

**RECOGNITION AND ENFORCEMENT OF FOREIGN
CUSTODY ORDERS AND THE
ASSOCIATED PROBLEM OF
INTERNATIONAL PARENTAL KIDNAPPING:
A MODEL FOR SOUTH AFRICA**

by

CAROLINE MARGARET ANNE NICHOLSON

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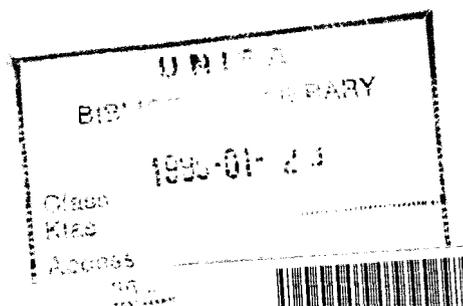
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I dedicate this thesis to Samantha, Robyn and Amy.



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SUMMARY

Within the context of recognition and enforcement of foreign judgments the recognition and enforcement of foreign custody orders is unique. By reason of the fact that custody orders are always modifiable "in the best interests of the child" they cannot be regarded as final orders and are thus not capable of recognition and enforcement on the same basis as final orders.

The failure of courts to afford foreign custody orders recognition and enforcement in the normal course has created the potential for a person deprived of the custody of a child to remove the child from the jurisdiction of a court rendering a custody order to another jurisdiction within which he or she may seek a new, more favourable order. This potential for behaviour in contempt of an existing order has been exploited by numerous parents who feel aggrieved by custody orders. The problem of parental child snatching has escalated to such a degree that the Hague Convention on the Civil Aspects of International Child Abduction was drawn up to introduce uniform measures amongst member states to address this problem. Despite being a meaningful step in the fight against international child abduction the Hague Convention does not fully resolve the problem. For this reason other measures have been suggested to supplement the Convention.

The different approaches taken in South Africa, the United Kingdom, Australia and the United States of America to recognition and enforcement of foreign custody orders and the measures to overcome the problem of international child abduction are examined and a comparative methodology applied to the design of a model approach for South Africa. The object of this model is to permit the South African courts to address the international child abduction problem without falling prey to any of the pitfalls experienced elsewhere in the legal systems examined.

Key terms: Acquiescence; child abduction; contempt; Council of Europe Convention; criminal liability; custody; delict; enforcement; extradition; finality; foreign judgments; full faith and credit; grave risk; Hague Convention; jurisdiction; kidnapping; merger; parental abduction; pre-emption; psychological harm; public policy; recognition; *res judicata*; retention; wrongful removal.

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PREFACE

Recognition and enforcement of foreign custody orders is an aspect of the conflict of laws that is fraught with difficulty. Rules applicable to the recognition and enforcement of other foreign judgments do not find application in relation to custody orders for the simple reason that custody orders are not final.

The difficulties encountered in dealing with foreign custody orders are further exaggerated by the fact that custody is an emotional issue. For this reason a party who has been unsuccessful in a bid to win custody of a child may be tempted to entice the child away from the lawful custodian and to flee with him or her. If custody orders are not enforceable outside of the jurisdiction of the court that awarded them then a disappointed party, desperate for the companionship of the child, may safely abduct the child and approach another court for a more favourable order. This phenomenon is known as child abduction.

Where the person who abducts a child, or who orders the abduction of a child, is a parent of the child this constitutes parental child abduction. Child abduction may take place within the borders of one country or may be of an international nature.

The failure of conflict rules to adequately cater for recognition and enforcement of foreign custody awards has resulted in increased parental child abduction in recent years, prompting the need for a clear and uniform approach to this problem at an international level.

The approaches of South Africa, the United Kingdom (UK), Australia and the United States of America (US) to this phenomenon will be examined in this thesis.

As the US has a number of concepts that are fundamental to its approach to recognition and enforcement of foreign judgments this thesis is prefaced by a short discussion on the meaning of these.¹

- a) **Supremacy clause:** Clause VI of the US Constitution, known as the "supremacy clause" provides, inter alia, that any state law must yield if it interferes with or is contrary to any federal law. The Supremacy clause of the US Constitution is thus the basis for the policy of federal preemption.

- b) **Due process:** Constitutional due process protects the interests of a defendant. It requires that no state shall deprive a person of his life or liberty without due process. A court cannot exercise jurisdiction in circumstances in which it has no connection with the defendant and, in certain circumstances, the cause of action. The reason for this requirement is that the American legal system is premised upon notions of fairness. In addition the due process principles require that all interested parties to a case be given reasonable notice of the hearing and an opportunity to be heard.

- c) **Full faith and credit:** This clause of the US Constitution allows for the extraterritorial effect of, inter alia, the judicial proceedings of another state. It requires that these proceedings be given the same effect in the enforcing state as they are given in the state in which they took place.

- d) **Merger:** Merger means the merging of the plaintiff's cause of action and the judgment. This means that the plaintiff cannot initiate proceedings on the same claim a second time between the same parties. The defendant may raise the first action and judgment as a bar to a second action. This is also known as "claim preclusion". "Collateral estoppel" means that the *res judicata* effect of a first

¹ Full explanations can be found in any leading text on American law such as Scoles EF and Hay P *Conflict of Laws* 2nd ed West Publishing Co, St Paul Minnesota (1992). (Scoles and Hay).

judgment extends also to the same issues being raised in a new action between different parties if the precluded party had a reasonable opportunity to be heard in the first action. This is also known as "issue preclusion".

- e) Long-arm jurisdiction: Long-arm jurisdiction exists in circumstances where a foreign defendant is subjected to the jurisdiction of a state of the US without having been served with process within the state. Most cases of long-arm jurisdiction are regulated by statutory provisions.

CHAPTER ONE

INTRODUCTION

An increase in international parental kidnapping in recent years has occasioned considerable interest in this phenomenon. South Africa appears to be a popular destination for parents fleeing with their offspring from the jurisdiction of one or other court.¹ Perhaps this popularity stems from the absence of a coherent body of rules to address the situation that allows a parent, who is in contempt of an existing custody order, to bring a fresh custody action here unprejudiced by his or her previous actions. This situation is clearly unsatisfactory in that it encourages malcontents to disregard court orders and to take the law into their own hands. Ultimately the victim of this type of behaviour is the child whom the court has sworn to protect.

The perception of South Africa as a safe haven for parental abductors is expected to change as a result to South Africa's accession to the Hague Convention on the Civil Aspects of International Kidnapping (the Hague Convention) which came into effect on 1 October 1997.² Unfortunately the Hague Convention is not the "cure-all" that it was initially hoped and expected to be.

This doctoral thesis will closely examine the South African approach to the recognition and enforcement of foreign custody orders and the associated problem of international and interstate parental child kidnapping. Deficiencies in this approach will be identified and a new approach will be proposed to meet modern South African legal needs. Until very recently South African jurists had more or less ignored recognition and

1 See, for example, Cresswell R and Holdsworth V "Love-swap Couple Flee with Kids to SA" and "Drama as Couple Find Abducted Children" 1993 April 18 *Sunday Times* 3; Stagg C "No Sign in SA of Missing Father and Son" 1993 July 18 *Sunday Times* 7; Ismail A "Aussie Mother in Plea for her Son" 1993 August 1 *Sunday Times* 10; Harris S "Law No Answer to Child Theft" 1986 August 3 *Sunday Times* 14; Smith L "Tug-of-Love Dad Arrives for Court Battle" 1996 August 29 *The Star* 3; Staff Reporter "British Girl May Have Been Brought to SA After a Shopping Spree with Mother" 1996 August 22 *The Star* 3; *Märtens v Märtens* 1991 4 SA 287 T.

2 Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

enforcement of foreign custody orders and the associated problem of international parental kidnapping. For this reason the topic lends itself to comparative methodology. South Africa's accession to the Hague Convention³ is a recent development and no adequate policy has yet been formulated to deal with its shortcomings. Thus a comparative examination of foreign legal systems that have implemented the Hague Convention may be of great value to the South African jurist in developing a holistic approach to the recognition and enforcement of foreign custody orders, the problem of international kidnapping, and the implementation of the Hague Convention.

The development of the different approaches formulated in Australia, the United Kingdom (UK)⁴ and the United States of America (US) will be examined. These systems have been chosen for comparative examination on the basis that similar circumstances often require similar solutions. Because these countries share an English common law heritage with South Africa, and because they also share the potential for generating internal conflicts, a study of these systems should constitute a suitable backdrop for the design of an appropriate model to address the South African situation while advancing the coherent development of the field of conflict of laws. Conventions fulfil an important role in harmonising aspects of the law, but jurists have a responsibility to contribute to the process of harmonisation by taking cognisance of the manner in which particular problems have been resolved by other legal systems. Complete harmony is an unrealistic ideal because of the lack of consensus between legal systems as regards legal categories and concepts. Despite the reality of diverse legal rules which confront a jurist who employs a comparative methodology, increased harmonisation remains both possible and desirable.⁵

3 *Ibid.*

4 The discussion of the UK will be devoted almost entirely to the situation in England save where otherwise indicated.

5 David R and Brierley JEC *Major Legal Systems in the World Today* 3rd ed Stevens and Sons, London (1985) 10-11 (David and Brierley). On the desirability of a uniform approach see Von Mehren AT "The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments" 1995 23 *Rabel Z* 86-92 (Von Mehren 1995 *Rabel Z*).

Each of the countries whose legal systems will be examined in this thesis is plurilegal and has formulated a unique approach to the resolution of internal conflicts which is structured to meet the needs of the regional composition and legal system applicable to each of them. For purposes of this thesis plurilegal systems may fall into one of three main categories. These categories are:

- Federal systems under a written constitution. Australia and the US are examples of such systems;
- Politically united countries, each with an independent legal system. The UK is an example of such a system; and
- A single unified country within which personal legal systems co-exist. Within such systems the personal attributes of a legal subject may dictate the application of a body of rules to that subject despite the fact that the same body of rules does not apply to all legal subjects within the country. The South African legal system, with the presence of customary law which is only applicable to certain sections of the population, falls into this category.

A legal system that falls into the third category is also capable of falling into either of the other two categories. The principal difference between the first two categories lies in the fact that in the case of federal legal systems under a written constitution the division of authority between state and federal jurisdiction is, in principle, vertical, whilst all the units of a group within a politically united country generally are vested with equal or parallel authority. As with all general statements, this is of course subject to exceptions.

An examination of the unique approach taken in each system to the resolution of internal (domestic) conflicts relating to interstate custody orders and interstate parental child abduction may prove valuable in resolving problems of the same nature in South Africa.

Because of the extent of the custody problem this discussion will be limited to an

examination of the problems associated with recognition and enforcement of custody orders in respect of children born of a marriage, made pursuant to dissolution of marriage by divorce. The position regarding extra-marital children is a study on its own and is fraught with complex issues that will require attention in the future. Occasional reference may be made to temporary custody orders, third party custody orders and access or visitation rights, but these will not be discussed in detail and will receive mention only in so far as they impact upon the main thrust of the research.

In an attempt to minimise the discontent that leads parents to relitigate custody matters all of the legal systems included in this thesis have recently reassessed the basis upon which custody orders are made. In addition they have acceded to conventions and considered treaties with the stated objective of making parental kidnapping an unattractive option to a parent who has been deprived of custody.

International trends regarding the award of custody upon divorce have changed. The Roman law view of the child as a possession of his or her parents has given way to the recognition of a child as an individual with rights and needs.⁶ A direct result of the increased awareness of the child as an individual has been a shift in the attitudes of the courts which have become increasingly child-focused and concentrate on the best

6 Moloney L "Beyond Custody and Access: A Children's Rights Approach to Post Separation Parenting" 1994 8 *AJFL* 249 (Moloney); Hodgson D "International Legal Recognition and Protection of the Family" 1994 8 *AJFL* 219 (Hodgson); Parry RS, Broder EA, Schmitt AG, Saunders EB and Hood E *Custody Disputes Evaluation and Intervention* Lexington Books, Toronto (1986) (Parry *et al*); Elster J *Solomonic Judgments: Studies in the Limitations of Rationality* Cambridge University Press, Cambridge (1940) (Elster); Maccoby EE and Mnookin RH *Dividing the Child: Social and Legal Dilemmas of Custody* Harvard University Press, Cambridge (1992) (Maccoby and Mnookin); Committee on Professional Practice and Standards, a Committee of the Board of Professional Affairs with input from the Committee on Children, Youth, and Families adopted by the Council of Representatives of the American Psychological Association February 1994 "Guidelines for Child Custody Evaluations in Divorce Proceedings" 1995 29 *FLQ* 52; Clark BK "Acting in the Best Interests of the Child: Essential Components of a Child Custody Evaluation" 1995 29 *FLQ* 19 (Clark BK *FLQ*); Montgomery J "Children as Property?" 1988 51 *MLR* 323 (Montgomery); Jones A "In the Best Interests of the Child - Who Says?" 1988 *JCL* 88 (Jones "Best Interests"); Carbone J "Child Custody and the Best Interests of Children - A Review of From Father's Property to Children's Rights: The History of Child Custody in the United States" 1995 29 *FLQ* 721 (Carbone); Palmer A "The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985-1995" 1996 *Acta Juridica* 98 (Palmer).

interests of the child. Formula-driven approaches to custody determinations which first presumed the father and, later, the mother to be preferable custodians have fallen by the wayside in all of the legal systems included in this thesis. The active involvement of both parents in the upbringing of the modern child constitutes valid justification for each parent's assertion that he or she is equally suitable to act as the custodian. The responsibility that rests upon the court to assess the child's relationship with each parent and to determine who will best meet the future needs of the child is enormous. Parental kidnapping is often a result of a perception on the part of a non-custodial parent that a custody order was unfair or failed to take into account the emotional and psychological needs of the child. The legal rules should therefore be designed to dispel the image of the non-custodial parent as a loser and instead to reinforce the need for both parents to maintain meaningful relationships with the child. To this end custody laws should reflect a policy allowing the non-custodial parent the maximum access to the child that is consistent with the child's physical and emotional stability and well-being.

"The best interests of the child" is an almost universally accepted criterion in child custody determinations. This criterion clearly reflects the shift in emphasis from the rights of parents to those of children. Whatever considerations the court takes into account in making a custody determination the ultimate outcome must accord with what is in the child's best interests. In establishing the best interests of the child the courts have traditionally emphasised external factors and have overlooked the psychological aspects of the enquiry. The courts are now moving away from this approach. For example, the US has moved away from the traditional approaches and suggestions have been made that alternative tests, such as the "least detrimental available alternative for safeguarding the child's growth and development" may be more appropriate to the equitable determination of custody.⁷ This wording recognises that

7 Goldstein J, Freud A and Solnit A *Beyond the Best Interests of the Child* Free Press, New York (1973) ch 4 (Goldstein *et al*); Goldstein J *The Best Interests of the Child: The Least Detrimental Alternative* Maxwell Macmillan International, New York (1996) (Goldstein); Bordow S "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" 1994 8 *AJFL* 252 (Bordow); Bates F "New Trends and Expert Evidence in Child Custody Cases: Some New Developments and Further Thoughts from Australia" 1979 *CILSA* 65 (Bates); Mercer KL "The

child placements are inherently detrimental and that while some alternatives may be better than others none is good. Ultimately the application of this alternative test will also result in doing what is in the best interests of the child, but the parenting skills of each parent will be evaluated to determine which parent offers the greatest emotional and psychological support to the child. This approach thus attempts to cater for both the physical and emotional best interests of the child. The interdisciplinary nature of modern custody determinations which may involve a number of independent professionals has evolved from the desire to meet the child's needs as far as possible. The UK has gone further than South Africa, Australia and the US in its drive to focus the court's attention on the child's needs rather than those of the parent. It has replaced the concept of custody with that of parental responsibilities and has replaced custody orders with residence, contact, prohibited steps and specific issues orders.⁸ This approach is no exception to the principle that the welfare of the child is the paramount consideration in determining custody.

Competition between courts in matters involving custody issues should also be eliminated to prevent the constant shifting of children from one jurisdiction to another. The elimination of such competition would ensure that custody determinations are made by the court in the best position to assess the child's needs. Moves are afoot internationally to attain this objective and by so doing to enhance the stability of the child's home environment whilst reducing the incidence of parental abduction and relitigation. Legislative provisions on an interstate level, and treaties and conventions at an international level, will facilitate the enforcement of custody decrees outside the

Ethics of Judicial Decision-making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and "Primary Caretaker" Standards as Utility Rules" 1997 33 *Idaho LR* 389 esp 401ff (Mercer); Fitzgibbon LM "*Campbell v Campbell*: Requiring Adherence to the Correct Legal Standard in Child Custody Proceedings - The "Best Interests of the Child"" 1993 45 *Maine LR* 471 (Fitzgibbon); Beaudoin R "Towards a More Positive and Prospective Approach to Determining the Best Interests of Children" 1993 8 *Maine Bar Jour* 110 (Beaudoin); Redwine J "*In Re A.R.B.*: Towards a Redefinition of the Best Interests Standard in Georgia Child Custody Cases" 1995 11 *Georgia State Uni LR* 711 (Redwine); Wall JC and Amadio C "An Integrated Approach to Child Custody Evaluation: Utilizing the "Best Interests" of the Child and Family Systems Frameworks" 1994 21 *Journal of Divorce and Remarriage* 39 (Wall and Amadio).

8 Children Act 1989 s3(1) & 8. See Ch 5 *infra*. The term custody will be used for parental responsibility and section 8 orders will be regarded as custody orders for purposes of this thesis.

jurisdiction of the rendering court and enhance a degree of uniformity in the approach to such judgments.

The time is ripe for the South African legal system to re-evaluate its position on custody.⁹ The country consists of nine new provinces and internal conflicts may increase in frequency as a direct result of changes in the constitutional structure. In addition, South Africa is no longer on the fringes of international interaction, hence the conflict of laws in international perspective will, in all probability, also increase. Countries such as the US have shown the way for the development of South African law in this field and the opportunity must be seized to improve our legal system by harmonising it with related systems and supporting international trends which discourage those who disregard court orders.

OUTLINE

In outline the structure of this thesis proceeds as follows:

The introductory chapter one will be followed by a brief discussion in chapter two of the

9 See Clark B "Custody: The Best Interests of the Child" 1992 109 *SALJ* 391 (Clark 1992 *SALJ*); Clark B "Joint Custody: Perspectives and Permutations" 1995 112 *SALJ* 315 (Clark 1995 *SALJ*); Lambiase EEA and Cumes JW "Do Lawyers and Psychologists have Different Perspectives on the Criteria for the Award of Custody of a Child?" 1987 104 *SALJ* 704 (Lambiase and Cumes); Heaton J "Some General Remarks on the Concept 'Best Interests of the Child'" 1990 53 *THRHR* 95 (Heaton); Robinson JA "Divorce Settlements, Package Deals and the Best Interests of the Child: *van Vuuren v van Vuuren* 1993 1 SA 163 (T)" 1993 56 *THRHR* 495 (Robinson "Package Deals"); Robinson JA "Die Beste Belang van die Kind by Egskeiding: Enkele Gedagtes na Aanleiding van *McCall v McCall* 1994 3 SA 201 (K)" 1995 58 *THRHR* 472 (Robinson "Beste Belang van die Kind"); Palmer *supra* n 6 99ff; Singh D "*Kougianos v Kougianos* on Appeal" 1996 113 *SALJ* 701 (Singh). The factors that will be examined by a South African court in determining which parent is best suited to advance and promote the physical, moral, emotional and psychological needs of the child were set out in *McCall v McCall* 1994 3 SA 201 C 204J. An important aspect of child custody determinations in South Africa is the role of race as a determinative factor in custody determinations. In terms of the South African Constitution it is unconstitutional to discriminate against any person on the basis of, inter alia, race. See, Nöthling-Slabbert M "Child Custody and Race in the Light of the New South African Constitution: a Comparative Approach" 1995 28 *CILSA* 363 (Nöthling-Slabbert). The role of race in making US custody determinations was examined by Cox: Cox JA "Judicial Enforcement of Moral Imperatives: Is the Best Interests of the Child Being Sacrificed to Maintain Societal Homogeneity?" 1994 59 *Missouri LR* 775 (Cox "Best Interests of the Child") 776-785.

theory underlying the need for recognition and enforcement of foreign judgments, the traditional English common law approach to recognition in South African law, and the reasons why this approach does not govern child custody orders.

