The Family Law Reform Act and the Hague Convention

by SALLY NICHOLES

More legal remedies may now be available in Australia to parents trying to find children illegally brought here from other countries.

The Convention on the Civil Aspects of International Child Abduction (the Hague Convention) was adopted on 24 October 1980 by unanimous vote of the member states present, including Australia. Approximately 46 countries have become parties to the Hague Convention, which assumes that all issues relating to the child will be determined in the country of habitual residence once the child is returned. The exceptions to the mandatory return of children are very limited and generally stringently interpreted by the courts in favour of the return of the child to the country of habitual residence.[1]

The recent highly publicised Hague Convention matter of *Karides*[2] involved the abduction of two month old Adam Karides from his home in the United States by his mother, Mary Louise Karides, an Australian citizen. Adam was wrongfully removed to New Zealand and then to Australia on or about 29 November 1994.

There were a series of applications made in the Family Court at Melbourne by the State Central Authority and by solicitors for the husband, US citizen James Peter Karides, in an attempt to locate the missing mother and child. Notwithstanding these applications and extensive national publicity sought by solicitors for the husband and the Australian Federal Police, by May 1996 James Karides still had had no contact with his son or wife for eighteen months.

Despite the belief of the Australian Federal Police (subsequently confirmed) that some members of the abducting parent's family or associates may have been aware of Mrs Karides' whereabouts and may have been assisting the abducting parent in remaining in hiding, no obvious penalties existed under the *Family Law Act* 1975 or the *Crimes Act* 1958 (Vic) to have a court deal with this alleged assistance.

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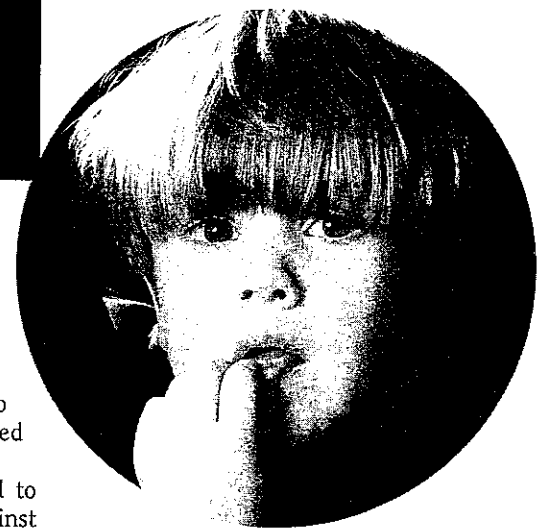
Solicitors for the husband resorted to bringing a contempt application against Adam's maternal grandmother and pleading a provision of the *Family Law Act* 1975 which had not been used before in the context of Hague Convention application matters. This application was supported by the Australian Federal Police on the basis that it might assist the investigation and, more particularly, might induce Mrs Karides to come forward. In fact Mrs Karides delivered herself to the Family Court at Melbourne on the return date of the contempt application brought against her mother.

The *Family Law Reform Act* (the Reform Act) has introduced new provisions into the *Family Law Act*, effective from 11 June 1996, which may affect the way a similar Hague Convention case proceeds in the future. This article deals with two aspects of the Reform Act:

- the introduction of parenting orders and abolition of the terms "custody" and "access"; and
- the introduction of recovery orders.

ABOLITION OF CUSTODY AND ACCESS

The Hague Convention was enacted to secure the prompt and safe return of children who have been wrongfully removed from one Convention country to another. The *Family Law (Child Abduction Convention) Regulations* (the Child Abduction Regulations) gave effect to the Hague Convention in Australia on 1 January 1987 under powers contained in s111B of the *Family Law Act* 1975.



A person seeking recourse to the Hague Convention must satisfy Article 3 which provides that the removal or retention of a child is considered wrongful where:

"(a) it is in breach of custody rights attributable to a person, an institution or another body, either jointly or alone,

under the laws of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

The Reform Act has replaced the notions of custody and access with parenting orders that encourage both parents to have a more active role in the day to day and long term decision-making in relation to their children. A residence order determining where a child resides is separate to a specific issues order which determines who is responsible for the decision-making for a child. This raises the issue of what will constitute custody rights under the Hague Convention.

