

Australia Ratifies The Hague Child Protection Convention 1996 on 29 April 2003.

The Family Law Amendment (Child Protection Convention) Act (Cth) 2002 amends the Family Law Act 1975 ("the Act") by incorporating the 1996 Hague Child Protection Convention¹ ("the Convention"). The amending Act will come into effect on 1 August 2003 and makes significant changes in relation to the appropriate forum for conflicts in children's matters between courts in different countries. These amendments provide rules to determine which courts have jurisdiction in particular circumstances, such rules largely being a codification of highly technical conflict of law rules developed within the common law.

1. Recognition of Parental Rights.

The Convention also guarantees the recognition and enforcement of Australian parental responsibility orders in other Convention countries. For example, under the Convention, an unmarried Australian father's parental responsibility for a child will be recognised in another Convention country even if, under the law of that country, the father would not usually be recognised as having rights and responsibilities in relation to the child. In countries such as New Zealand and the United Kingdom, where a father who is not married to the child's mother has no rights of custody by operation of law, this results in a significant change as the rights of Australian fathers will now be governed by the Act, which provides that each parent of a child has parental responsibility.²

2. Habitual Residence Defines Jurisdiction.

The concept of the child's habitual residence, as opposed to nationality, is central to the issue of jurisdiction. Considerable limitations are placed on the Contracting States' jurisdiction to hear international parental responsibility disputes where the child is not habitually resident in that country. Significantly, when a change in habitual residence follows from a wrongful removal or retention, jurisdiction remains with the former habitual country, with the contracting state into which the child has been wrongfully removed having limited jurisdiction to deal with "urgent" protective measures only. These orders will continue in effect and be entitled to international recognition until the court of the child's habitual residence determines otherwise.

3. Effect of New Convention on Child Abduction Cases.

The Convention may have significant ramifications on the courts ability to determine child abduction applications where the abducting parent is contesting return on the basis of the "grave risk" defence. The late

¹ The full name of the Convention is "The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children".

² Family Law Amendment (Child Protection Convention) Bill 2002: Second Reading 13 March 2002 House of Representatives and Explanatory Memorandum paragraph 91

Doctor Nygh, in his paper presented in July 2001³, predicted that a general ratification of the Convention would "alleviate the problem" created by the Australian High Court's decision in the case JML and DP⁴, where the majority adopted an interventionist approach in its application of the Child Abduction Convention⁵. He said of the High Court's decision in DP that;

"[i]nstead of trusting the institutions and procedures of the country of origin to resolve the custodial issues between the parties, it took the view that the "grave risk" exception requires the court in which return is sought to make the kind of inquiry that will inevitably involve some consideration of the interests of the child, in other words a hearing of the merits of the custody dispute."⁶

In DP and JLM, the High Court took a wider approach of the "grave risk" defence and presumed that return of the child to their place of habitual residence cannot proceed from a premise that it is designed to achieve return for the purpose of the courts in the returning country conducting a hearing into what is best for the child.

The Convention restores Australian Court's past narrow approach of putting their trust in the ability of the courts of the country of origin to resolve disputed allegations and to take the necessary steps to protect the child. This restoration results from the Court having jurisdiction to take measures for protection of a child in cases of urgency only.⁷ As the Convention has been adopted into the Family Law Act, the interpretation of its provisions would have superiority in the event of any conflict with the regulations, pursuant to which the Child Abduction Convention is encapsulated.⁸

This has two effects. Firstly, an inquiry into the best interests of the child will be limited to instances where the court has jurisdiction, due to urgency, to take measures for the protection of the child. Secondly, it can now be presumed that return of the child to its habitual place of residence *is* for the purpose of allowing the courts in the returning country to determine what is in the best interests of the child.

4. Child Protection Orders.

The Convention also provides for the registration and enforcement of child protection orders in other Child Protection Convention countries. Thus, if the Court sought fit to make an order for the protection of the child

³ *Review of the Hague Convention on the Civil Aspects of Child Abduction – March 2001 meeting of the Special Commission* delivered by Peter Nygh at the 25th Anniversary Conference, Justice, Courts & Community: The Continuing challenge, Family Courts of Australia, July 2001 in Sydney.

⁴ (2001) FLC 93-081

⁵ Hague Convention on the Civil Aspects of Child Abduction adopted into Australian Law pursuant to the Family Law (Child Abduction Convention) Regulations 1986.

⁶ Op Cit Nygh at page 4

⁷ Article 7 (3) Child Protection Convention.

⁸ s46(1)(b) Acts Interpretation Act 1901 (Cth)

in cases of urgency, such order could be registered and would be enforceable in the returning country. This could make the defence of "grave risk" harder to satisfy as the protection order has the ability to address the "physical or psychological harm" or "intolerable situation" to which it is alleged the child will be exposed.

5. Member States.

Member States include Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Monaco, Morocco, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, and the UK. It should be noted however, that the Convention might not be binding in other member states until adopted into their respective legislation or regulations. In such cases, the provisions of the Convention may have persuasive value only.

Sally Nicholes

NICHOLAS FAMILY LAWYERS