Chapter three will contain a detailed discussion of the Hague Convention and the European Convention on the Recognition and Enforcement of Decisions concerning the Custody of Children (Council of Europe Convention). The purpose of this chapter is to establish the provisions of the conventions and the scope of their applicability. South Africa, Australia, the UK and the US have all acceded to the Hague Convention and the UK to the Council of Europe Convention. This chapter is therefore an essential backdrop to the examination of these systems.

Chapter four will explore the South African position as regards the recognition and enforcement of foreign custody orders and will include an examination of the current South African position regarding international parental kidnapping. The need for legislative intervention to regulate what has become a vital aspect of South African international relations will be highlighted. The advent of modern technology has facilitated the kidnapping of children by their parents and the immediacy of the problem facing South Africa on her re-entry into the mainstream of international life will become apparent. Accession of South Africa to the Hague Convention will be discussed, as will the fact that this Convention does not offer a total solution to the problem.

Chapters five, six and seven will examine the legal position in Australia, the UK, especially England, and the US relating to recognition and enforcement of foreign custody orders respectively. Although the issue of recognition and enforcement of custody orders and the problem of international parental child abduction will be placed within a brief historical context the main focus of the discussion will be upon the position within these legal systems after accession to the Hague Convention. These chapters will of necessity be of a highly descriptive nature as their purpose is to lay the foundation for chapter eight in which the contents of chapters three to seven will be analysed and applied to the development of a model for South Africa. The model for

South Africa will then be set out in the ninth and final chapter.

In developing a South African model the needs of the South African system will be exposed and the value of aspects of the foreign approaches in addressing these needs elsewhere will be evaluated. Two models will then be proposed. The first of these models will deal with internal conflict of laws within this area and the second with problems of an international nature. This latter model will take cognisance of South Africa's position on the Southern African subcontinent as well as her position as a member of the wider international community. It is hoped that by making use of a comparative methodology viable models may be developed which will avoid the pitfalls experienced in the other legal systems examined.

CHAPTER TWO

THE TRADITIONAL APPROACH TO RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ITS INAPPLICABILITY TO CUSTODY ORDERS

1 INTRODUCTION

South Africa, the United Kingdom (UK), Australia and the United States of America (US) all adhere to the doctrine of territorial sovereignty. The principle underlying this doctrine is that a state has exclusive jurisdiction over its territory or population. A consequence of adherence to this doctrine is that judgments made within one area of territorial sovereignty are without direct effect in another.¹ For purposes of this investigation a judgment is a civil judgment based upon civil litigation between a plaintiff and defendant, in the traditional sense, issued by a competent court outside of the sovereign state under discussion.

A successful plaintiff may wish to enforce a judgment of the courts of one jurisdiction within the jurisdiction of another. This is often the case where a money judgment has been awarded but the defendant has insufficient assets within the jurisdictional area of the rendering court to settle the judgment. The rules of recognition and enforcement of foreign judgments were designed to grant relief for such a plaintiff by regulating the

1 Silberberg H *The Recognition and Enforcement of Foreign Judgments in South Africa* IFCOL Unisa, Pretoria (1977) 1 (Silberberg); Brownlie I *Principles of Public International Law* 2nd ed Clarendon Press, Oxford (1973) 280 (Brownlie); Forsyth CF *Private International Law* 3rd ed Juta, Cape Town (1996) 361 (Forsyth); McClean D *Morris Conflict of Laws* 4th ed Sweet & Maxwell Ltd, London (1993) 104 (Morris); Collins L (gen ed) *Dicey and Morris on the Conflict of Laws* 12th ed Sweet & Maxwell, London (1993) and 1994 Supplement 453-456 (Dicey and Morris); North PM and Fawcett JJ *Cheshire & North's Private International Law* 12th ed Butterworths, London (1992) 346 (Cheshire and North); *Russell v Smyth* (1842) 9 M & W 810; *Godard v Gray* (1870) LR 6 QB 139 per Blackburn J 149-150; *Adams v Cape Industries plc* [1990] Ch 433 552-553; *Owens Bank Ltd v Bracco* [1991] 4 All ER 833 844, [1992] 2 WLR 127 139-140 (CA); Platto C and Horton WG *Enforcement of Foreign Judgments Worldwide* 2nd ed Graham & Trotman and International Bar Association, London, Dordrecht and Boston (1993) 123ff (Platto); Scoles EF and Hay P *Conflict of Laws* 2nd ed West Publishing Co, St Paul Minnesota (1992) 959 (Scoles and Hay).

circumstances under which it is necessary for the courts of one country to give effect to the judgments of the courts of another country. These rules, which form part of the national law of a country, are supplemented by international obligations to recognise and enforce foreign judgments, assumed in terms of various treaties and conventions.²

Unlike Europe, the US traditionally refused to regulate recognition and enforcement of foreign judgments by means of treaties.³ Instead it relied upon the common law and judicial development.⁴ After World War II America modified its attitude to treaties and joined the Hague Conference on Private International Law in 1960. The US has since ratified a number of Hague Conventions, most notably the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.⁵ When dealing with treaties, however it should be borne in mind that in the absence of something along the lines of the American supremacy clause of the US Constitution, treaties have no domestic effect outside of that conferred by the implementing legislation.⁶

In addition to treaty provisions the US, with its manifest aversion to repetitive re-litigation of claims and issues, has a well developed preclusion policy. This policy protects the reasonable and legitimate expectations of parties consequent to previous litigation, and ensures that the court system is not overburdened by endless re-litigation

2 See further *infra*.

3 Von Mehren AT "Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention be Useful?" 1993 57 *Rabels Z* 449 451 (Von Mehren 1993 *Rabel Z*); Pfund PH "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners" 1990 24 *FLQ* 35 35-36 (Pfund).

4 See Von Mehren 1993 *Rabel Z* *ibid* for a brief discussion of the advantages and disadvantages of treaty participation.

5 21-3 UST 2517 (1970); TIAS No 6997.

6 McClean D "The Hague Child Abduction Convention - The Common Law Response" 1993 40 *Neth Int'l LR* 67 (McClean).

of disputes.⁷

The rules of recognition and enforcement are not internationally uniform but, despite this, the traditional English common law approach to recognition and enforcement of foreign judgments in South Africa, the UK, Australia and the US is remarkably similar. Unfortunately, for reasons which will become apparent, these rules are not applicable in cases where the courts of these countries are faced with foreign custody orders. The upsurge in international parental kidnapping is directly attributable, inter alia, to this failure of the traditional approach to regulate such orders.

2 THE JURISPRUDENTIAL BASIS FOR RECOGNITION AND ENFORCEMENT

The objective of this thesis is to conduct a comparative analysis of the modern legal provisions pertaining to the recognition and enforcement of foreign custody orders. For this reason a detailed discussion of the historical and theoretical bases of recognition and enforcement in South Africa is not attempted. A brief discussion of these is, however, important. The theoretical underpinnings are similar to those which underlie the application of foreign law in general.⁸

The three leading theories advanced to answer the question why foreign judgments are recognised and enforced in South Africa under certain circumstances are the comity theory, the acquired rights theory and the theory of reciprocity.

7 The preclusion policy is clearly reflected in *Baldwin v Iowa State Traveling Men's Association* 283 US 522 525, 51 S Ct 517, 75 L Ed 1244 (1931) in which case the US Supreme Court stated that "one trial of an issue is enough".

8 Forsyth *supra* n 1 362. For a discussion of the Roman-Dutch law in this regard see Spiro E "The Incidence of Jurisdiction in the Recognition and Enforcement of Foreign Judgments" 1978 *Acta Juridica* 59ff (Spiro "Incidence of jurisdiction"). This article also contains a review of the theoretical basis of recognition and enforcement.

2.1 The comity theory

The comity theory, or the doctrine of comity as it is better known, was widely accepted in the nineteenth century and was extensively relied upon by the courts of England and the US despite uncertainty regarding its meaning.⁹ South African courts too have used the theory that judgments are recognised *ex comitate* and not *ex necessitate*.¹⁰ The comity theory requires the court to determine whether it is just and equitable to award execution on a judgment and then to act in accordance with that determination.¹¹

This theory lacks explanatory value and leads to the unacceptable reciprocity rule as a prerequisite to recognition and enforcement. Reciprocity was required as a concomitant of comity in the early South African case law¹² but not in later cases.¹³

A further criticism of the comity doctrine is that it prevents an accurate determination of available defences. Despite these criticisms however, the South African courts apply the comity principles of equity and equality in deciding whether or not to recognise and enforce a foreign judgment. The US Supreme Court indicated, in *Hilton v Guyot*,¹⁴ that in view of the fact that the full faith and credit clause of the US Constitution does not

9 For Voet comity was nothing more than commercial convenience. Huber regarded it as an international duty. The fact that comity is capable of more than one meaning was acknowledged by Silberberg *supra* n 1 30-31.

10 *Acutt Blaine & Co v Colonial Marine Assurance Co* (1882) 1 SC 402, per De Villiers CJ; *Bank of Africa v Hare* (1885) 3 HCG 286; *Edwards v Goldberg* (1902) 23 NLR 345; *Von Brockdorff & Schuster v Burger* (1904) 9 HCG 341, per Laurence JP; *Michaelson v Wobbe* (1907) 24 SC 724; *Duarte v Lissack* 1973 3 SA 615 D, per Shearer J.

11 Silberberg *supra* n 1 2.

12 E.g. *Bank of Africa v Hare* (1885) 3 HCG 286.

13 *Duarte v Lissack* 1973 3 SA 615 D; *Lissack v Duarte* 1974 4 SA 560 N. See too Silberberg *supra* n 1 2&n4. On reciprocity see Renton AW "Reciprocity as to Foreign Judgments" 1933 50 SALJ 157 (Renton).

14 159 US 113, 16 S Ct 139, 40 L Ed 95 (1895). See Blynn EL "In Re: International Child Abduction v Best Interests of the Child: Comity Should Control" 1986/87 18 *Uni Miami Inter-American LR* 353 357-358 (Blynn).

apply to foreign country judgments such judgments were only entitled to recognition on the basis of comity.¹⁵ As will appear from the further discussion a substantial number of states have now departed from this approach.

2.2 The acquired rights theory

The comity theory has lost ground to the acquired rights theory which is premised upon the view that a judgment confers a vested right upon the successful litigant and that this vested right is independent of the original judgment upon which the action was based.¹⁶ A compelling criticism of this theory is however that it presupposes the existence of a right, the acquisition of which is in question.¹⁷ The theory has also been regarded as inappropriate in certain cases, such as those relating to matters of status, where there is no enforceable obligation.¹⁸ The effect of the application of this theory as it has developed in South Africa would be to deprive the plaintiff of the right to pursue his or her original claim before the South African court, no matter how meritorious the original claim may be.¹⁹ Although circumstances could be envisaged where pursuit of the original claim might be advisable there are no recorded South African cases of foreign plaintiffs instituting action on the original cause and, for this reason, some leading

15 For a note on this, see Morgenstern BR "The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification" 1985 10 *NCJ Int'l L & Com Reg* 463 465; Katz SN *Child Snatching the Legal Response to the Abduction of Children* American Bar Association Press, Washington (1981) 5-7, 68-71 (Katz).

16 See Silberberg *supra* n 1 3; Wolff M *Private International Law* 2nd ed Clarendon Press, Oxford (1950) (Wolff); Hahlo HR & Kahn E *The South African Law of Husband and Wife* with an appendix by Kahn E on *Jurisdiction and the Conflict of Laws* 4th ed Juta & Co, Cape Town (1972) 644-645 (Kahn in Hahlo); *Joosab v Tayob* 1910 TPD 486 488-489; *Greathead v Greathead* 1946 TPD 404 406; *Resnik v Lekhethoa* 1950 3 SA 263 T; *Commissioner of Taxes (Federation of Rhodesia) v McFarland* 1965 1 SA 470 W 471.

17 Silberberg *supra* n 1 3; Wolff *idem* 251; Kahn in Hahlo *ibid*.

18 Kahn in Hahlo *ibid*.

19 Silberberg *supra* n 1 3-4&n12; Graveson RH *Conflict of Laws* 7th ed Sweet & Maxwell, London (1974) 617-618 (Graveson).

South African jurists regard this procedure as obsolete in South Africa.²⁰ In the Rhodesian case of *Cosmopolitan National Bank of Chicago v Steinberg*²¹ the plaintiff successfully instituted action against the defendant on the original cause of action despite a prior refusal of the Rhodesian court to enforce the foreign judgment in respect thereof because of the foreign court's failure to comply with the requisites of natural justice. There is no South African case authority regarding whether or not an original cause of action is extinguished by a judgment. Spiro is of the opinion that action cannot be instituted on the original cause of action after a foreign judgment has been granted. He does however concede that on the basis of the court's decision in *Commissioner of Taxes (Federation of Rhodesia) v McFarland*²² such an action is feasible.²³ Silberberg opines that in certain circumstances the South African courts would entertain an action based upon the original claim as to do otherwise would be to deny a *peregrinus* access to the South African courts to establish a valid claim.²⁴ In England a judgment extinguishes the original cause of action.²⁵ In Australia a person wishing to enforce a foreign judgment may rely on the foreign judgment, institute action on the original cause of action or do both.²⁶ The foreign judgment does not estop the plaintiff from relying upon the original cause of action but it does estop the defendant to such an action from raising a defence which was or could have been raised before the foreign court.²⁷

20 Silberberg *idem* 4; Graveson *idem* 617-618. For an example of circumstances under which institution of an action on the original cause may be advisable see *Lissack v Duarte* 1974 4 SA 560 N.

21 1973 4 SA 579 R.

22 1965 1 SA 470 W.

23 Spiro E *Conflict of Laws* Juta, Cape Town (1973) 255-256 (*Spiro Conflicts*).

24 Silberberg *supra* n 1 4&n17.

25 Civil Jurisdiction and Judgments Act 1982 s34. This section does not apply in Scotland.

26 Nygh P *Conflict of Laws in Australia* 6th ed Butterworths, Sydney (1995) 148 (*Nygh Conflicts*); Platto *supra* n 1 21.

27 See in this regard *Godard v Gray* (1870) LR 6 QB 139 and *Delfino v Trevis (No 2)* [1963] NSWLR 194; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 (HL); *DSV Silo und Verwaltungsgesellschaft mb H v Owners of Sennar (No 2)* [1985] 1 WLR 490, (CA). See too Sykes EI and Pryles MC *Australian Private International Law* 3rd ed 1991 The Law Book

Some courts in the US have approached the problem of enforcement of foreign country judgments on the basis that the foreign judgment creates an obligation which may be enforced everywhere.²⁸ The notion of obligation accords with the principle that something that has been finally determined binds the parties. The extent to which foreign country judgments should be preclusive is however uncertain. Story took the view that a successful defendant could plead the foreign court's determination in bar to any subsequent action by the original plaintiff in the US.²⁹ He also stated that the successful plaintiff's claim for recovery would be subject to an enquiry into the merits. The Restatement, Second retains this idea despite the fact that the non-merger rule is subject to severe criticism and makes little sense today.³⁰

The acquired rights theory bears some resemblance to the English doctrine of obligation which replaced the comity theory as the basis for recognition and enforcement of foreign judgments, and gained popularity in England from the mid-nineteenth century onwards. In terms of this theory a judgment imposes upon the person against whom it is granted, an obligation to comply with the terms of that judgment. It also simultaneously vests in the other party the right to claim compliance with the judgment through the English courts.³¹

Company, New South Wales (1991) 109 (Sykes and Pryles *Private International Law*); Nygh *Conflicts idem* 149-150.

28 *Johnston v Compagnie Generale Transatlantique* 242 NY 381, 152 NE 121 (1926), 243 NY 541, 154 NE 597 (1926). A contrary view was taken by Smit H "International *Res Judicata* and Collateral Estoppel in the United States" 1962 9 *UCLA Rev* 44 59 (Smit).

29 Story J *Commentaries on the Conflict of Laws* Arno Press, New York (1834) ss500; 508; 591-592; 598 (1834).

30 Restatement of the Law Second Conflict of Laws 2d vol 1 ss1-221 May 1969 American Law Institute Ch 5 S95 comment (c)(1) (Restatement 2d). For a critique of the non-merger rule see Scoles and Hay *supra* n 1 956-957.

31 Collier JG *Conflict of Laws* 2nd ed Cambridge University Press, Cambridge (1994) 112-113 (Collier); Morris *supra* n 1 104; Dicey and Morris *supra* n 1 465; Scott AW *Private International Law: Conflict of Laws* 2nd ed MacDonald & Evans Ltd, Plymouth (1979) 102 (Scott); *Schbisby v Westenholz* (1870) LR 6 QB 155; *Adams v Cape Industries plc* [1990] Ch 433, (CA).

In cases involving money judgments the acquired rights theory and the obligation theory suppose that a judgment creates a new right vested in the judgment creditor, a new obligation upon the judgment debtor, and an implied contract to pay the debt.³² Wolff finds this theory deficient in that it is unable to justify the recognition and enforcement of foreign divorce decrees or other judgments *in rem*.³³

2.3 The reciprocity theory

The reciprocity theory achieved some popularity, but it should be borne in mind that the circumstances under which a court will recognise the jurisdiction of a foreign court over an *incola* will not necessarily coincide with those under which it will exercise jurisdiction over a *peregrinus*.³⁴ The true test for reciprocity is thus substantially equal treatment.³⁵

An assessment of the above mentioned theories reveals that the true reasons for recognition and enforcement of foreign judgments are considerations of practical convenience and the facilitation of international business transactions.

3 RECOGNITION AND ENFORCEMENT DISTINGUISHED

Recognition of a foreign judgment entails that the *forum* recognises that the judgment has the legal effect which it was intended to have within the jurisdiction of the foreign court. Enforcement means that the *forum* will compel compliance with the terms of the

32 Silberberg *supra* n 1 5 citing Graveson *supra* n 19 617-618, which in turn cites, inter alia, *Williams v Jones* (1845) 13 M & W 628 633; Dicey and Morris *supra* n 1 987; Cheshire and North *supra* n 1 346; *Adams v Cape Industries plc* [1990] Ch 433, (CA).