The amendments to the Child Abduction Regulations have addressed the change in terminology in s111B(4) of the *Family Law Act* 1975 as follows:

"For the purposes of the Convention:

(a) each of the parents of a child should, subject to any order of the Court for the time being in force, be regarded as having custody of the child; and

(b) a person who has a residence order in relation to a child should be regarded as having custody of the child; and

(c) a person who, under a specific issues order, is responsible for the day to day care, welfare and development of a child should be regarded as having custody of the child; and

(d) a person who has a contact order in relation to a child should be regarded as having a right of access to the child."

Sub-section 4(a) is unclear, as it could be read as meaning that any parent may have a custody right. However, the words "subject to any order" could be construed as intending that once a parenting order has been made sub-sec 4(a) may no longer apply. The latter interpretation appears to be consistent with existing case law.

Section 111B(5) states that sub-sec 4 is not intended to be a complete statement of the circumstances in which a person has custody of or access to a child. The latitude offered by sub-sec 5 may prove significant for parents who are subject to parenting orders, and for whom sub-sec 4(a) may not apply.

There is scope to extend the definition of custody provided by sub-sec 4 through existing case law. The Family Court has determined that the rights of custody need to be liberally interpreted. In his reasons for judgment delivered 22 May 1996 in *Karides*, Justice Kay cited (at page 10) the case of *Re B (A Minor) (Abduction)*,[3] where Waite J said: "The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the breakdown of their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord that objective. In most cases that will involve giving the term the widest sense possible."

In the latter part of the 1980s, case law in Australia confirmed the idea that the right of the parent who had "only" access, combined with a right to be consulted and to consent before the child could be removed from the jurisdiction (for example the parent had a guardianship order), constituted a "right of custody" under the Hague Convention.[4]

On the above analysis it is arguable that persons who have a specific issues order giving them responsibility for the long term welfare of the child should have a custody right under the Hague Convention - assuming that the determination of where a child lives is not covered by a specific issues order pertaining to the day to day decision-making for the child.

Current commentary argues that existing guardianship orders can be read as long term decision-making specific issues orders.[5] Prior to 11 June 1996, guardianship orders gave a person the right to be involved in long term decision-making pertaining to matters such as health, education and the *determination of where a child lived*. The concept still exists that if no parenting orders exist then both parents maintain their common law guardianship rights. Section 111B(4) specifically excludes long term decision-making orders from constituting a right of custody under the Hague Convention. It would be advisable for practitioners, when contemplating making parenting orders for parents who may fear an abduction, or who have a partner with international connections or an international passport, to specifically include the ability to choose a child's country of residence in order to secure rights under the Hague Convention.

RECOVERY ORDERS

Prior to the reforms of 11 June 1996, there were restricted penalties associated with abducting a child or assisting an abducting parent. There are no criminal penalties under the variety of state and territory crime legislation associated with parental abduction: parents cannot be charged with kidnapping or related offences. For example, s63 of the *Crimes Act* 1958 (Vic) rules that anyone convicted of child stealing is committing an indictable offence and shall be liable to six years imprisonment. However, there is a proviso that people claiming to have parental rights to the child cannot be prosecuted under this section.

Section 70A of the *Family Law Act* provided powers to implement penalties against those who attempted to remove a child from Australia. There were associated penalties that could be imposed on a person aiding and abetting such a removal. Bryan Walter Wickam was effectively convicted in the County Court under s70A over his role of assisting in removing the children of Jacqueline Gillespie from Australia to Malaysia.

