was incarcerated. Again, the State Central Authority did not submit any substantial evidence regarding the likelihood of the mother's incarceration or processes involved, and Bennett J did not receive a response to her own queries to Greek specialist liaison judges in family law matters (at [119]). This distinguished the matter from previous cases raising incarceration as a component of the grave risk exception in which the courts had been able to assess probable outcomes and processes of the criminal charges. Accordingly, her Honour accepted the argument that there was a very serious risk of the mother being incarcerated (at [128]).

The outcome

Bennett J reached the decision that, on the evidence, the children would be exposed to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation if they were ordered to return to Greece. Despite this finding, it was still open to Bennett J to exercise her discretion to return the children to Greece. The Hague Convention and the Regulations give no guidance on what matters should be considered when determining whether to exercise such discretion.

In reaching her decision here, Bennett J chose to rely on the list of relevant factors compiled originally by Hale LJ, and referred to most recently in Australia by Kay J in *State Central Authority and DB*.[9] These include the

comparative suitability of the forum to determine the child's future in the substantive proceedings, the likely outcome (in whichever forum) of the substantive proceedings, the consequences of the acquiescence, the situation which would await the absconding parent and the child if compelled to return, the anticipated emotional effect on the child of an immediate return, and the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused (at [135]). After comprehensively considering each of these in turn, Bennett J found that the balance of factors was in support of her not exercising the discretion to make a return order, and consequently the State Central Authority's application for return of the children should be dismissed.

For the mother, this decision opens the door to a new life in Australia – free from fear for herself and her children, and surrounded by the support of her family as she regains health. ●

SALLY NICHOLES is the principal of Nicholes Family Lawyers. She represented the mother in this case.

The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. [2008] FamCA 1120 (22 December 2008).
2. (2001) 206 CLR 401.
3. An interesting aside here is Bennett J's assertion that the State Central Authority's role can be distinguished from that of other model litigants, as their ability to prepare the case is limited by their reliance on the resources of the Greek Central Authority: see [55].
4. See Justice Kay, "The Hague Convention – order or chaos?" (2005) 19 *Australian Family Law Journal* 245 at 264.
5. Note 2 above, at [40].
6. (1989) FLC ¶92-001 at p77,160.
7. (1993) FLC ¶92-416 at p80,259.
8. (2004) FLC 93-200 at [29].
9. [2002] FamCA 804 (24 September 2002) at [33].