33 Wolff *supra* n 16 251.

34 Silberberg *supra* n 1 8.

35 Silberberg *idem* 5.

judgment. Recognition is a *sine qua non* for enforcement.³⁶ Some judgments simply require recognition and not enforcement.³⁷ It is possible that a *forum* may refuse to enforce a judgment that it recognises.³⁸ Often such a refusal will have the same effect as non-recognition, but the grounds upon which enforcement of a judgment would be refused differ from those upon which recognition would be refused. On the one hand recognition will only be refused in cases where there is an inherent defect in:

- The judgment itself;
- the proceedings from which the judgment flowed; or
- the law that was applied.

Non-enforcement of a judgment, on the other hand, is always a consequence of extraneous circumstances present at the time that enforcement is sought.

4 TRADITIONAL CRITERIA FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

There are four criteria for recognition and enforcement at South African law:

- The foreign court must have international competence;
- the judgment must be final and conclusive;
- recognition and enforcement of the judgment must not be contrary to the public policy of the *forum*; and
- the Minister of Industries, Commerce and Tourism must have given consent in

36 Silberberg *idem* 6; Forsyth *supra* n 1 362-363; Edwards AB Title on *Conflict of Laws* in Joubert WA & Dlamini CMR (eds) 1 (first re-issue) LAWSA Butterworths, Durban (1993) par 476 n 10 (Edwards LAWSA).

37 E.g. declaratory orders establishing title to things, decrees of divorce, judgments dismissing claims, other than ancillary costs orders. See Silberberg *ibid*.

38 Silberberg *idem* 7, 30-31.

terms of the Protection of Businesses Act.³⁹

Patently, the fourth requirement is irrelevant in relation to the recognition and enforcement of foreign custody orders.

International competence is also a requisite for recognition and enforcement of foreign judgments at English law.⁴⁰ Furthermore, recognition and enforcement will not be afforded a foreign judgment by the English courts unless the judgment is final and conclusive even though there may be an appeal pending.⁴¹

The Australian requisites for recognition and enforcement are almost identical to the South African. Australian law requires:

- The foreign court must have international competence in accordance with Australian conflict rules;
- the judgment must be final and conclusive;
- the parties to the judgment must be identical to those in the enforcement proceedings; and

39 99 of 1978. Leon PGS "*Roma Non Locuta Est: The Recognition and Enforcement of Foreign Judgments in South Africa*" 1983 16 *CILSA* 326 (Leon *CILSA*); Edwards *LAWSA supra* n 36 par 477; Forsyth *supra* n 1 402-405; compliance with the Act was recognised as a requirement in *Jones v Krok* 1995 1 SA 677 A 685D.

40 Collier *supra* n 31 113; Morris *supra* n 1 105 107ff; Cheshire and North *supra* n 1 348ff; Jaffey *AJE Introduction to the Conflict of Laws* Butterworths, London (1988) 223-228 (Jaffey); Scott *supra* n 31 104; *Buchanan v Rucker* (1808) 9 East. 192; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 PC. For a discussion of the jurisdictional rules applicable to recognition and enforcement of judgments *in rem* in cases involving immovable or movable property see Dicey and Morris *supra* n 1 495-499.

41 Scott *idem* 110; Dicey and Morris *idem* 468; Morris *idem* 122-123; Cheshire and North *idem* 358-360; Jaffey *idem* 228; *Nouvion v Freeman* (1889) 15 App Cas 1; *Blohn v Desser* [1962] 2 QB 116; *Scott v Pilkington* (1862) 2 B & S 11; *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85, [1966] 1 WLR 1287.

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- if the judgment is a judgment *in personam* it must be for a fixed debt.⁴²

As with the South African requirements the fourth requisite of Australian law is not applicable to custody matters as these are judgments *in rem*.

In principle the requisites listed above are equally applicable to both international and interstate judgments but, in the case of the latter, have been substantially rendered obsolete by legislation. The common law rules relating to recognition and enforcement of foreign-country judgments are supplemented in Australian law by statutory provisions in each jurisdiction where reciprocal arrangements have been made.⁴³ It is interesting to note that the majority of judgments in respect of which enforcement is sought in Australia are judgments *in personam*.⁴⁴

Article four, section 1 of the US Constitution requires each state of the Union to give full faith and credit to the judicial proceedings of every other state. Thus judicial proceedings must be given the same full faith and credit in any state as they would have received by law and usage in the courts of the rendering state.⁴⁵ This clause does not apply to foreign country judgments but it has influenced the US courts' approach to such judgments. Policies favouring conclusive termination of litigation are identical in both the international and interstate settings and the interstate full faith and credit

42 Sykes and Pryles *Private International Law supra* n 27 113-119; Platto *supra* n 1 30-31; Nygh *Conflicts supra* n 26 137. With regard to the requirement of international competence, see *R v McLeod* (1890) 11 LR (NSW) 218 per Windeyer J 221. As to finality see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No2)* [1967] 1 AC 853 (HL).

43 Nygh *Conflicts ibid* 137.

44 *Idem* 138.

45 Scoles and Hay *supra* n 1 953-954; Platto *supra* n 1 123; Brilmayer L and Martin J *Conflict of Laws Cases and Materials* 3rd ed Little Brown and Company, Boston (1990) 703-784 (Brilmayer and Martin).

clause is mirrored in its international counterpart, the act of state doctrine.⁴⁶ For recognition to be afforded a foreign judgment at US law the foreign court must have had jurisdiction. The foreign court's determination of its jurisdiction in a matter will not be *res judicata* when the basis upon which the foreign court accepted jurisdiction does not comply with US standards of due process.

Furthermore, it is generally accepted that recognition will only be afforded final decrees and judgments.⁴⁷ The law of the rendering state or country will be applied to determine finality although, in cases of interstate decrees, there is a presumption that the decree is final unless the contrary is demonstrated.⁴⁸

4.1 International competence

At South African law international competence requires that the foreign court must have had jurisdiction according to the jurisdictional rules of the *lex fori*. Jurisdiction according to the rendering court's domestic rules will not suffice.⁴⁹ The principle of effectiveness implies that a court will not be permitted to exercise jurisdiction over a person in a matter in circumstances where the court has no control over the person or property of the defendant.⁵⁰

46 See in this regard Scoles EF "Interstate and International Distinctions in Conflict of Laws in the United States" 1966 54 *Cal LR* 1599 1607 (Scoles); Casad RC "Issue Preclusion and Foreign Country Judgments: Whose Law?" 1984 70 *Iowa LR* 53 (Casad).

47 Note: "The Finality of Judgments in the Conflict of Laws" 1941 41 *Colum LR* 878 (Note: "Finality of judgments"); Restatement, 2d *supra* n 30 S107.

48 Scoles and Hay *supra* n 1 963-964; *Barber v Barber* 323 US 77, 65 S Ct 137, 89 L Ed 82 (1944).

49 Leon *CILSA supra* n 39 326; Edwards *LAWSA supra* n 36 par 477; *BG Smart v AM Raymond & G Smart* (1903) 24 NLR 347 352; *Borough of Finsbury Permanent Investment Building Society v Vogel* 1910 NLR 402 404; *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 1 SA 13 T 14H-16H; *Moresby-White v Moresby-White* 1972 3 SA 222 R; *Duarte v Lissack* 1973 3 SA 615 D 623; *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 1 SA 1033 T 1037H.

50 Silberberg *supra* n 1 9; *Schlimmer v Executrix in Estate Rising* 1904 TH 108 111-112.

The grounds for international competence are uncertain. Leon argues that a court may only be recognised as internationally competent on the basis of residence or submission.⁵¹ Submission does not generally confer jurisdiction in status related matters. Pollak regards the term "international competence" as encompassing jurisdiction exercised in accordance with the principles regarding jurisdiction of foreign courts which are recognised by South African law.⁵² Clearly international competence must be assessed in relation to the particular cause of action in issue.⁵³

The jurisdiction of the High Courts of South Africa over custody orders flows from the role of these courts as upper guardian of all minor children in the district.⁵⁴ In principle international competence in custody matters is founded upon the domicile of the parties at the time of making the order.⁵⁵ The jurisdiction of the domiciliary court is not however exclusive.⁵⁶ Submission is regarded as a basis to found internal competence in relation to custody matters,⁵⁷ but it is uncertain whether or not it would constitute a basis for international competence, especially bearing in mind that submission is not generally regarded as a sufficient basis for jurisdiction in status-related matters. Likewise, as residence and physical presence generally found internal competence in custody matters, on an application of *Travers v Holley*⁵⁸ these will probably suffice to found

51 Leon *CILSA supra* n 39 326-327. See further Forsyth CF "Submission as a Ground of International Competence and the Finality of Foreign Default Judgments" 1992 109 *SALJ* 1 (Forsyth "Submission").

52 Pistorius D *Pollak on Jurisdiction* 2nd ed Juta, Cape Town (1993) 160-162 (Pollak).

53 Silberberg *supra* n 1 9; Edwards *LAWSA supra* n 3 par 477.

54 Spiro E "Variation and Enforcement of Custody Orders" 1957 *Butterworths SA LR* 56 (Spiro *Butterworths*).

55 Kahn in Hahlo *supra* n 16 59; Edwards *LAWSA supra* n 36 par 482; Forsyth *supra* n 1 391.

56 *Hubert v Hubert* 1960 3 SA 181 W 183G-184C; Forsyth *ibid*.

57 *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 W 543F.

58 [1953] P 246 (CA), [1953] 2 All ER 794. In this case the English courts held that a foreign court would be regarded as having jurisdiction to grant a divorce on a jurisdictional basis which also enabled the English court to grant a divorce decree. This case is also authority for the requirement of reciprocity.

international competence.⁵⁹

There are two principal bases upon which the Australian courts will recognise the jurisdiction of a foreign court in a matter:

- Where the defendant is personally resident or present within the jurisdiction of the court at the date of institution of the action;⁶⁰ and
- where the defendant has voluntarily submitted to the court's jurisdiction.⁶¹

There are additional alternative bases to found international competence at Australian law. These include reciprocity. This principle, although accepted in respect of matrimonial causes has not, to date, received acceptance in other areas of the law.⁶²

Other possible jurisdictional bases are:

- Nationality or domicile;⁶³ and
- the subject matter is present in, or the cause of action arose within the jurisdiction.

The recognition of nationality as a jurisdictional ground is problematic in cases where a migrant's nationality is dormant. Due to the technical nature of the notion of domicile

59 This was approved by Kahn E 1987 ASSAL 481 (Kahn 1987 ASSAL) and in *Zorbas v Zorbas* 1987 3 SA 436 W, per Van Schaikwyk AJ 439C-D.

60 *Herman v Meallin* (1891) 8 WN (NSW) 38; *Seegner v Marks* (1895) 21 VLR 491.

61 Nygh *Conflicts supra* n 26 139-142. The presence/residence rule is adapted somewhat in relation to jurisdiction in respect of juridical persons: Nygh *op cit* 139. With regard to international competence in general see Sykes and Pryles *Private International Law supra* n 27 113-117.

62 *Dulles' Settlement, re (no2)* [1951] Ch 842 851; *Travers v Holley* [1953] P 246, (CA) per Hodson J 257. See Nygh *idem* 143.

63 Nationality as a ground of jurisdiction found little support until considered by the NSW Supreme Court in *Federal Finance & Mortgage Ltd v Winternitz* (1989) NSW Supr Ct 9 November 1989, where nationality was recognised as a ground. There is slight authority for the recognition of domicile as a jurisdictional ground. See in this regard *Jaffer v Williams* (1908) 25 TLR 12 per Bucknill J 13; *Marshall v Houghton* [1923] 2 WWR 553. Nygh is averse to the extension of the notion of domicile: Nygh *idem* 143-144.

it is likewise fraught with difficulty. The Court of Appeal in *Emanuel*⁶⁴ rejected the fact that the subject matter of a dispute is present in the jurisdiction of the court as a jurisdictional ground unless the judgment is *in rem*. It does not suffice that the obligation which it is sought to enforce arose within the jurisdiction.⁶⁵

According to *Emanuel v Symon*,⁶⁶ English courts will recognise international competence of a foreign court in actions *in personam* where the defendant:

- Is a subject of the foreign country whose court granted the judgment;
- was resident in the foreign country when the action was granted;
- in the character of plaintiff selected the jurisdiction in which he or she is later sued;
- has voluntarily appeared; or
- has contracted to submit to the jurisdiction of the forum in which judgment is obtained.

While the first of these five bases is doubtful, the third, fourth and fifth bases are examples of submission of a defendant to the jurisdiction of the court.⁶⁷

64 *Emanuel v Symon* [1908] 1 KB 302, (CA).

65 *Bank of New Zealand v Lloyd* (1898) 14 WN (NSW) 160.

66 [1908] 1 KB 302, (CA) per Buckley LJ; based upon the judgment of Fry J in *Rousillon v Rousillon* (1880) 14 Ch 351.

67 For a detailed discussion of these jurisdictional bases see Dicey and Morris *supra* n 1 472ff. On residence and presence see Scott *supra* n 31 104; Collier *supra* n 31 114-117; Morris *supra* n 1 108ff; *Adams v Cape Industries plc* [1990] Ch 433; *contra Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 PC. "Residence" is favoured in most statutory provisions: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(iv) (The 1933 Act); Administration of Justice Act 1920 s 9(2)(b). On submission see Scott *op cit* 105-106; Dicey and Morris *op cit* 482-485; Collier *op cit* n 1 117-119; Morris *op cit* 1 110; *Copin v Adamson* (1875) LR 1 Ex D 17, (CA); The 1933 Act *op cit* s 4(2)(a)(ii)-(iii); *Vogel v R A Kohnstamm Ltd* [1973] 1 QB 133; *Emanuel v Symon* [1908] 1 KB 302, (CA), *contra Blohn v Desser* [1962] 2 QB 116 123; *Sfeir & Co v National Insurance Co of New Zealand* [1964] 1 LI R 330 339-340; *Schibsby v Westenholz* (1870) LR 6 QB 155 161; *Burpee v Burpee* [1929] 3 DLR 18. On whether or not an appearance to contest the jurisdiction of the court constituted submission see: *Guiard v De Clermont* [1914] 3 KB 145; *Harris v Taylor* [1915] 2 KB 580; *Dulles Settlement, re (no 2)* [1951] Ch 842; and *Henry v Geoprosco International Ltd* [1976] QB 726, (CA) which overruled *Daarnhouwer & Co NV v*

The modern US approach to recognition and enforcement of foreign country judgments accords with that of England,⁶⁸ in that the judgment of a foreign court having jurisdiction is, save in exceptional cases, conclusive as to the rights of the plaintiff and the obligations of the defendant.⁶⁹ This approach was seemingly qualified in the early case of *Hilton v Guyot*⁷⁰ where due process and reciprocity were required before a foreign judgment would be afforded recognition and enforcement.⁷¹ The New York Court of Appeals refused to apply the *Hilton* doctrine as the *Hilton* decision was from a lower federal court sitting in diversity and was thus not conclusive on state courts and, with respect to federal courts, simply stated a rule of federal common law. In 1938 the Supreme court held that federal courts have a constitutional obligation to apply the law of the state in which they sit in diversity cases.⁷² This approach became known as the *Erie* doctrine and was extended by the court in *Klaxon Co v Stentor Electric Manufacturing Co*.⁷³ The *Hilton* doctrine probably no longer binds federal courts in diversity cases and many federal and state courts have now declined to follow *Hilton v Guyot*.⁷⁴

The US government has now considered the conclusion of bilateral treaties for the reciprocal recognition of judgments. These would overcome the obstacles to the

Boulos [1968] 2 LI R 259; Civil Jurisdiction and Judgments Act 1982. For a discussion of implied agreement to submit see *Scott op cit* 106-107.

68 Expressed in *Godard v Gray* (1870) LR 6 QB 139.

69 *Scoles and Hay supra* n 1 997; *Johnston v Compagnie Generale Transatlantique* 242 NY 381, 152 NE 121 (1926), 243 NY 541, 154 NE 597 (1926).

70 159 US 113, 16 S Ct 139, 40 L Ed 95 (1895).

71 *Hilton v Guyot* 159 US 113 202-203, 16 S Ct 139 158 (1895) and 159 US 113 210, 16 S Ct 139 161 (1895) respectively. See *Scoles and Hay supra* n 1 997-998.

72 In *Erie Railroad Co v Tompkins* 304 US 64, 58 S Ct 817, 82 L Ed 1188 (1938), 98 F 2d 49 (2d Cir 1938), 305 US 637, 59 S Ct 108, 83 L Ed 410 (1938), 305 US 673, 59 S Ct 229, 83 L Ed 436 (1938).

73 313 US 487, 61 S Ct 1020, 85 L Ed 1477 (1941), 125 F 2d 820 (3d Cir 1942), 316 US 685, 62 S Ct 1284, 86 L Ed 1757 (1942).

74 159 US 113, 16 S Ct 139, 40 L Ed 95 (1895). See *Scoles and Hay supra* n 1 1000 ns 6-7.

recognition of US judgments abroad and, in the case of the European Union, would neutralise the potentially adverse effects of the intra-EC-judgments Convention.⁷⁵ The first bilateral treaty was drawn up in 1977 between the US and the UK but it was never adopted.

The foreign court must have had jurisdiction to pass judgment. That is, it must have had jurisdiction in the international sense. This jurisdictional requirement often requires satisfaction of the US due process standards. This need for due process differs from that required in the interstate setting. The reason for this is that there is no uniform standard of due process in an international context and thus there cannot be any confluence of due process and full faith and credit observed in the interstate setting. Thus a foreign judgment that is valid where it was issued will not necessarily be recognised in the US.⁷⁶ It is interesting to note that the US attempts to give its Constitutional limitations extraterritorial effect while it objects to the Brussels and Lugano Conventions in which long-arm jurisdiction is provided for.

Recognition treaties give some certainty in that they provide designated jurisdictional bases which, if satisfied by the rendering forum, entitle the judgment to recognition in the courts of each state or treaty partner.⁷⁷ Each state or treaty partner still retains the discretion to grant recognition in additional cases.⁷⁸ Most American recognition treaties and statutes apply principally only to money judgments and exclude judgments for support in family and matrimonial actions.⁷⁹

75 Scoles and Hay *supra* n 1 1007 & n4. These Conventions include the Council of Europe Convention, the Brussels Convention and the Lugano Convention.

76 Scoles and Hay *idem* 1011. For a further discussion of this defence see Scoles and Hay *op cit* 1011-1013.

77 See Hay P "International Versus Interstate Conflicts Law in the United States" 1971 35 *Rabels* Z 429 450 n 101 (Hay).

78 Scoles and Hay *supra* n 1 1012.

79 See ss1(2) and 3 of the Uniform Foreign-Money Judgments Recognition Act 13 ULA 261 (1962); Scoles and Hay *supra* n 1 1013 n 10.