These provisions did not assist in cases like the *Karides* matter where the abduction was to Australia. In *Karides*, a contempt application was brought by the father against the abducting parent's mother and two sections of the contempt legislation were pleaded in the alternative, namely ss112AP and 112AB(1)(b)(ii) of the *Family Law Act*. The s112AP application referred to an alleged breach of an undertaking

made by Mrs Armishaw on 30 June 1995 to use her best endeavours to encourage her daughter to come forward to the Family Court or assist the Federal Police in their investigations. Section 112AB(1)(b)(ii) says that: "A person shall be taken for the purposes of this part to have contravened an order under this Act if, and only if:

(a) where the person is bound by the order, he or she has:
  (i) intentionally failed to comply with the order; or
  (ii) made no reasonable attempt to comply with the order; or
(b) in any other case - he or she 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 the person who is bound by it."

Although s112AB(1)(b)(ii) does not appear to have been pleaded before in a Hague Convention case, the structure of the section appeared to suit the alleged type of behaviour that would be typical of a person aiding or abetting an abducting parent to defeat an order of the Family Court. The order of the Court referred to in that section was the order for the abducting parent to return the child, as well as the order for the warrant of arrest of the abducting parent.

Having to invoke and test pieces of legislation in contexts that may not be their original design is not ideal. It would be far preferable to use an offence that directly confronts the activities of an abductor or person aiding an abductor. New provisions implemented by the Reform Act relating to recovery orders (ss67Q-67Y) may redress the problem facing practitioners where children are abducted to Australia.

The new recovery orders are drafted to require the return of a child; such orders are not predicated on the removal of the child from Australia, but appear to be intended to assist parents or persons with orders seeking the return of their children.

Section 67Q defines a recovery order as "requiring the return of a child to:

(i) a parent of the child; or
(ii) a person who has a residence order or a contact order in relation to the child; or
(iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long term or day to day care, welfare and development."

The Act provides that persons are not to prevent or hinder the taking of action under a recovery order, and penalties are imposed for intentional hindrance and prevention of an action: s67X(3).

Further, the Act allows the Court to make an order under s67X(3) or such other orders as it considers necessary to ensure the person does not again contravene the recovery order. Form 35 is a new form by which practitioners lodge an application against a person for preventing or hindering recovery.

There appears to be no immediate barrier to practitioners using recovery orders and associated provisions in Hague Convention matters. Practitioners faced with evidence of persons assisting an abducting parent, particularly where the parent cannot be found, should turn their mind to implementing these new provisions.

CONCLUSION

Australia's accession to the Hague Convention is an acknowledgment of the damage to children and the infringement of their rights caused by parental abduction. A prompt and secure return of the child to his or her country of habitual residence is of primary importance to Convention countries and to the welfare of the abducted child.

The amendments to the Child Abduction Regulations do not appear to address the exact definition of custodial rights under existing case law. Although the bridging legislation is yet to be tested in court, when drafting parenting orders practitioners should allow for a long term specific issues order which includes the responsibility for determining the country in which a child is to reside to secure their client's recourse to the Hague Convention.

Although the scope and application for recovery orders are untested, their provisions appear to have the potential to assist parents of abducted children and their legal advisers on a strategic and practical level in the Family Court. ■

Notes

The author acted for James Karides in the Hague Convention proceedings, and acknowledges the assistance of Registrar Harold of the Family Court's Melbourne Registry in the preparation of this article. 1. The Hague Convention is administered in the various Convention countries by Central Authorities. In Australia, the Attorney-General is appointed by the Secretary of the Attorney-General's Department as the Commonwealth Central Authority, and has appointed an agency in each state, the State Central Authorities. 2. *Karides and Karides v John Pryde Patterson, Secretary, Department of Health and Community Services, State Central Authority*, final judgment delivered 22 May 1996 by Justice Kay in the Family Court at Melbourne. 3. (1994) 2 FLR 249 at 260. 4. In his paper delivered to the Sixth National Family Law Conference at Adelaide (17-22 October 1994) Justice Kay cited the case of *C v C (minor abduction: rights of custody abroad)* [1980] 2 All ER 465, where an injunction restraining the parties from removing the children from Australia was held to constitute a "right of custody". 5. For further discussion on this point refer to Butterworths *Australian Family Law*, Vol 1: Family Court Legislation, cl2.7 at p1035.