4.2 Finality

South African courts will not enforce the provisional judgment of a foreign court which is capable of being altered or set aside by the rendering court.⁸⁰ Only judgments that are final and conclusive are capable of recognition and enforcement. The judgment must therefore be *res judicata* between the parties. The rendering court must be incapable of setting it aside or altering it. Maintenance orders under the Enforcement of Maintenance Orders Act⁸¹ are an exception to this rule.⁸²

Judgments that are not *prima facie* final and conclusive must be proven by law and fact to be final.⁸³ South African law follows English law, as set out in the *Nouvion* case,⁸⁴ in this regard, and finds expression in the words of Wolff⁸⁵ where he states that the judgment must be final but may be open to appeal, cassation, or revision, even if an appeal is pending.⁸⁶ South African courts will usually exercise a stay of enforcement proceedings if an appeal is pending. The purpose of this is to avoid the enforcement of a judgment that is subsequently overturned.⁸⁷ Foreign custody orders are never

80 Leon *CILSA supra* n 39 342; Silberberg *supra* n 1 32; Forsyth *supra* n 1 391; *Jones v Krok* 1995 1 SA 677 A; Kahn E 1948 ASSAL 203 (Kahn 1948 ASSAL).

81 23 of 1963.

82 Silberberg *supra* n 1 32-33; Kahn in Hahlo *supra* n 16 113-114; *S v Dolman* 1970 4 SA 467 T.

83 Silberberg *idem* 33 & n171 where the author cites *Joffe v Salmon* 1904 TS 317 318 & *Dawood v C & A Friedlander* 1913 CPD 291 as authority.

84 *Nouvion v Freeman* (1889) 15 App Cas 1.

85 Wolff *supra* n 16 par 252.

86 *Rosenstrauch v Korb* 1931 GWL 102; Leon *CILSA supra* n 39 342; *Jones v Krok* 1995 1 SA 677 A 692.

87 Silberberg *supra* n 1 33&n172; *Joffe v Salmon* 1904 TS 317 318; *Dougherty v Dougherty* 1907 WLR 1; *Ismail v Stradling* 1911 TPD 428; *Scorgie v Munnich* 1912 EDL 422; *Muller v Behr* 1915 OPD 81; *Rosenstrauch v Korb* 1931 GWL 102; *Greathead v Greathead* 1946 TPD 404 407; *McNutt v Mostert* 1949 3 SA 253 T 255-256; *Estate H v Estate H* 1952 4 SA 168 C; *De Crespigny v De Crespigny* 1959 1 SA 149 N 152, 153-154. See too Forsyth *supra* n 1 396-397.

regarded as final for purposes of recognition and enforcement.⁸⁸

The Australian legal interpretation of the finality requirement is almost identical to the South African interpretation. The foreign judgment must end the matter once and for all and the matter must be regarded as *res judicata*.⁸⁹ Australian maintenance orders are not regarded as final and conclusive and will thus not be enforced in Australia save in accordance with statutory provisions.⁹⁰ The fact that an appeal may lie from a decision or is pending does not affect finality at English, Australian or US law.⁹¹

The full faith and credit clause of the US Constitution,⁹² which regulates recognition and enforcement of interstate judgments, does not *prima facie* require finality as a prerequisite for recognition or enforcement.⁹³ Theoretically, therefore, the recognising court may give effect to a non-final judgment.⁹⁴ It is however generally accepted that

88 Silberberg *idem* 26, 33; *McKee v McKee* [1951] AC 352 (PC); *Ferrers v Ferrers* 1954 1 SA 514 SR 517; *Riddle v Riddle* 1956 2 SA 739 C 744; *Hubert v Hubert* 1960 3 SA 181 W 184; *Jagoe v Jagoe* 1969 4 SA 59 R; *Crow v Cuthbert & Cuthbert* 1948 1 PH B 20 T; *Leyland v Chetwynd* (1901) 18 SC 239; *Coombe v Coombe* 1909 TH 241 243; *Eilon v Eilon* 1965 1 SA 703 A; *Littauer v Littauer* 1973 4 SA 290 W; *Righetti v Pinchen* 1955 3 SA 338 D; *Abrahams v Abrahams* 1981 3 SA 593 B, discussed in Forsyth CF "Enforcement of a South African Custody Order in a Bophuthatswana Court" 1982 99 SALJ 34 (Forsyth "Enforcement in Bophuthatswana").

89 Sykes & Pryles *Private International Law supra* n 27 117-118; Nygh *Conflicts supra* n 26 145. *Nouvion v Freeman* (1889) 15 App Cas 1 per Lord Herschell 9; *Charm Maritime Inc v Kyriakou and Mathias* [1987] 1 LI R 433, (CA) 441-442; *Blohn v Dessler* [1962] 2 QB 116. On *res judicata* in general see Campbell E "Res Judicata and Decisions of Foreign Tribunals" 1994 16 *Sydney LR* 311-341 (Campbell "Res Judicata"); Bouwer GS and Turner AK *The Doctrine of Res Judicata* 2nd ed Butterworths, London (1969) (Bouwer and Turner).

90 Nygh *idem* 146; *Davis v Davis* (1922) 22 SR (NSW) 185.

91 On Australia see: *Colt Industries Inc v Sarlie (No 2)* [1966] 3 ALL ER 85; *Scott v Pilkington* (1862) 2 B & S 11; *R v White and Noonan* (1975) 133 CLR 113. In such cases the court has a discretion to stay proceedings. On English law see n 34 *supra*. On the US see Platto *supra* n 1 125; Restatement, Third, of the Foreign Relations Law of the United States American Law Institute (1987) S485, comment (a) and reporter's n 5.

92 28 USCA s1738.

93 *Barber v Barber* 323 US 77 87, 65 S Ct 137 141, 89 L Ed 82 (1944); Platto *supra* n 1 125.

94 *Barber v Barber ibid*.

constitutional recognition is only required in respect of final decrees and judgments.⁹⁵ The reason for this is that the recognising state should not give greater effect to the judgment than the rendering court would have. The local law of the rendering state will be applied to determine whether or not the judgment is final. There is however a strong presumption in interstate cases that the judgment is final unless the contrary is demonstrated.⁹⁶ The concept of finality is of special importance in relation to modifiable decrees such as those for support, which can never be final.

4.3 Public policy

No foreign judgment that contravenes the fundamental principles of public policy will be recognised and enforced at South African law.⁹⁷ Traditionally this means that judgments obtained contrary to natural justice, by fraud, or which are penal or revenue judgments will not be recognised or enforced in South Africa.⁹⁸ It should be noted that foreign judgments will not be refused recognition and enforcement simply because they are inconsistent with the South African common law or statute law but only if their enforcement would be contrary to the spirit and purpose of a South African rule of law.⁹⁹ The Constitution of the Republic of South Africa entrenches the right of any person to a fair administrative action.¹⁰⁰ It has been suggested that at English law foreign judgments will not be enforced if the causes of action upon which they are based would

95 *Maner v Maner* 412 F 2d 449 (5th Cir 1969); Note: Finality of judgments *supra* n 47 878; Restatement, 2d *supra* n 30 S107.

96 *Scoles and Hay supra* n 1 963-964; *Barber v Barber* 323 US 77, 65 S Ct 137, 89 L Ed 82 (1944).

97 *Forsyth supra* n 1 398-399; *Silberberg supra* n 1 34; *Edwards LAWSA supra* n 36 477; *Jones v Krok* 1995 1 SA 677 A 685.

98 *Silberberg idem* 1 35; *Leon CILSA supra* n 39 343; *Forsyth idem* 378ff; *Edwards LAWSA idem* par 477; *Kahn 1948 ASSAL supra* n 80 207; *Joffe v Salmon* 1904 TS 317 319; *Goodman v Goodman* (1903) 20 SC 376; *Rubie v Haines* 1948 4 SA 998 W. For a discussion of the distinction between intrinsic and extrinsic fraud see *Forsyth op cit* 401.

99 *Ibid.*

100 Constitution of the Republic of South Africa Act 108 of 1996 s33. S34 of the Constitution guarantees access to the courts and an independent and impartial hearing.

not have supported an action in England.¹⁰¹ Kahn queries the validity of this test and advocates its exclusion from South African law where the notion of public policy should suffice to prevent enforcement of any judgment inconsistent with fundamental notions of our law.¹⁰²

For recognition and enforcement to be afforded to a foreign judgment the requisites of procedural natural justice must be complied with. Hence due notice must be given, the parties must be given a reasonable opportunity to be heard, and the judgment must be delivered by an impartial tribunal comprised of disinterested parties.¹⁰³

The leading South African case on natural justice is *Lissack v Duarte*.¹⁰⁴ In that case the failure of the foreign court to advise the appellant of the proper procedure to adopt in refuting the respondent's claim constituted a serious breach of natural justice.¹⁰⁵ Enforcement was also refused on the basis of a failure of natural justice in *Corona v Zimbabwe Iron and Steel Co Ltd*.¹⁰⁶ The onus of proving a failure of natural justice rests upon the party alleging it.¹⁰⁷

Section 2 of the Constitution of South Africa provides that the Constitution is the

101 Kahn in Hahlo *supra* n 16 667-668; *Macartney, In re: MacFarlane v Macartney* [1921] 1 Ch 522; See too the discussion of this view in Silberberg *supra* n 1 35.

102 Silberberg *ibid*.

103 Silberberg *idem* 1 36; *Rosenstrauch v Korb* 1931 GWL 102; *Panamanian Oriental Steamship Corporation v Wright* [1971] 2 All ER 1028, (CA) 1032; Forsyth *supra* n 1 398; *Lissack v Duarte* 1974 4 SA 560 N 565. On what constitutes notice see Forsyth *op cit* 399-400; Pollak *supra* n 52 229; *Steinberg v Cosmopolitan National Bank of Chicago* 1973 4 SA 564 RAD 575ff; *Edwards v Goldberg* (1902) 23 NLR 345 347-347; *Boffey v Boffey* (1910) 27 SC 192 194-195; Silberberg *op cit* 36-37 n191; *Coluflandres Ltd v Scandia Industrial Products Ltd* 1969 3 SA 551 R.

104 1974 4 SA 560 N. See Leon *CILSA supra* n 39 344.

105 *Lissack v Duarte* 1974 4 SA 560 N 566G-H.

106 1985 2 SA 423 TKA. See Forsyth *supra* n 1 400.

107 Forsyth *ibid*; Edwards *LAWSA supra* n 36; *Coluflandres Ltd v Scandia Industrial Products Ltd* 1969 3 SA 551 R; *Duarte v Lissack* 1973 3 SA 615 D; *Lissack v Duarte* 1974 4 SA 560 N; *Rubie v Haines* 1948 4 SA 998 W.

supreme law of South Africa and that any law or conduct that is inconsistent with its provisions will be invalid and all obligations imposed by it will be fulfilled.¹⁰⁸ Foreign judgments will therefore not be enforced where the effect of such enforcement would be contrary to South African constitutional provisions. A South African court would thus refuse recognition and enforcement to, inter alia, foreign judgments that fail to recognise the constitutional right of every person to a fair administrative action. This limitation on recognition and enforcement under South African law is analogous to the American constitutional due process limitation.¹⁰⁹

At English law defences to enforcement are limited to fraud,¹¹⁰ failure of natural justice,¹¹¹ contravention of public policy,¹¹² and that the judgment is for multiple damages.¹¹³

Australian law also restricts defences against enforcement of a foreign judgment. The defences at Australian law are almost identical to those available at South African law.

108 *Supra* n 100. See *Fraser v Children's Court, Pretoria North & Others* 1997 2 SA 261 (CC) 282 E-F.

109 *Scoles and Hay supra* n 1 93-103.

110 1933 Act *supra* n 67 s 4(1)(a)(iv). For a detailed discussion of the nature of fraud as a defence and the bases upon which it may succeed see *Collier supra* n 31 123-124; *Morris supra* n 1 115-116; *Dicey and Morris supra* n 1 505-511; *Jaffey supra* n 40 231-232; *Scott supra* n 31 111-112; Foreign Judgments (Reciprocal Enforcement) Act 1933; *Syal v Heyward* [1948] 2 KB 443; *Abouloff v Oppenheimer* (1882) 10 QB 295, (CA). The defence of fraud has been problematic in a line of English decisions, see *Vadala v Lawes* (1890) 25 QB 310 316-7; *Jet Holdings Inc v Patel* [1990] 1 QB 335, (CA) 346-347. See too *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137. The English law position may change, *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, (CA) and *Owens Bank Ltd v Bracco* [1992] 2 AC 443 esp 472.

111 See in this regard *Collier idem* 124-125; *Morris idem* 117-119; *Dicey and Morris idem* 514-519; *Jaffey idem* 232-234; *Scott idem* 112-113; *Copin v Adamson* (1875) LR 1 Ex D 17, (CA); *Jacobson v Frachon* (1927) 138 LT 386, (CA) 392; *Adams v Cape Industries plc* [1990] Ch 433; *Price v Dewhurst* (1837) 8 Sim 279; *Jet Holdings Ltd v Patel* [1990] 1 QB 335, (CA). Neither the Administration of Justice Act *supra* n 67 nor the 1933 Act *supra* n 67 mentions this defence: See s9(2)(c) of the Administration Act and s4(1)(a)(iii) of the 1933 Act.

112 See: *Armitage v Nanchen* (1983) 4 FLR 293; *Macartney, re* [1921] 1 Ch 522; *Collier idem* 125-126; *Morris idem* 1 116-117 and ch 4; *Dicey and Morris idem* 511-514; *Jaffey idem* 5 234-235.

113 *Morris idem* 119.

They include:

- Fraud;¹¹⁴
- the foreign judgment is *contra bonos mores*;¹¹⁵
- the foreign court acted contrary to natural justice;¹¹⁶
- the judgment was of a penal or revenue nature;¹¹⁷
- the foreign court acted perversely in refusing to apply appropriate law;¹¹⁸
- the party seeking to enforce the judgment is estopped from doing so;¹¹⁹ and
- enforcement would contravene the Foreign Proceedings (Excess of Jurisdiction) Act.¹²⁰

At US law a foreign judgment will not be recognised and enforced unless it was rendered by an impartial tribunal.¹²¹ The tribunal may be a court or, in the absence of

114 See in this regard Nygh *Conflicts supra* n 26 154-157; Sykes & Pryles *Private International Law supra* n 27 119-121; *Keele v Findley* (1990) 21 NSWLR 445. Fraud is not restricted to fraud of the plaintiff, see *Baden v Societe Generale pour Favoriser le Developement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 per Peter Gibson J 596-597; *Norman v Norman (No 2)* (1968) 12 FLR 39 per Fox J 47; *Res Nova Inc v Edelsten* (1985) Supr Ct NSW (unreported) 7 May 1985 per Foster J; *Keele v Findley* (1990) 21 NSWLR 445 in which the court felt that the same rules should apply for enforcement of inter-jurisdictional and foreign-country judgments in the face of alleged fraud at 457-458.

115 See Nygh *idem* 157; *Macartney, re* [1921] 1 Ch 522; *Vervaeke v Smith* [1983] 1 AC 145, (HL); *Re Meyer* [1971] P 298; *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137.

116 For a discussion of due notice see *Igra v Igra* [1951] P 404 per Pearce J 412; *Jeannot v Furst* (1909) 25 TLR 424; *Terrell v Terrell* [1971] VR 155; *Macalpine v Macalpine* [1958] P 35. On the impartiality of the tribunal see *Price v Dewhurst* (1837) 8 Sim 279. If neither party was afforded an opportunity to be heard a failure of natural justice will not occur as both parties suffer the same disadvantage: Nygh *ibid*; *Scarpetta v Lowenfeld* (1911) 27 TLR 509.

117 Nygh *Conflicts idem* 159; Sykes and Pryles *Private International Law supra* n 27 123-124; Howard M "Interstate Conflicts and the Enforcement of Australian State's "Governmental Interests" Within Australia" 1992 21 *Fed LR* 90 90ff (Howard).

118 This defence would be almost impossible to prove: Nygh *Conflicts idem* 159-160.

119 *Idem* 160.

120 Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth). See Nygh *Conflicts idem* 160-161; Platto *supra* n 1 31ff.

121 *Russell v Perry* 14 N H 152 (1843) 155.

constitutional limitations, a legislative, executive or administrative body. The tribunal must have had proper jurisdiction to determine the matter and the defendant must have had a reasonable opportunity to be heard. The defendant is entitled to demand compliance with these requirements which form the basis of the due process requirement.¹²² Failure to comply with the US due process requirements would constitute a valid defence to any claim for recognition and enforcement.

In the US public policy is given a wider ambit in the international context than is attributed to it in relation to interstate judgments. In the international context it is an umbrella for a number of concerns in international practice that may lead to a denial of recognition.¹²³

Defences to claims on US sister-state judgments include:

- Lack of jurisdiction of the rendering court.¹²⁴ This defence is now severely limited by the application of the rules of *res judicata*. Any attempt by a court without jurisdiction to render a judgment contravenes the rules of due process. Such a judgment is void and is not entitled to full faith and credit;¹²⁵
- the judgment was obtained by fraud;
- other equitable defences;¹²⁶

122 Scoles and Hay *supra* n 1 968.

123 Scoles and Hay *idem* 1015 -1017.

124 See in this regard Scoles and Hay *idem* 972ff; Born *GM International Civil Litigation in United States Courts* 3rd ed Kluwer Law International, The Hague, Boston, London (1996) 937 (Born).

125 Scoles and Hay *idem* 973; *Bertke v Cartledge*, 597 F Supp 68 (NDGa 1984)(Kentucky); *World-Wide Volkswagen v Woodson* 444 US 286, 100 S Ct 559, 62 L Ed 2d 490 (1980); *Shaffer v Heitner* 433 US 186, 97 S Ct 2569, 53 L Ed 2d 683 (1977); *Hanson v Denckla* 357 US 235, 78 S Ct 1228, 2 L Ed 2d 1283 (1958); Restatement, 2d, *supra* n 30 ss92, 104 (1971); von Mehren AT and Trautman DT "Jurisdiction to Adjudicate" 1966 79 *Harv LR* 1121 1126 (von Mehren and Trautman 1966); Born *ibid*.

126 Scoles and Hay *idem* 977-978; Born *ibid*.

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- the judgment was not granted on the merits;¹²⁷
 - the judgment was not issued by a competent court;¹²⁸ and
 - the judgment was not final or there exists an injunction against the enforcement of the judgment.¹²⁹

Additional defences may be offered in respect of foreign country judgments. Neither Foreign country judgments for taxes or penalties will be enforced,¹³⁰ nor those that are contrary to public policy.

In the US the full faith and credit clause generalises the preclusive effect of a judgment within an interstate context by requiring the enforcing court to give the judgment the same effect as it would have had in the state of rendition. The absence of such a constitutional mandate in relation to international judgments allows the US courts to severely limit the preclusive effect of a foreign country judgment. Despite this, these courts seldom deny foreign court judgments preclusive effect. They draw analogies between the defences to recognition and enforcement of international judgments and those available in relation to interstate judgments.¹³¹

4.4 Other

A foreign judgment will be enforced even if the foreign court incorrectly applied its own substantive law or arrived at an incorrect decision on the facts.¹³² A foreign judgment that is null and void in the place where it was granted will be unenforceable in South

127 Scoles and Hay *idem* 986-991; Born *ibid*.

128 Scoles and Hay *idem* 978-986; Born *ibid*.

129 Scoles and Hay *idem* 991-995; Born *ibid*.

130 Scoles and Hay *idem* 1013-1014.

131 Scoles and Hay *idem* 1017.

132 Silberberg *supra* n 1 39; *Joffe v Salmon* 1904 TS 317 319; *BG Smart v AM Raymond & G Smart* (1903) 24 NLR 347; Forsyth *supra* n 1 405.

Africa, but an irregularity in the proceedings at which the judgment was granted will not result in non-enforcement unless the irregularity constituted a violation of the principles of natural justice.¹³³ South African courts will not enforce a foreign judgment that has prescribed or become superannuated according to the laws of the country which granted it.¹³⁴

5 RECOGNITION OF A FOREIGN JUDGMENT AS A DEFENCE

At South African common law a defendant can raise the defence of *res judicata* if he or she is sued locally by a plaintiff on the same cause of action as was previously dismissed by a competent foreign court in an action between the same two parties.¹³⁵ Likewise, English law rules regulating action estoppel prohibit parties or their privies from reopening a matter that is *res judicata*.¹³⁶ A foreign judgment may also offer a defence at English law in circumstances in which the defendant may rely upon issue estoppel. Issue estoppel, also known as cause of action estoppel, arises where the determination of an action required the court to determine an issue or issues, the

133 Silberberg *ibid*; Forsyth *ibid*; Kahn in Hahlo *supra* n 16 669.

134 *Scorgie v Munnich* 1912 EDL 422; Silberberg *ibid*. For a discussion of the Australian approach to judgments issued by courts with international competence but without domestic jurisdiction see *Hogan v Moore* (1885) 6 ALT 156, per Higinbotham J 157; *Pemberton v Hughes* [1899] 1 Ch 781 791 per Lindley MR (an English case); *Vanquelin v Bouard* (1863) 15 CBNS 341 368 per Erle CJ; *Ainslie v Ainslie* (1927) 39 CLR 381; *Merker v Merker* [1963] P 283; *General Textiles (SA) v Sun and Sand Ltd* [1978] QB 297, per Lord Denning MR; *Papadopoulos v Papadopoulos* [1930] P 55; *Adams v Adams* [1971] P 188.

135 Forsyth *supra* n 1 406. See too *Wolff v Solomon* (1898) 15 SC 297 306 and *Fass & Co, In re v Stafford* (1885) 6 NLR 261, cited by Kahn in Hahlo *supra* n 16 674. The most recent case in which the question arose was *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 D. In that case Booysen J adopted a formalistic approach to *res judicata*. This resulted in a finding that the matter raised in that case was not rendered *res judicata* by the Alabama court's ruling. On *res judicata* at Australian law see n 89 *supra*.

136 *Plummer v Woodbourne* (1825) 4 B & C 625; *Frayes v Worms* (1861) 10 CB (NI) 149; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, (HL). This applies only where the judgment was based upon a finding on the merits and not where judgment was based upon some procedural ground such as prescription. As regards action estoppel see *Harris v Quine* (1869) LR 4 QB 653; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A/G* [1975] AC 591, (HL); *Charm Maritime Inc v Kyriakou and Mathias* [1987] 1 LI R 433, (CA). See too the 1933 Act *supra* n 53 s 8 and the Foreign Limitation Periods Act 1984 s 3.

determination of which was essential in reaching its decision. It bars a party from asserting or denying a cause of action. Issue estoppel is applicable to both English decisions and foreign proceedings.¹³⁷ For this defence to operate the issue before the English court must be identical to that determined by the foreign court, the parties or their privies must be identical, and the foreign judgment must be final and conclusive on the merits.¹³⁸

Res judicata is also important in the US legal context¹³⁹ where it has the effect that the plaintiff cannot re-litigate the same claim, and the defendant may raise *res judicata* as a bar to any such subsequent action. In most instances *res judicata* operates in respect of the same cause of action arising between identical parties or their privies, however in exceptional circumstances collateral estoppel may extend the effect of *res judicata* to encompass the same issues between different parties.¹⁴⁰ Despite the technical meanings attributed to *res judicata*, it is an expression of a policy, the effect of which is variable depending upon the particular circumstances of individual cases.¹⁴¹

6 ENFORCEMENT PROCEDURES

The Roman-Dutch requirement that a foreign court address letters of request to any

137 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (no 2)* [1967] 1 AC 853, (HL) 910A-911F, 928C-929A, 936C.

138 *Carl Zeiss Stiftung ibid*; Collier *supra* n 21 133. See too *The Sennar (no 2)* [1985] 1 WLR 490, (HL) and *House of Spring Gardens v Waite* [1991] 1 QB 241, (CA).

139 Scoles and Hay *supra* n 1 950; Cramton RC, Currie DP, Kay HH, Kramer L *Conflict of Laws Cases - Comments - Questions* 5th ed West Publishing Co, St Paul Minnesota (1993) ch 5 (Cramton *et al*). On *res judicata* and custody decrees see Silverman BS "The Search for a Solution to Child Snatching" 1983 11 *Hofstra LR* 1079 (Silverman); Katz *supra* n 15 71-73.

140 Scoles and Hay *idem* 951.

141 For a discussion of the circumstances under which the application of estoppel may vary see Scoles and Hay *idem* 952.

court asked to enforce its judgment is now obsolete.¹⁴² Today the most commonly enforced foreign judgments are foreign money judgments which are usually enforced in provisional sentence proceedings.¹⁴³ Statutory procedures for recognition and enforcement of foreign money judgments will not be examined in this thesis.

In summary, the general rule in South Africa is that foreign judgments are not directly enforceable; there are, however, statutory exceptions to this rule.¹⁴⁴

At English law enforcement of foreign judgments may be sought in terms of the common law, in terms of the Administration of Justice Act,¹⁴⁵ or the Foreign Judgments (Reciprocal Enforcement) Act.¹⁴⁶ The legislation relates only to judgments *in personam* and will not be discussed further. The Civil Jurisdiction and Judgments Acts of 1982¹⁴⁷ and 1991, as well as the Brussels and Lugano Conventions of 1968 and 1989, radically altered the common law and prevailing statutory law approach with regard to the jurisdiction of the English courts over persons domiciled in other member states of the European Community (now the European Union) and the recognition and enforcement of judgments of other European Union states. The main purpose of the 1982 Act was to implement the Brussels Convention¹⁴⁸ and the 1971 protocol. In addition to giving the Brussels Convention, the protocol, and subsequent accession Conventions force of law

142 Forsyth *supra* n 1 409 n362; Silberberg *supra* n 1 43; Edwards *LAWSA supra* n 36 par 476; Spiro Incidence of jurisdiction *supra* n 8 14; *Russell v King* (1909) 30 NLR 209 211; *Fairfield v Fairfield* 1925 CPD 297 303-304; *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 1 SA 13 T 15H. For the old procedures see Voet 42 1 41 and Van der Linden 4 4 5.

143 Forsyth *idem* 409; Silberberg *idem* 43; *Cosmopolitan National Bank of Chicago v Steinberg* 1973 4 SA 579 R.

144 Forsyth *idem* 361ff; Edwards *supra* n 36 par 476; *BG Smart v AM Raymond and G Smart* (1903) 24 NLR 347.

145 *Supra* n 67. See Jaffey *supra* n 40 229.

146 The 1933 Act *supra* n 67. See Jaffey *idem* 229-230; Scott *supra* n 31 115-118.

147 The 1982 Act.

148 1968. It came into effect in 1973.

in the UK,¹⁴⁹ it contained jurisdictional rules and rules regulating the enforcement of judgments between the constituent parts of the UK. The Lugano Convention,¹⁵⁰ concluded by the member states of the European Union and those of the European Free Trade Association (EFTA),¹⁵¹ operates parallel to the Brussels Convention. The text is, with minor exceptions, identical to that of the Brussels Convention.

The Brussels Convention is aimed at the facilitation of movement of judgments throughout the member states by ensuring that the judgments of member states are accorded "full faith and credit" by the courts of all other member states.¹⁵² It establishes domestic jurisdictional rules for courts of member states and provides that the recognition and enforcement of judgments of such courts are to be more or less automatic. Four classes of cases are specifically excluded from the scope of this Convention. One class of cases so excluded is that pertaining to status or legal capacity of natural persons, matrimonial property rights or rights in property flowing from wills or succession.¹⁵³ As the Brussels Convention does not apply to custody

149 See s 2. The relevant English texts are contained in Schedules 1, 2 and 3. A consolidated English version of the text of the Convention is to be found in the Civil Jurisdiction and Judgments (Amendment) Order, 1990. All the different language versions are equally authentic. Byrne P *The EEC Convention on Jurisdiction and the Enforcement of Judgments* The Round Hall Press, Dublin (1990) (Byrne) and Lipstein K (ed) *Harmonisation of Private International Law by the EEC* London Institute of Legal Studies (University of London) Chameleon Press Ltd, London (1978) 91 and App B (Lipstein) contain discussions of the 1968 Convention. Collins L "The Brussels Convention Within the United Kingdom" 1995 111 *LQR* 541 (Collins) deals with *forum non conveniens* within the context of the Brussels Convention.

150 Concluded in 1989.

151 Austria, Finland, Iceland, Norway, Sweden and Switzerland.

152 *Morris supra* n 1 126ff. The European Court of Justice has emphasised this in, inter alia, *Dumez France SA and Tracoba v Hessische Landesbank* [1990] ECR 49; *Marc Rich & Co A/G v Societa Italiana Impianti SpA (The Atlantic Emperor)* [1991] ECR-I 3855 reported in *The Times* Sept 20 1991.

153 *Collier supra* n 31 138. See too *De Cavel v De Cavel (no 1)* [1979] ECR 1055; *De Cavel v De Cavel (no 2)* [1980] ECR 731; *W v H* [1982] ECR 1189. In the later *De Cavel* case it was clear that matters ancillary to these are included under the Convention, hence a claim for maintenance arising from divorce proceedings is included.

orders it will not be discussed further here.¹⁵⁴ Note that a new Brussels Convention II has been proposed to govern certain family matters, particularly divorce. Custody of children was to be discussed in relation to this Convention in a second round of negotiations, however nothing came of these negotiations in this regard.¹⁵⁵

In the US, whether the judgment to be recognised or enforced is a sister-state or foreign-country judgment, it is a foreign judgment for purposes of the jurisdiction in which enforcement is sought, and is thus without direct effect there. In consequence the judgment creditor is obliged to seek the assistance of the local courts for its recognition and enforcement.¹⁵⁶ At common law a judgment creditor could bring an action on the foreign judgment and obtain a local order which he or she could then enforce.¹⁵⁷ Although the constitutional authority of Congress under the full faith and credit clause has not been fully exercised to provide for direct enforcement of sister-state judgments, the full faith and credit clause does mandate recognition of such judgments, thereby restricting refusal of such recognition by states of the Union.¹⁵⁸ State legislation often provides for summary procedures for recognition of sister state judgments and federal legislation provides for the registration of a federal court

154 See further on this Convention: Collier *supra* n 31 139ff; Dicey and Morris *supra* n 1 530ff; Byrne *supra* n 149; Morris *supra* n 1 126ff.

155 Beaumont P and Moir G "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community?" 1995 20 (3) *European LR* 268 (Beaumont and Moir). Custody orders have occasioned difficulties in the application of the Council of Europe Child Custody Convention (European Treaty Series 105). The Brussels model is inappropriate to deal with such orders which are unsuited to automatic recognition and enforcement by reason of the fact that they are constantly being re-assessed in light of changing circumstances.

156 Scoles and Hay *supra* n 1 959.

157 Restatement, 2d *supra* n 30 ss99-100; *McElmoyle v Cohen* 38 US (13 Pet) 312, 10 L Ed 177 (1839); *Ostrom v Ostrom* 231 F 2d 193 (9th Cir 1955); *Lamberton v Grant* 94 Me 508, 48 A 127 (1901); *Eaton v Hasty* 6 Neb 419, 29 Am Rep 365 (1877); *Anglo American Provision Co v Davis Provision Co* No 1 169 NY 506, 62 NE 587 (1902), 191 US 373, 24 S Ct 92, 48 L Ed 225 (1903).

158 Scoles and Hay *supra* n 1 959; US Constitution Art IV s1; Cook WW "The Powers of Congress Under the Full Faith and Credit Clause" 1919 28 *Yale LJ* 421 (Cook); Corwin ES "The Full Faith and Credit Clause" 1933 81 *U Pa LR* 371 (Corwin). See too the Parental Kidnapping Prevention Act of 1980 (PKPA), federal legislation adding s1739A to 28 USCA prescribing full faith and credit to state court decisions essentially complying with the UCCJA.

judgment for the recovery of money or property in any other district.¹⁵⁹

Foreign country judgments do not benefit from the full faith and credit clause. Such judgments have traditionally been afforded recognition on the basis of comity.¹⁶⁰ Most states afford foreign judgments more or less the same recognition as sister state judgments.¹⁶¹ However, a few states still appear to follow *Hilton v Guyot*¹⁶² in requiring reciprocity as a precondition to recognition and enforcement of foreign judgments other than those *in rem* or relating to status.¹⁶³ Congress has not legislated this matter and for some time the executive did not utilise federal treaty power to provide for uniform recognition and enforcement of foreign judgments in the US. Continued disparate state practices within the US, giving rise to a possible obstacle to the recognition of American judgments abroad in jurisdictions where reciprocity is still required, coupled with the fact that adoption of bilateral and multilateral recognition treaties by foreign countries may make foreign country judgments against Americans enforceable in foreign countries, even though they would not have been entitled to recognition and enforcement in the US, has led to a change in the position. The position as regards foreign money judgments will not be examined here; suffice it to note that some Commonwealth countries recognise foreign money judgments of other Commonwealth countries on the

159 Scoles and Hay *idem* 959 n 4.

160 Platto *supra* n 1; Scoles and Hay *idem* 960; *Hilton v Guyot* 159 US 113, 16 S Ct 139, 40 LEd 95 (1895); Restatement, 2d *supra* n 30 S 98; Joiner CW "The Recognition of Foreign Country Money Judgments by American Courts" 1986 Spec Supp 34 *Am J Comp L* 193 (Joiner); Peterson CH "Foreign Country Judgments and the Second Restatement" 1972 72 *Colum LR* 219 220 (Peterson); von Mehren AT and Trautman DT "Recognition of Foreign Adjudications: A Survey and a Suggested Approach" 1968 81 *Harv LR* 1601 1607 (von Mehren and Trautman 1968); von Mehren RB and Patterson ME "Recognition and Enforcement of Foreign Country Judgments in the United States" 1974 6 *Law and Policy in Int'l Bus* 37 (von Mehren and Patterson). For the history of the doctrine of comity, see Yntema HE "The Comity Doctrine" 1966 65 *Mich LR* 9 (Yntema).

161 Scoles and Hay *idem* 960 text and n 2.

162 159 US 113, 16 S Ct 139, 40 L Ed 95 (1895).

163 See Scoles and Hay *supra* n 1 60 text & n 3.

basis of registration.¹⁶⁴ The UK Foreign Judgments (Reciprocal Enforcement) Act¹⁶⁵ extends recognition to judgments rendered in foreign countries which accord similar treatment to UK judgments.

Many foreign countries have made provision for the recognition of foreign judgments by means of bilateral treaty. Multilateral Conventions such as the Hague Convention on Private International Law of 1971 have also been proposed. The most successful and comprehensive multilateral agreement is the European Union's Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters adopted by further countries in terms of the "Parallel Convention" (the Lugano Convention).¹⁶⁶ These Conventions abolish nationally available exorbitant jurisdiction bases between member countries but generalise such bases in favour of domiciliaries of member states as against parties of a third state. A resulting judgment is entitled to recognition in all member states. Thus even where the judgment would not be entitled to recognition in the US, an American judgment debtor may be exposed to liability through enforcement of the judgment against him in any contracting state in which he has assets. It is thus important that the US conclude recognition agreements with foreign countries in order to avoid such problems.

As regards interstate judgments, any judgment issued outside of the territorial jurisdiction of a state of the US is technically regarded as foreign to that state. Thus to be enforced in a state other than the rendering state, a judgment must be recognised and given effect to by the court of the state in which enforcement is sought. The full faith and credit clause of the constitution¹⁶⁷ mandates recognition and enforcement of

164 Scoles and Hay *idem* 961 text & n 1.

165 1933.

166 See chapter 3 *infra*; Herzog PE "Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?" 1995 43 *Am J Comp L* 379 (Herzog).

167 Art IV s1. The Constitution provides that "Full faith and credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be

interstate judgments. Recognition and enforcement here assumes a valid judgment of a sister state.¹⁶⁸ The recognition requirement applies both to state court judgments enforced in state or federal courts as well as federal judgments enforced in state courts.¹⁶⁹

As recognition and enforcement by registration is restricted to federal judgments for the recovery of money or property it will not be discussed further here.¹⁷⁰

The full faith and credit clause of the Constitution alone does not do away with the need for an action on the judgment to precede enforcement of a sister-state judgment. Congressional power to implement the clause and provide for the registration of sister-state judgments in a manner akin to federal judgments has not been exercised. The Uniform Enforcement of Foreign Judgments Act¹⁷¹ seeks to approximate the ease of the federal registration procedure by providing for summary proceedings for the enforcement of sister-state judgments. Once the filing and notice requirements in terms of the Act have been complied with, the preclusive effect of the judgment is determined by the law of the recognising state and not the rendering state, as was the case with the full faith and credit clause.¹⁷²

7 CONCLUSION

As custody awards fail the finality requirement embodied in the common law rules for recognition and enforcement, these common law rules do not apply to such judgments.

proved and the Effect thereof."

168 Restatement, 2d *supra* n 30 s 93.

169 Scoles and Hay *supra* n 1 969 text & n7, 970 text & n98.

170 See Scoles and Hay *idem* 970-971.

171 9A ULA 488.

172 S2.

Thus foreign custody orders are not capable of recognition and enforcement at common law in any of the legal systems examined in this thesis.

For this reason these legal systems have been obliged to develop legislation and to accede to international treaties in order to regulate their approaches to recognition and enforcement of foreign custody orders and parental child abduction.

CHAPTER THREE

MODERN INFLUENCES ON RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS AND INTERNATIONAL PARENTAL KIDNAPPING

1 INTRODUCTION TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION¹ AND THE EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN AND ON THE RESTORATION OF CUSTODY OF CHILDREN²

The most important modern influence upon the recognition and enforcement of foreign country custody judgments and international parental kidnapping in South Africa, Australia, the United Kingdom (UK) and the United States of America (US) has been the Hague Convention. For this reason the discussion of each individual legal system and the implementation of Convention provisions in each is prefaced by this discussion of the provisions, scope and shortcomings of the Convention. In the UK a second convention is applied, the Council of Europe Convention. The intended scope of this Convention and its relationship to the Hague Convention will also form part of the discussion in this chapter.

2 THE HAGUE CONVENTION

International child abduction has increased in modern times as a result of, inter alia, dual nationality, frequency of foreign travel, relaxation of cross-border control, an

1 Hereafter the Hague Convention.

2 Hereafter the Council of Europe Convention.

upsurge in bi-national marriages and their related problems, etc.³ The seriousness of the problem is evidenced by the conclusion of two international child abduction conventions within a twelve-month period and their subsequent ratification by a number of states. These conventions, the Hague Convention and, to a lesser degree, the Council of Europe Convention, have substantially improved the situation. This improvement is largely attributable to the high percentage of abducted children returned by contracting states. The problem has not however, been fully resolved by the Conventions and, as will appear below, more countries must sign and ratify these Conventions.

The Hague Convention will be the main focus of this chapter as it was more strongly influenced by the common law situation than the Council of Europe Convention. For this reason the Hague Convention is more suited to the common law situation and has been more widely accepted by the international community than the Council of Europe Convention.

3 For a discussion of some of the reasons offered by abducting parents see Greif GL "Parents Who Abduct: A Qualitative Study with Implications for Practice" 1994 43 *Fam Rel* 283 (Greif); Horstmeyer ES "The Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of *Tehan* and *Viragh* and their Impact on its Efficacy" 1994 33 *Uni Louisville Jour of Fam L* 125 (Horstmeyer); Hegar RL & Greif GL "Parental Abduction of Children from Interracial and Cross-cultural Marriages" 1994 25 *Jour of Comp Fam Studies* 135 (Hegar and Greif); Daigle DC "Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exceptions" 1993 26 *Vanderbilt Jour of Transn'l Law* 865 866 (Daigle); Harper T "The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-abduction" 1995 9 *Emory Intn'l LR* 257 (Harper); Morgenstern BR "The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification" 1985 10 *NC Jour Intn'l & Com Reg* 463 (Morgenstern); Schwerin BU "The Hague Convention on International Child Abduction: A Practical Application" 1988 10 *Loyola LA Intn'l & Com LJ* 163 163-164 (Schwerin); Shirman BJ "International Treatment of Child Abduction and the 1980 Hague Convention" 1991 15 *Suffolk Transn'l LJ* 188 189 (Shirman); Clifford DJ "What to do About International Child Abduction" 1996 42 *The Practical Lawyer* 39-46 (Clifford). The American State Department received 4563 reports of abductions of American children to foreign countries for the period 1973-1993: Harper *op cit* 258; Jones RL "Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children" 1981 30 *ICLQ* 467 (Jones "Council of Europe Convention").

2.1 The origins of the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction was adopted at the fourteenth session of the Hague Convention on private international law in plenary session on 24 October 1980. The following day the Final Act of the fourteenth session containing the text of the Convention was signed and the Hague Convention was born. It was implemented in most contracting states by legislation. South Africa acceded to the Convention with the promulgation of the Hague Convention on the Civil Aspects of Child Abduction Act⁴ which was implemented on 1 October 1997. In the UK it was implemented by Part 1 of the Child Abduction and Custody Act of 1985, which came into effect on 1 August 1986. This Act also ratified the Council of Europe Convention. In the US the Hague Convention became the law of the land on 1 July 1988 by the implementation of the International Child Abduction Remedies Act (ICARA),⁵ and in Australia it was implemented by the Family Law (Child Custody Convention) Regulations⁶ which came into effect on 1 January 1987.

2.2 Objectives of the Hague Convention

The primary objective of the Hague Convention is to facilitate the speedy return of a child, wrongfully removed or retained, to his or her place of habitual residence. This objective is premised upon the view that the place of habitual residence is the forum with the most significant interest in resolving the dispute and best suited to make a determination on the merits.⁷ The Convention is aimed at deterring parents from

4 72 of 1996.

5 42 USC ss 11601-11610. Shirman *supra* n 3 205.

6 (Cth) SR 1986 NO 85 made pursuant to the Family Law Act 1975 s111B.

7 Hague Convention Art 1. De Hart GF ed *International Child Abductions a Guide to Applying the 1988 Hague Convention with Forms* American Bar Association, United States of America (1989) 1 (De Hart); Horstmeyer *supra* n 3 126; van Boeschoten CD "Hague Conference Conventions and the United States: A European View" 1994 57 *L&CP* 47 53 (van Boeschoten); Daigle *supra* n 3 867; Silberman L "Hague International Child Abduction Convention: A Progress Report" 1994 57 *L&CP* 209 210ff (Silberman *L&CP*) where the writer indicates that the procedural,

resolving family disputes by resorting to self-help by ensuring that custody and access rights under the law of one contracting state are enforced in another.

The basic premise of the Hague Convention is that a court implementing the Convention is not making a custody determination but deciding where custody jurisdiction should be exercised. The Convention was designed to protect custody rights and not to facilitate the recognition and enforcement of decisions relating to custody. This latter is the objective of the Council of Europe Convention.⁸

2.3 Procedure to be followed under the Hague Convention⁹

In order to attain the stated objectives of the Hague Convention article 6 requires each contracting state to designate a Central Authority. The interaction between these Central Authorities is determined by the provisions of article 7.¹⁰

jurisdictional nature of the Convention ensures that it focuses on wrongful removals or retentions and not on the enforcement of foreign custody orders. In this regard see too Silberman L "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" 1994 28 *FLQ* 9 10-11 (Silberman *FLQ*); Anton AE "The Hague Convention on International Child Abduction" 1981 30 *ICLQ* 537 540-545 (Anton); Bodenheimer BM "The Hague Draft Convention on International Child Abduction" 1980 14 *FLQ* 99 102-103 (Bodenheimer); Droz GAL "A Comment on the Role of the Hague Conference on Private International Law" 1994 57 *L&CP* 3 7 (Droz); Stranko WA "International Child Abduction Remedies" 1993 July *Army Lawyer* 28 (Stranko); Harper *supra* n 3 259; Herring LR "Taking Away the Pawns: International Parental Abduction & the Hague Convention" 1994 20 *NC Jour Intn'l Law & Com Reg* 137 146 (Herring); Schwerin *supra* n 3 184; Le Gette C "International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception" 1990 25 *Texas Intn'l Law* 287 288 (LeGette); Standley K "International Child Abduction: The Hague and European Conventions" 1991 3 *JCL* 137 (Standley).

8 Davis S, Rosenblatt J & Galbraith T *International Child Abduction* Sweet and Maxwell, London (1993) preface (Davis *et al*).

9 For a detailed discussion of the procedure see Davis *et al idem* ch 1; Hilton WM "Handling a Hague trial" 1992 6 *American Journal of Fam Law* 211 (Hilton "Handling a Hague trial").

10 The US Central Authority is the Office of Citizens Consular Services in the Bureau of Consular Affairs of the Department of State (the Office of Children's Issues), discussed in full in Pfund P "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners" 1990 24 *FLQ* 35 45-51 (Pfund); Silberman *FLQ supra* n 6 12-13; Anton *supra* n 7 546-549. The Australian Central Authority is within the federal Attorney-General's Department in Canberra, Australian Capital Territory, which then delegates to the relevant welfare department of the state or territory

Central Authorities designated in terms of the Hague Convention are directed to take measures to:

- Locate an abducted child;
- ensure his or her safety pending the outcome of the application in terms of the Convention;
- initiate proceedings;
- provide administrative support to secure the return of the child; and
- ensure the ongoing free flow of information relating to the case.¹¹

The Central Authority of the requested state responds to requests for the return of the child and attempts to facilitate his or her voluntary return, as well as creating access to legal assistance. The Central Authority of the requesting state helps the applicant process the case. An aggrieved party may apply either to the Central Authority of the state of the child's habitual residence immediately before the abduction, or to the Central Authority of any other contracting state.¹² Parties are not compelled to make use of a Central Authority and may bring their own action for return of the child. Central authorities have however, played an important role in processing applications, performing administrative functions, ensuring efficient information systems and generally expediting the process.¹³

involved. See Nygh P "The Hague Convention at Work in Australia" 1993 15 *Fam Adv* 24 (Nygh *Fam Adv*). The Central Authority for England and Northern Ireland is the Lord Chancellor's Department: Child Abduction and Custody Act 1985 (UK) s3. The Central Authority for South Africa is the Family Advocate: Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 s3. The role of the Central Authorities is discussed fully in Bruch CS "The Central Authorities Role Under the Hague Child Abduction Convention: A Friend in Deed" 1994 28 *FLQ* 35 (Bruch); Stranco *supra* n 7 29-30; Herring *supra* n 7 150-151; Schwerin *supra* n 3 185. The two-way communication process between Central Authorities is emphasised by Droz *supra* n 7 7-8.

11 Art 7.

12 Art 8.

13 Silberman *L&CP supra* n 7 215.

Costs of proceedings under the Hague Convention, including legal representation, are borne by the state and are not for the account of the applicant. This is so irrespective of the financial abilities of the applicant.¹⁴

2.4 Wrongful removal or retention

Children in respect of whom the Hague Convention may be invoked are those who are wrongfully removed or retained. Article 3 of the Hague Convention defines a wrongful removal or retention as being one in

"breach of rights of custody ... under the law of the state in which the child was habitually resident immediately before the removal or retention; and ... [where] those rights [of custody] were actually exercised, whether jointly or alone, or would have been so exercised, but for the removal or retention."

The remedy for such a removal or retention is contained in article 12, discussed below.

At English law, in the case of *P v P*,¹⁵ it was indicated that the purpose of the Convention is to ensure that parties do not gain adventitious advantage by removing the child wrongfully from the country of his or her usual residence, or having taken the child with the agreement of any other party who has custodial rights to another jurisdiction, then wrongfully retaining that child.¹⁶

The focus of the courts is thus on the breach of the custodial rights of the innocent parent and not, save in exceptional circumstances, the merits of the case.

14 Art 26. Anton *supra* n 7 254. Exceptions to this rule may be made in respect of the costs of legal representation or court proceedings where such costs are not covered by the general system of legal aid pertaining in a given state. The US has made a reservation of this nature: Silberman *L&CP supra* n 7 215; Silberman *FLQ supra* n 7 13-14. Due to limited financial resources available in South Africa, South Africa may follow the American example and make a reservation as regards the costs provision.

15 Unreported Sept 19 1989.

16 Per Scott-Baker J. This case was later reported as [1992] 1 FLR 155.

If a child under 16 years of age¹⁷ is abducted from one Hague Convention country to another, the innocent parent can seek an order for his or her return in terms of the Convention.¹⁸ The burden of proving the wrongfulness of the removal or retention rests on the plaintiff.

Removal is wrongful if:¹⁹

- The parties were married at the date of the child's removal and domestic law vested joint custody in the parties;
- the parties were divorced and there was a custody order in favour of the plaintiff;
- the parties were unmarried and the father had a custody order in his favour;²⁰ and
- the child had been made a ward of the court and is removed by the parent who has been granted interim care and control.²¹

Retention is wrongful if:²²

- The parties agreed to a temporary separation and one removed the children abroad without any intention of returning;²³ or
- the plaintiff agreed to the removal of the child from the jurisdiction for a set period of time and the child is not returned after the elapse of such time.

17 Art 4.

18 Art 3.

19 *Davis et al supra* n 8 12.

20 *C v S (A Minor)* [1990] 3 WLR 492, [1990] 2 FLR 442.

21 *Re J (A Minor)(Abduction)* [1989] Fam 85.

22 *Davis et al supra* n 8 12-13.

23 See English case of *Re S (Minors)(Abduction: Wrongful detention)* [1994] 1 All ER 237 (Fam).

The Convention only applies to wrongful removals or retentions to or from a contracting state after the date on which the Convention was implemented in that state. Removal or retention is a specific event not a continuing state.²⁴

There are few American cases involving the Hague Convention. The standards of proof required by the Convention were, however, set out in *David S v Zamira*.²⁵ *In casu* the court required the petitioner to show on a preponderance of the evidence that the removal was wrongful.

2.5 Habitual residence

The Hague Convention only applies to a child habitually resident within a contracting state immediately prior to the breach in custody or access rights. Habitual residence is a simpler concept than domicile.²⁶ On occasion habitual residence has been regarded as a matter of general impression.²⁷ Time is of the essence in parental child abduction cases and often a quick overview is all that is possible. The meaning of "habitual residence" has been discussed in a number of cases in which it was determined that habitual residence may end if a person leaves with a settled intention not to return, but an appreciable period of time and a settled intention to stay will be necessary to enable

24 Silberman *L&CP supra* n 7 232ff; Silberman *FLQ supra* n 7 24.

25 574 NYS 2d 429 (Fam Ct 1991) 431-432. See too Silberman *FLQ idem* 16-20.

26 Davis *et al supra* n 8 14; Herring *supra* n 7 152-154; Crawford EB "Habitual Residence of the Child as the Connecting Factor in Child Abduction Cases: A Consideration of Recent Cases" 1992 June *The Juridical Rev* 177 (Crawford *Juridical Rev*). Domicile was rejected by the drafters because of its technical nature. This rejection was emphasised in *Friedrich v Friedrich* 983 F 2d 1396 (6th Cir 1993). For a discussion of the role of habitual residence see Silberman *FLQ supra* n 7 20-24.

27 *Re B* (August 21 1992) per Waite LJ. The US considered habitual residence in *Friedrich v Friedrich* 983 F 2d 1396 (6th Cir 1993), discussed in Daigle *supra* n 3 872-874. See too Silberman *L&CP supra* n 7 225ff.

a person to become habitually resident.²⁸ In *Kapur v Kapur*²⁹ habitual residence was interpreted as having the same meaning as ordinary residence, characterised by an element of voluntariness. In *Barnet London Borough Council v Shah*³⁰ a settled purpose was required. The court in *C v S (A Minor)*³¹ indicated that habitual residence is a question of fact in each case and it is not lost by temporary absence.³²

2.6 Rights of custody

Custody rights include rights relating to care of the child, in particular the right to determine his or her place of residence.³³ In *Re C (A Minor) (Abduction: Illegitimate Child)*³⁴ the court found that a custody order issued by the court in Sydney, Australia in favour of a mother conferred a right of custody on the father in that it was conditional upon her obtaining the consent of the father before removing the child from the court's jurisdiction. Thus it allowed the father the right to object to the child's removal. Such a right is protected by the Hague Convention.

28 *C v S* [1990] 3 WLR 492, [1990] 2 FLR 442. See Davis *supra* n 8 15-16. For a discussion of other cases in point see Silberman *L&CP ibid*.

29 [1984] 5 FLR 920.

30 [1983] 2 AC 309.

31 [1990] 3 WLR 492; [1990] 2 FLR 442. This case is discussed in Standley *supra* n 7 138ff.

32 *Oundjian v Oundjian* [1979] 1 FLR 198, 10 Fam Law 90. On the meaning of habitual residence see also *Levesque v Levesque* 816 F Supp 662 665 (D Kan 1993); *Meredith v Meredith* 759 F Supp 1432 1433 (D Ariz 1991); *Klam v Klam* 797 F Supp 202 206 (EDNY 1992).

33 Hague Convention art 5. See, "Special Commission Reviewing Operation of the Hague Convention" 1990 29 *ILM* 219 222 ("Special Commission"); Davis *et al supra* n 8 ch 4; Silberman *L&CP supra* n 7 218ff; Herring *supra* n 7 156-157. See too *David S v Zamira* 574 NYS 2d 429 (Fam Ct 1991); *C v C (Abduction: Rights of Custody)* [1989] 2 All ER 465, [1989] 1 WLR 654, [1989] FCR 197, [1989] 1 FLR 403, [1989] Fam Law 228, (CA); Bailey M "Rights of Custody" Under the Hague Convention" 1997 11 *BYU Jour of Public Law* 33 (Bailey).

34 [1990] 2 All ER 449, (CA).

Under the Children Act³⁵ of the UK and the Family Law Act³⁶ of Australia the concept of custody has been replaced by that of parental responsibility.³⁷ In terms of the UK legislation parental responsibility is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". This includes the right to day-to-day care and control of the child.³⁸ Thus a person with parental responsibility would appear to have custody for purposes of the Hague Convention. Likewise, a parent having a residence order in terms of the abovementioned legislation has the right to determine where the child will live and thus also possesses custody rights.³⁹

Custody rights may arise from law, by way of judicial or administrative decision, or legal agreement having effect under the laws of the place of habitual residence.⁴⁰ Whether or not such rights have been breached must be determined with reference to the custody laws of the state from which the child was wrongfully removed or retained. The Hague Convention is only available in instances where the custody rights were actually being exercised or would have been but for the abduction.

2.7 Defences

Articles 12 and 13 of the Hague Convention contain certain exceptions to the principle that a child should be returned as speedily as possible to the place from which he or she was abducted. Article 12 provides that where a child has become settled in his or

35 1989.

36 1975, as amended by the Family Law Reform Act 1995 (Cth).

37 S3(1) UK legislation; s64B(2)(a) of the Australian legislation. See discussions of the UK and Australian positions in chapters 5 & 6 *infra*.

38 Davis *et al supra* n 8 17.

39 *Idem* 18.

40 Herring *supra* n 7 156ff.

her new environment he or she will not necessarily be returned.⁴¹ This article also provides that where the court is convinced that the child has already been moved to another state it may stay the proceedings or dismiss the application.

Article 13 provides that the authorities of the state requested in terms of the Convention are not bound to return the child to the requesting state if they are not convinced that the person, body or institution in which custody or care of the person of the child was vested was exercising such rights at the time of the removal or retention, or if they are convinced such person, body or institution had consented to, or subsequently consented to, the removal or retention.⁴² Furthermore, the authorities will not return a child where they are convinced there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.⁴³ Article 13(b) is the most litigated article of the Convention because the

41 Discussed in *Davis et al supra* n 8 22-23; *Silberman L&CP supra* n 7 246-247; *Stranko supra* n 7 30; *Harper supra* n 2 263-264; *Herring supra* n 7 165-166; *Anton supra* n 7 550ff; *Clifford supra* n 3 41-43..

42 For a discussion of the relevant case authority in this regard see chs 4-7 *infra*. The leading English case relating to art 13 acquiescence is *Re A (Minors) (Abduction: Acquiescence)* [1992] Fam 106, [1992] 1 All ER 929, [1992] 2 WLR 536, [1992] 2 FLR 14, [1992] 2 FCR 9 in which the court found that acquiescence could be active or passive. A person could not acquiesce unless aware of the rights he or she has against the other parent. Acquiescence that is active must be clearly stated and acquiescence is not a continuing state of affairs. Here the plaintiff need not have day-to-day care and control of the child. Exercising a say in the child's upbringing or a right of access is sufficient. Consent or acquiescence here should not be confused with consent or acquiescence to the child travelling for a specific period of time which, when that period expires, may result in a wrongful retention. See too *Stranko ibid*; *Harper idem* 262-263; *Herring idem* 166-167; *Silberman FLQ supra* n 7 25-26.

43 Grave risk has been analysed in, inter alia, *Re C (A minor) (Abduction)* [1989] 1 FLR 403 in which the court declared that the risk must not be trivial and that risk must not be equated to the child's personal welfare. In *Re A (A Minor) (Abduction)* [1988] 1 FLR 365 Nourse LJ stated at 372 that the risk had to be more than just ordinary risk, more than one expects from simply taking the child away from one parent and passing him or her to the other. One possible example of grave risk may be where civil war is threatening in the country where the child is residing.

Psychological harm must be proven by obvious, incontrovertible evidence: *Re C (A Minor) (Abduction) op cit*. The harm must be substantial: *Re A (A Minor)(Abduction) op cit*.

What constitutes an intolerable situation was discussed in *Re C* 11 April 1990 Fam Div. Here Eastham J discussed the meaning of the word intolerable. The meaning must be determined by examining all the circumstances of the case. In *Re C (A minor) (Abduction) op cit* it was pointed out that in all Convention cases there will be psychological harm to the child irrespective of

courts still feel compelled to consider the best interests of the child while giving effect to the objective of the Convention to return the abducted child. In the American case of *Tahan*⁴⁴ the New Jersey court attempted to delineate specific rules for analysing whether or not the return of a child will cause physical or psychological trauma. The court of appeal found that article 13(b) required more than a cursory evaluation of the civil stability of the place of the child's habitual residence. The court found that it was "empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there".⁴⁵ Clearly an analysis of this nature is important as it is patent that Convention exceptions are to be narrowly interpreted in order to avoid undermining the express objective of the Convention to return the child promptly. Article 13(b) was not intended to open the door to relitigate the best interests of the child. One proposal to improve article 13(b) is to require the court to return the child to the custody of a third party in the state of the child's habitual residence. The courts of that place would then determine whether to return the child to the aggrieved party or to modify the custody order.⁴⁶ This proposal still does not resolve the problem of determining whether or not grave risk of harm exists and simply defers litigation from

whether or not the child is returned. The courts also examined art 13(b) in *Re D (A Minor) (Child Abduction)* [1989] 1 FLR 97; *C v C (Abduction: Custody Rights)* [1989] 2 All ER 465, [1989] 1 WLR 654, (CA); *Re H* (Eng CA Aug 20 1991) unreported, discussed in Silberman *L&CP supra* n 7 239-240. In America the art 13(b) exception based on grave risk was invoked but rejected in *Becker v Becker* 15 Fam LR (BNA) 1605 (NJ Super Ct 1989), cited by Horstmeyer *supra* n 3 128 n25; *Sheikh v Cahill* 145 Misc 2d 171, 546 NYS 2d 517 521 (Sup Ct 1989) and *Navarro v Bullock* 15 Fam LR (BNA) 1576 (Cal Super Ct 1989) and analysed in *Tahan v Duquette* 259 NJ Super 328, 613 A 2d 486 (App Div 1992) discussed in depth in Horstmeyer *op cit* 126ff. The article was examined by the Australian courts in *Gsponer v Johnstone* [1988] 12 Fam LR 755, (1988) FLR 164.

On the risk of harm defence see in general Silberman *L&CP op cit* 235ff 267ff; Stranko *idem* 30; Harper *idem* 259-261; Herring *idem* 167-170; Silberman *FLQ idem* 26-31; LeGette *supra* n 7 297-304. See too chs 4-7 *infra*.

44 *Tahan v Duquette* 259 NJ Super 328, 613 A 2d 486 (App Div 1992). See discussions of this case in Daigle *supra* n 3 875-877; Silberman *idem* 237. For a different approach see *Renovales v Roosa* No FA 910392232S, 1991 WL 204483 (Conn Super Ct 1991) discussed in Daigle *op cit* 877. See also the similar case of *Navarro v Bullock* 15 Fam LR (BNA) 1576 (Cal Super Ct 1989).

45 *Idem* 489.

46 Shirman *supra* n 3 218-219. For a discussion of the burden of proof in such cases see Daigle *supra* n 3 872.

one court to another, increasing costs and dragging out the proceedings. In its favour, however, it would discourage abductors who would be forced to explain their actions before the original court and would not be afforded the opportunity of taking advantage of judicial discretion by relitigating the child's best interests.⁴⁷

Article 13 also permits a child of suitable age to object to his or her return. Such objections have seldom been recognised by the courts. Where they are allowed the court requires more than a mere expression of a preference and the reasons for the child's wishes not to be returned must be fully considered.⁴⁸

Where an exception exists in terms of either of the two articles mentioned above, the court is vested with a discretion as to whether or not to return the child. The discretion not to return the child is normally exercised in circumstances where the court of the state where the child finds himself or herself is a more appropriate forum to determine the child's welfare. In such cases that court should give effect to the policy underlying the Convention in ensuring that the parent who wrongfully removed or retained the child does not gain any advantage from his or her wrongful actions.

The burden lies on the requesting state to minimise the harm to a returning child. The returning court may assume that the other court will take all possible and necessary steps to eliminate harm. Hence article 13 exceptions will only apply in rare cases.⁴⁹

47 Horstmeyer *supra* n 3 133. See Schwerin *supra* n 3 186 where the author indicates that in accordance with art 16 of the Hague Convention no determination of the merits of a custody award may be made until the decision has been taken not to return the child.

48 See Silberman *L&CP supra* n 7 245-246; *Bickerton v Bickerton* No 91-06694 (Cal Super Ct, Contra Costa City July 17 1991); *Matter of McIntyre & Hammon* (Kan Civ Ct Johnson Cty July 15 1990, unreported) discussed by Silberman *L&CP op cit* 245; *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, (CA); *Re R (A Minor)(Abduction)* [1992] 1 FLR 105. See further chs 4-7 *infra*.

49 In *P v P (Minors)(Child Abduction)* [1992] 1 FLR 155 Scott-Baker J suggested that an example of a defence under art 13 (b) would be where a mother leaves a father after a long history of violence. In *Re E (A Minor)(Abduction)* [1989] 1 FLR 135, [1989] Fam Law 105, (CA) the alleged prostitution and drug taking on the part of the mother were not sufficient grounds to prove that his return to Australia would place him in an intolerable situation.

Article 20 of the Hague Convention contains another exception. This article provides that where the Central Authority in the requested state can prove that the return of the child would result in a violation of the requested state's principles of human rights then the child need not be returned.⁵⁰ This article will only be invoked in exceptional circumstances where public morality demands it because it offends against a fundamental principle of public policy,⁵¹ or due process is absent.

2.8 The Hague Convention and non-Convention countries⁵²

One of the greatest problems facing the Hague Convention is that there are still many countries that have not become parties to the Convention.⁵³ Such countries become safe havens for parental abductors in which the Hague Convention cannot be invoked. Would-be abductors are increasingly making use of this escape route.⁵⁴ All an abductor need do to avoid the Convention is to ascertain the status of the country to which he or she is fleeing.⁵⁵

Where a child is removed to a non-Convention country the parent who has been deprived of custody, the so-called "left-behind", or aggrieved parent, is faced with enormous problems, not the least of which is the potential lack of financial resources.

50 Daigle *supra* n 3 378-379; Silberman *L&CP supra* n 7 242ff; Stranko *supra* n 7 30-31; Herring *supra* n 7 170-171.

51 See in this regard Perez-Vera E *Hague Conference on the Private International Law, Convention on the Civil Aspects of International Child Abduction: Convention and Recommendation Adopted by the Fourteenth Session and Explanatory Report* ("The Perez-Vera Report") 50/462; Eekelaar JM "International Child Abduction by Parents" 1982 32 *Toronto L J* 281 314 (Eekelaar). Silberman *L&CP idem* 242 is critical of the analysis of this article by Daigle *idem* n 3.

52 Davis *et al supra* n 8 ch 6.

53 1993 32 *ILM* 1211. Harper *supra* n 3 264ff. For a current list of Convention countries see Clifford *supra* n 3 46. See too chs 4-7 *infra*.

54 Harper *idem* 265.

55 American State Department records cited by Harper *idem* 265 reveal that 3899 of the 4563 child abductions from America since 1973 were to non-Convention countries.

Legal aid is not available in these cases. Assuming the parent is financially able to pursue the matter and to arrange an appropriate hearing of the matter there are no guarantees that the courts of the country in which the child is located share the notions of justice adhered to by the courts of the country from which the child was abducted. In such cases custody is dictated by the laws of the receiving state and that state's notion of what is in the best interests of the child. There may well be a real possibility of the aggrieved parent being prejudiced by the close ties that the abducting parent has with the legal system to which he or she has fled.⁵⁶

Remedies here are extremely limited. Where the abducting parent has not instituted custody proceedings in the courts of the country to which he or she has removed the child, locating the child can prove an insurmountable challenge. Initially, the parent may work through his or her embassy in that country, approach the police for assistance and advertise in, and grant interviews to, newspapers and magazines. The longer it takes to locate the child the greater the possibility that the foreign court will find the child to be settled in his or her new environment.

Once the child has been located the relevant embassy in the place of the child's habitual residence should be contacted so that the aggrieved parent can make an informed decision about what action to take.⁵⁷ If a hearing of the matter is arranged the matter is dealt with according to the laws of the receiving country. An existing custody order will not automatically be recognised or enforced. This is especially true in many Middle-Eastern countries which regard a father's claim to children of a marriage as superior to that of the mother.

Delays in the judicial process may be crucial, especially where the foreign court makes an order and it cannot be enforced, or the abductor has decamped to another

56 Harper *idem* 267.

57 Davis *et al supra* n 8 30.

jurisdiction.⁵⁸ As will be seen in the detailed discussions of the legal position in the UK, Australia, the US and South Africa, breach of a custody order issued by the courts of any of those countries amounts to contempt of court and contempt proceedings may be instituted. In the UK a committal order may be sought in terms of which the abducting parent may be seized by a court officer.

Extradition is another possible means by which return of an abducting parent and, in consequence thereof the possible return of an abducted child, may be achieved.⁵⁹ Extradition is the process of bringing the abducting parent back to the country from which the child was abducted. It may take place if that person has committed an extradition offence.⁶⁰ The child is not extradited but his or her return may be secured by forcing the return of the abducting parent. For extradition to be available as a remedy the child must have been removed from one country to another, both of which are signatories to an extradition treaty.⁶¹ Extradition becomes a far more significant possibility in cases of re-abduction where the second abduction may breach a foreign custody order or law and extradition may be sought for criminal prosecution.⁶²

58 For a discussion of practical steps which can be taken see Davis *et al idem* 31.

59 Davis *et al idem* 32.

60 For a definition of what constitutes an extradition offence in each of the legal systems examined see chs 4-7 *infra*.

61 In the UK extradition will only be effected where the child has been removed to a country that is a party to an extradition treaty in terms of the Extradition Act 1989. Extradition from the US is contingent upon the existence of a valid extradition treaty between the US and the country from which the child was abducted or re-abducted. The treaty must encompass parental kidnapping and both countries must regard it as criminal conduct: Harper *supra* n 3 275; Gaw M "When Uncle Sam Needs to Come to the Rescue" 1987 9 *Fam Adv* 24 (Gaw).

62 See chs 4-7 *infra*.

3 THE COUNCIL OF EUROPE CONVENTION⁶³

The Council of Europe Convention was signed on May 20 1980 in Luxembourg.⁶⁴ It was implemented in the UK by part II of the Child Abduction and Custody Act.⁶⁵ The abduction of children and their return to the countries from which they were abducted is not the primary concern of this Convention. It focuses upon the recognition and enforcement of foreign custody orders. In circumstances where either the Council of Europe or Hague Conventions may be applied the latter will take precedence. The Council of Europe Convention is only applicable between countries that are signatories to it.

The Council of Europe Convention is applicable in respect of children, of any nationality, under the age of 16 who do not have the right to determine their own place of residence under the law of their place of habitual residence or nationality, or according to the internal law of the state addressed.⁶⁶ Within the context of this Convention improper removal of a child is removal across an international border in breach of a custody decision given in a contracting state within which it is enforceable. It includes a failure to return the child across an international frontier at the end of a visitation period or at the end of a temporary stay in a territory other than that in which the custody is recognised. The Convention will also be applicable in cases where the removal is subsequently declared unlawful within the meaning of article 12 of the Convention.⁶⁷

63 Davis *et al supra* n 8 Ch 7 34; Anton *supra* n 7; Council of Europe "Explanatory Report 8 on the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children" Strasbourg (1980)5-23 ("Council of Europe report"). A copy of the full text of the Council of Europe Convention appears as an addendum to the report.

64 Anton *idem* 538.

65 1985. For the history of the Council of Europe Convention see Council of Europe report *supra* n 63.

66 Art 1(a).

67 Art 1(d).

For purposes of the Council of Europe Convention a custody determination is a decision of an authority relating to the care of the person of the child, including the right to decide on the place of residence or the right of access to the child.⁶⁸

Article 2 provides for the appointment of Central Authorities in contracting states.⁶⁹ In terms of article 3 these authorities will co-operate with each other to promote good relations between competent authorities in their respective countries.⁷⁰ Article 3(2) sets out the responsibilities of Central Authorities to transmit requests for legal or factual information from other Central Authorities and to provide each other with up-to-date information about their laws relating to child custody and any difficulties that may arise in relation to the application of the Convention. It is also the responsibility of duly appointed Central Authorities to eliminate as many obstacles to the application of the Council of Europe Convention as possible.

A person who has obtained a custody order in the courts of a contracting state may apply to the Central Authority of any other contracting state where he or she wishes to have the order recognised or enforced.⁷¹ If the Central Authority that receives the application is not the Central Authority addressed it will immediately transmit the application to the appropriate Central Authority.⁷² The Central Authorities keep the applicant updated on the progress of the application.⁷³

68 Art 1(c).

69 Federations may appoint multiple Central Authorities. The Central Authority in England and Wales for both the Hague and Council of Europe Conventions is the Lord Chancellor's Department.

70 A detailed discussion of what constitutes a competent authority appears in Jones "Council of Europe Convention" *supra* n 3 470-471.

71 Art 4(1).

72 Art 4(3). The Central Authority will only proceed if the Convention requirements are met: Art 4(4).

73 Art 4(5).

A person seeking restoration of custody or recognition and enforcement of a custody decision may approach the Central Authority of a contracting state or may apply directly to the courts of the state addressed. The Central Authority will immediately take all the necessary steps to initiate proceedings before its competent authorities to:

- Locate the child;
- provide for the interests of the child;
- secure recognition and enforcement of the decision;
- secure the return of the child to the applicant in cases where enforcement is granted; and
- keep the requesting authority informed.⁷⁴

If a Central Authority believes the child is in the territory of another contracting state it will immediately forward the application to the Central Authority of that state.⁷⁵ Aside from costs of repatriation the Central Authority will not receive payment for its services.⁷⁶

Article 7 of the Council of Europe Convention provides that a custody decision given in one contracting state will be recognised and, where it is enforceable in the state of origin, enforceable in all other contracting states.

The procedures for the return of a child improperly removed are set out in article 8. This article provides that a Central Authority must start proceedings for return of an improperly removed child where that child and his or her parents were sole nationals of, and the child had habitual residence in, the territory of the state where the decision was given, either at the date of institution of the custody proceedings or immediately before the removal, whichever was earlier. The request for restoration must be

74 Art 5(1).

75 Art 5(2).

76 Art 5(3).

addressed to the Central Authority within six months of the removal. Article 8(3) provides that these restoration procedures will also be available to any person with custody rights whose rights are infringed by the unauthorised retention of the child abroad after expiry of a visitation period by any person to whom he or she granted access rights in terms of a valid agreement.

Article 9 provides for instances of improper removal other than those provided for in article 8. This article provides that an application for recognition and enforcement of custody, made to a Central Authority within six months of an improper removal, will only be refused if:

- The decision was given in the absence of the defendant or his or her legal representative, or the defendant was not served with the documents instituting action, or their equivalent, in sufficient time to plan his or her defence. The application will not be refused if the failure to serve on the defendant was occasioned by his or her concealing his or her whereabouts from the person who instituted action in the state of origin;
- the decision was given in the absence of the defendant or his legal representative and the competence of the authority giving the decision was not founded upon: (a) The habitual residence of the defendant; (b) the last common habitual residence of the child's parents, at least one parent still being habitually present there; or (c) the habitual residence of the child;⁷⁷ or
- the decision is incompatible with an earlier decision relating to custody which became enforceable in the state addressed before the removal of the child. Application will not be refused if the child has had his or her habitual residence in the territory of the requesting state for the year preceding the removal.

Under no circumstances will the substance of a foreign decision be reviewed.⁷⁸ Articles

77 Uncertainty may arise where habitual residence is founded upon the child's wrongful removal.

78 Art 9(3).

8 and 9 may be subject to reservation by a contracting state in terms of article 17. If articles 8 and 9 are excluded the contracting state retains the ultimate discretion to refuse the return of a child where return would be contrary to the child's welfare. Supporters of the automatic return of children in kidnapping cases support articles 8 and 9 on the basis that the Convention should deter kidnapping as far as possible.⁷⁹ Article 10(1) provides that enforcement may also be refused if:

- The effects of a decision are patently incompatible with the fundamental principles of the law of the family and children in the addressed state;
- it is found that the circumstances have changed, even by dint of passage of time, but not only by change of residence by removal, and that the decision no longer accords with the welfare of the child;⁸⁰
- at the time of institution of the proceedings in the state of origin the child is a national of the state addressed or was habitually resident there, or the child was a national of both the state of origin and the state addressed and was habitually resident in the latter; or
- the decision was incompatible with a decision given in the state addressed or enforceable there pursuant to a decision of a third state in respect of proceedings begun before the submission of the request for recognition or enforcement, and refusal accords with the welfare of the child. In *Re Ghysens (Minor)*⁸¹ enforcement of a Belgian order in favour of the father, breached by the mother, was refused as the minor was settled in England and did not want to return. In *Re L (Child Abduction: European Convention)*⁸² it was held that the Council of Europe Convention made it mandatory for a subsisting order to be recognised, registered and enforced in England. The discretion of the court to

79 Jones "Council of Europe Convention" *supra* n 3 472-473.

80 In *Re G (A Minor) (Child Abduction: Enforcement)* [1990] 2 FLR 325, [1990] Fam Law 23, (CA) it was held that refusal to recognise an order is discretionary.

81 November 8 1990 (Belgium).

82 [1992] 2 FLR 178.

refuse this was extremely limited.

Article 10(2) provides that proceedings for recognition and enforcement may be adjourned if:

- An ordinary form of review of the original order has been commenced;
- proceedings relating to the custody of the child, commenced before the proceedings in the state of origin were instituted, are pending in the state addressed; or
- another decision concerning the custody of the child is the subject of proceedings for enforcement or relating to the recognition of the decision.

Article 12 provides that a declaration of a wrongful removal includes an enforceable custody decision given in a contracting state before the removal or, in the absence of any such determination, any subsequent custody determination by a contracting state, given at the request of any interested party, which declares the removal to be unlawful. Thus a custody decision made after the removal may be recognised and enforced in the same way as a decision made prior to the removal.

As with the Hague Convention, application is made to the Central Authority of a contracting state. Applications should be accompanied by prescribed documentation and, where necessary, translations of such documentation.⁸³ Contracting states apply simple, speedy procedures.⁸⁴ Before arriving at a decision the Central Authority of the state addressed must, as far as possible, ascertain the wishes of the child.⁸⁵ It is also the duty of the Central Authority to initiate any necessary enquiries.⁸⁶ Costs of

83 Davis *et al supra* n 8 35. Art 13.

84 Art 14.

85 Art 15(1)(a). See Jones "Council of Europe Convention" *supra* n 3 474.

86 Art 15(1)(b).

enquiries in other contracting states are borne by the state in which they are carried out.⁸⁷

It is clear from the preamble to this Convention that the paramount consideration is the welfare of the child.⁸⁸ Hence it is possible for a court to simply determine that the recognition and enforcement of a custody order which is the subject of recognition and enforcement proceedings is simply not in the child's best interests.

"Nationality" and "habitual residence" are not defined in the Convention and must be determined in accordance with the national law of each contracting state.⁸⁹ No restrictions are placed on the circumstances under which a member state can assume jurisdiction in a custody matter, save that any custody or access decision made in one contracting state shall be recognised and enforced in any other, unless recognition is refused on recognised grounds. Thus a state will refuse recognition and enforcement where the child's connections of habitual residence and nationality are closer to the requested state than to the requesting state.⁹⁰

The problem of *ex lege* custody rights is also dealt with by the Council of Europe Convention which provides that a decision relating to custody made after the removal, and declaring the removal to be wrongful, will fall within the scope of the Convention.⁹¹

87 For a discussion of practical steps to be taken in complying with the mandate of this Convention see Davis *et al supra* n 8 35-36.

88 Jones "Council of Europe Convention" *supra* n 3 469.

89 Davis *et al supra* n 8 38; Kelly MM "Taking Liberties: The Third Circuit Defines "Habitual Residence" Under The Hague Convention on International Child Abduction" 1996 41 *Villanova LR* 1069 1072 (Kelly *Villanova LR*). The American courts appear to regard habitual residence as a mixture of fact and law: *Feder v Evans-Feder* 63 F 3d 217, 222 n 9 (3d Cir 1995) discussed in full in Kelly *Villanova LR op cit* 1074ff.

90 Jones "Council of Europe Convention" *supra* n 3 469.

91 *Idem* 469-470.

This is known as a chasing order.⁹² In child abduction cases obtaining a chasing order may take some time. The Council of Europe Convention will only apply in cases where a custody determination has been made and thus the need to obtain a chasing order may result in delays. The Hague Convention avoids these potential delays because it focuses on custody rights and does not require a custody award in order to be applicable. This is a fundamental difference between the two Conventions.

Unlike the Hague Convention which only applies in cases of wrongful removal or retention, irrespective of the absence of a judgment in the state of origin, the Council of Europe Convention is not restricted to cases in which the removal or retention is wrongful.⁹³ Rather, it is concerned with recognition and enforcement of existing orders.⁹⁴

4 A FEW REFLECTIONS ON THE HAGUE CONVENTION

The indications are that the Hague Convention has been extremely successful.⁹⁵ This success may be attributed, *inter alia*, to the trans-cultural objectivity manifest in the ongoing consultations with interested countries, contracting states and non-contracting states on potentially problematic issues.⁹⁶ These consultations have ensured the awareness amongst contracting states of their mutual needs in fulfilling the mandate of the Hague Convention. Another reason for the success of the Hague Convention has been the defined scope of the Convention which addresses only a limited number of specific issues. It avoids controversial issues relating to the merits of custody orders

92 Anton *supra* n 7 541-542.

93 Jones "Council of Europe Convention" *supra* n 3 468.

94 Anton *supra* n 7 538.

95 Silberman *L&CP supra* n 7 257ff. See also chs 4-7 *infra*.

96 First Special Commission, October 1989 (the Hague) and Second Special Commission January 1993 (the Hague). The former commission was attended by representatives of 30 countries and the latter by 44 countries, twenty-three of which were parties to the Convention. See Silberman *L&CP supra* n 7 257 265.

and creates a set of procedural and jurisdictional rules.⁹⁷ This enhances the objective standardised application of rules in return issues and minimises the application of self-interest considerations by authorities of countries to which children have been abducted. To enhance a standardised application of the Convention certain terms are clearly defined.⁹⁸ Some concepts, however, remain inherently ambiguous despite the advantage gained from the fact that the Hague Convention was drafted simultaneously in both French and English.⁹⁹ This feature of the Convention allows for the possible clarification of ambiguities in one language version by reference to the other, equally authentic, language version.¹⁰⁰

The two-way role of Central Authorities has also contributed to the success of the Hague Convention. Information exchange and dialogue have improved communications and resulted in the expeditious resolution of Convention matters. Implementation legislation in certain countries has also added value to the Convention.¹⁰¹

Despite the apparent success of the Hague Convention it should be borne in mind that its success should not only be measured against the number of children returned, but against the appropriateness of those returns.¹⁰² An examination of the appropriateness of the return will require both an examination of the family law and the private international law aspects of parental child abductions governed by the Hague Convention.¹⁰³ Family law principles require that decisions relating to minor children

97 Silberman *L&CP idem* 577-258, 265; Herring *supra* n 7 148.

98 See inter alia "custody" and "access": Silberman *L&CP idem* 258-259.

99 For example "psychological harm".

100 Silberman *L&CP supra* n 7 259-260; Nadelmann KH and von Mehren AT "Equivalencies in Treaties in the Conflicts Field" 1967 15 *Am J Comp Law* 195 (Nadelmann and von Mehren).

101 Silberman *L&CP idem* 262. See chapters 4-7 *infra*.

102 Schuz R "The Hague Child Abduction Convention: Family Law and Private International Law" 1995 44 *ICLQ* 771 772 (Schuz).

103 Schuz *ibid*.

should be based on the best interests of the child. This appears to be an underlying principle of the Hague Convention although the words "interests of the child" do not appear in the Convention. Furthermore, courts enforcing an application under the Convention often regard the plea that the return of the child is not in the child's best interests as irrelevant. The Convention thus appears to have the paramount purpose of returning the child who has been wrongfully removed. The Convention is concerned only with the best interests of children in general and not one child in particular.¹⁰⁴

Other difficulties that face the Hague Convention are numerous. Possibly the most significant of these difficulties is the fact that many countries have not yet ratified the Convention and such countries continue as safe havens for parental abductors.¹⁰⁵ To escape the ambit of the Hague Convention the abducting parent need only remove the child to a non-contracting state.¹⁰⁶ This is particularly important in respect of non-Western countries.¹⁰⁷ A broader adoption of the Convention is a pressing priority.¹⁰⁸ The Convention only applies between contracting states, one of which was the place of the child's habitual residence immediately before the abduction.¹⁰⁹ The Convention must have been implemented in both countries before the abduction took place.¹¹⁰ It is not retroactive in effect and will not apply in respect of children abducted to a country which becomes a signatory after the abduction took place.¹¹¹

104 Schuz *idem* 774. See also Schuz' discussion of the distinction between the best interests of the child in general and those of a particular child 774-779.

105 Silberman *L&CP supra* n 7 264, esp ns258-259; Daigle *supra* n 3 870. This failure to become a party to the Convention is often motivated by a desire of a country to retain jurisdiction in long term custody determinations.

106 *Gregory Lauder-Frost v Joanna Lauder-Frost* FD-16-3525-91 (NJ Super Ct Feb 11 1991) and discussed in Silberman *L&CP idem* 267.

107 Silberman *L&CP idem* n 7 265.

108 Herring *supra* n 7 171-172; Morgenstern *supra* n 3 464-485 .

109 Stranko *supra* n 7 28.

110 Stranko *idem* 29; Herring *supra* n 7 162-163.

111 Silberman *FLQ supra* n 7 24; Herring *idem* 161.

The application of the Hague Convention also poses some important conflict of laws problems. These conflicts problems fall into two distinct categories, those that are of a jurisdictional nature and relate to ensuring that the most appropriate *forum* hears the matter, and those of a choice of law nature which relate to ensuring that decisions of foreign competent courts are respected and that enforcement of foreign judgments takes place.

The Hague Convention creates a jurisdictional rule which confers exclusive jurisdiction in Convention matters upon the court of the place of habitual residence. This is not necessarily the most appropriate forum within the meaning of the *forum non-conveniens* rule.¹¹² It should be noted that the jurisdictional rule only comes into play once a wrongful removal or retention has taken place and will not apply in other situations. Wrongful removals are however quite extensive in that a breach of any custody right constitutes a wrongful removal or retention. The term "custody rights" is broadly interpreted.¹¹³ The rule that in such cases the place of habitual residence has exclusive jurisdiction except in terms of the Convention exceptions is absolute. For this reason the plea of *forum non conveniens* is not available as it would be in non-Convention cases.¹¹⁴

Treaties and conventions which incorporate jurisdictional rules are valuable in that they promote harmonisation of jurisdictional criteria and a better balancing of the interests of litigants where no mechanism exists to avoid conflicts of jurisdiction.¹¹⁵ These long-

112 Schuz *supra* n 102 779-780.

113 Schuz *idem* 781; *Re B (A Minor)(Abduction: Consent)* [1994] 2 FLR 249, (CA); *C v S* [1990] 2 AC 562; *David S v Zamira* 574 NYS 2d 429 (Fam Ct 1991); *Re H (A Minor)(Abduction)* [1990] 2 FLR 439; *Re J (Abduction:Ward of Court)* [1989] Fam 85; *B v B (Abduction: Custody Rights)* [1993] 2 All ER 144; *Thomson v Thomson* (1994) 119 DLR (4th) 253.

114 See in this regard *Re S (Minors)(Abduction)* [1994] 1 FLR 297, (CA); *Re A (A Minor)(Abduction)* [1988] 1 FLR 365. The courts can also rely on the converse argument that the place of habitual residence is the most appropriate forum to argue for the return of the child: *Re E (A Minor)(Abduction)* [1989] 1 FLR 135 per Balcombe LJ 142.

115 Van Boeschoten *supra* n 7 50.

term advantages may mitigate the disadvantages of individual litigants having to litigate in a foreign jurisdiction.¹¹⁶

In terms of the Hague Convention the court may refuse to return the child if a year or more has elapsed between the abduction and institution of the action, and the child is settled in his or her new home.¹¹⁷ This may be impractical where the location of the child and the abducting parent needs to be ascertained.¹¹⁸ This limitation is however balanced to some degree by the court's retaining a discretion to return the child even though a year or more has elapsed since the abduction.¹¹⁹ As the Convention can only be invoked in cases of international abduction the time limit set out in the Convention is easily avoided where the child is first abducted to a place within the country from which he or she is to be abducted, and later removed outside the country's borders.¹²⁰ Furthermore an abductor may simply go into hiding in the foreign country.¹²¹

Although the scope of the Hague Convention and the applicable time limits are clear, common law countries have a discretion to consider the principles of the Convention in relation to cases that fall outside its ambit.¹²²

116 *Ibid.*

117 Silberman *L&CP supra* n 7 244-247.

118 Silberman *L&CP idem* 247; Baker E and Seiler D "How to Recover a Missing Child After Parental Kidnap" 1986 60 *FLA BJ* 57 (Baker and Seiler).

119 See *In re Coffield* No 94-P-0034, 1994 Ohio App LEXIS 2546 (Ohio Ct App June 3 1994); *In re Marriage of Collopy* No 90 DR 1138 (Col Dist Ct Div B May 8 1991) cited in Silberman *L&CP ibid.*

120 Grayson J "International Relocation, the Right to Travel, the Hague Convention: Additional Requirements for Custodial Parents" 1994 28 *FLQ* 531 (Grayson).

121 Greif *supra* n 2 285 conducted a survey of 17 cases of abduction. The periods for which the abductor and child went into hiding ranged from 1 week to 11 years, the average was two years.

122 In some cases these policies have been considered; *In the Marriage of Barrios and Sanchez* [1989] 13 Fam LR 477; *Re F (A Minor)(Abduction)(Jurisdiction)* [1990] 3 All ER 97, (CA); *G v G (Minors)(Abduction)* [1991] 2 FLR 506, (CA); in others they have not; *In the Marriage of Hooft van Huysduyden (No 1)* [1989] 99 FLR 282; *Re Moshen (A Minor)* 715 F Supp 1063 (DC Wyo 1989).

The Hague Convention applies only in respect of children under 16 years of age. Irrespective of the child's age at the date of the abduction, the child must be under 16 years of age when action is instituted under the Convention.¹²³ This limitation is not open to discretionary abuse as age is a question of objective fact.¹²⁴ The exceptions to the application of the Convention created in articles 13 and 20 are, however, of a more discretionary nature and, as is evidenced above, may be applied inconsistently. For this reason the success or failure of the Hague Convention may depend strongly upon the willingness of the courts to conservatively interpret the limitations on its scope.¹²⁵

The exception offered under article 20 of the Convention is open to abuse and for this reason two possible limiting factors have been proposed, namely:

- The return of the child must violate an actual law of the requested country and not simply be incompatible with the policy or culture of that country; and
- reliance on public policy exceptions in applying the provisions of the Convention should be no more frequent than they are in relation to the application of domestic decisions.¹²⁶

It has been speculated that the application of these limitations could result in the return of the child constituting a violation of the due process rights of the parents and or the child. Failure to consistently interpret this Convention, and its exceptions, will undermine its value as a vehicle to ensure the return of abducted children.¹²⁷

123 Silberman *supra* L&CP n 7 244-245; Stranko *supra* n 7 28; Herring *supra* n 7 161; "Special Commission" *supra* n 33 223.

124 Harper *supra* n 3 264.

125 Horstmeyer *supra* 3 141; Daigle *supra* n 3 868; Silberman L&CP *supra* n 7 235.

126 Daigle *idem* n 3 879; Rivers DR (Student author) Comment "The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor" 1989 2 *Transn'l Law* 589 628 (Rivers).

127 Silberman L&CP *supra* n 7 213.

The Hague Convention does not require that there be an existing court order before it may be implemented,¹²⁸ but the removal or retention must be wrongful.¹²⁹ As appears above, the determination of whether or not a removal is wrongful is somewhat problematical.

The provisions of the Convention are not a bar to other means of securing the return of the child to his or her habitual residence.¹³⁰ Article 18 provides that the provisions of the Convention do not limit judicial or administrative authorities from exercising their powers to order the return of a child at any time. Article 29 provides that any person whose custodial rights have been breached within the meaning of the Convention is not precluded from applying directly to any judicial or administrative body of a contracting state whether or not under the provisions of the Convention.¹³¹ Clearly the Hague Convention does not bar an application under any other body of law for the return of the child. Limitations on return imposed by the Convention do not apply to other means of securing the return.¹³² Thus the Hague Convention is not the exclusive means to obtain the return of a child and the age limitation contained in the Convention will not bar the return of an older child in accordance with any other instrumentality.

An aggrieved parent will fail in his or her bid to recover an abducted child where the child has been removed to a non-Convention country or where a discretionary exception is invoked. In such cases that parent will have to institute custody litigation in the courts of the foreign country. Where such measures have been unsuccessful re-

128 Herring *supra* n 7 148.

129 Stranko *supra* n 7 29.

130 Arts 18 & 29. Hilton WM "The Non-exclusivity of the Convention on the Civil Aspects of International Child Abduction" 1995 9 *Am J FL* 6 (Hilton "Non-exclusivity of the Convention"); Stranko *idem* 28; Anton *supra* n 7 555.

131 Arts 3 & 21.

132 This non-exclusivity is apparent from the Department of State legal analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed Reg 10,503 (1986) and "The Perez-Vera Report" *supra* n 51.

abductions have occurred.¹³³ Re-abduction has been discouraged, inter alia, by the American State Department.¹³⁴ Such action could well constitute a criminal act in the place where the re-abduction occurs. In such instances a criminal prosecution could follow if the abductor is apprehended before leaving the borders of that state.¹³⁵ In order to avoid criminal prosecution certain parents have gone so far as to hire mercenaries to recover their abducted children.¹³⁶

Where a re-abduction takes place from one Convention country to another the question arises, to what extent will the receiving state honour the Convention in relation to the state to which the child was first abducted?¹³⁷

5 A FEW REFLECTIONS ON THE COUNCIL OF EUROPE CONVENTION

The Council of Europe Convention is of more limited geographical scope than the Hague Convention and finds application only in one of the legal systems examined in this thesis, the UK. A custody determination must have been made before the provisions of this Convention become applicable. The principal problem encountered in relation to the application of the Council of Europe Convention is not that there are conflicting decisions of states, but that locating a child and bringing all the relevant facts to the attention of authorities in another state may cause delays and extreme

133 Harper *supra* n 3 268.

134 Gaw *supra* n 61 27.

135 Harper *supra* n 3 269.

136 Harper *idem* 269ff.

137 Harper deals with some of the issues in the American context, *idem* 271ff, where it seems that if the first abducting parent did not intend a permanent move to the place to which the child was first abducted then habitual residence is not established there: *Cohen v Cohen* 1993 NY Misc LEXIS 390 * 16 (1993) cited in Harper *op cit* 271. In the absence of such habitual residence the US remains the place of habitual residence and the Hague Convention cannot be applied to the re-abduction. See too *Meredith v Meredith* 759 F Supp 1432 1434 (D Ariz 1991). See chapter 7 *infra* regarding the US special provisions which operate outside of the Convention.

expense.¹³⁸

6 SUMMARY

Before the inurement of the 1980 Hague Convention, international child abductions were not monitored by a single agency. Thus distraught parents were often required to proceed from one agency to another to locate their children and then to relitigate custody in the foreign judicial system. The Hague Convention was designed to assist these parents by returning children wrongfully removed from their habitual environments by an abductor. The abductor is often hopeful of obtaining a foreign custody order in his or her favour. The primary beneficiaries of the provisions of the Hague Convention are the children, although the aggrieved parent also benefits from the relief that the Convention affords him or her. An important consequence of the Hague Convention is that the custody rights established under the laws of one contracting state are respected in the other contracting states. The efficacy of the Convention depends upon the ongoing co-operation between the contracting states. By ratifying the Hague Convention a country ensures that its citizens may seek protection under the Convention should there be a wrongful removal of a child from that country to any other contracting state, even where the child was wrongfully removed before a valid custody order was issued.

The Hague Convention has been effective in creating a comprehensive and consistent system of administrative procedures designed to effect the return of abducted children. The communication facilitated by the establishment of Central Authorities has operated to deter would-be child snatchers¹³⁹ by minimising the chances that the abductor will obtain a contradictory custody decree in a foreign jurisdiction.¹⁴⁰

138 Jones "Council of Europe Convention" *supra* n 3 468-9.

139 Shirman *supra* n 3 212.

140 *Idem* 213.

The Hague Convention is of limited scope. It applies only between contracting states in respect of children under the age of 16 in circumstances where action is instituted within one year of the abduction.¹⁴¹ Shirman has suggested that the scope of the Convention be extended.¹⁴² Le Gette emphasised the need for attention to be paid to a number of the problems related to international parental abductions:

- The difficulties experienced by parents in locating abducted children;
- the insufficiency of legal aid funds available to assist parents once the child has been located;
- the increasing number of abductions to non-contracting states; and
- the problems occasioned by litigation under the discretionary exceptions contained in the Convention which result in the very delays which the Convention was designed to avoid.¹⁴³

One of the best tools for promoting the efficient and effective application of the Hague Convention is education. Herring calls for the general education of all persons likely to become embroiled in an abduction case in any manner.¹⁴⁴ It is only through education that more countries will be encouraged to participate in international measures to combat parental child-snatching.¹⁴⁵

141 *Idem* 214.

142 *Idem* 216.

143 *Supra* n 6 288-289. For a discussion of the success of litigation under the discretionary exceptions see 289-290, ns14-16, 297ff.

144 *Supra* n 6 171-172. In the UK the need for ongoing education was recognised by the Lord Chancellor who authorised a revised edition of a booklet called "Child Abduction". In this booklet procedures to be followed in the event of child abduction to or from the UK are set out: Evans S "International Child Abduction 1992 142 *NLJ* 232 (Evans).

145 A major international educational initiative was launched in the US. The North American Symposium on International Child Abduction was organised under the auspices of the American Bar Association Centre on Children and the Law, directed by Hoff in Washington DC on September 30 and October 1 1993, and was well attended by participants from throughout the world.

The Council of Europe Convention is of a far more limited scope than the Hague Convention. Of the legal systems included within this thesis only the UK is a member of this Convention. Furthermore, in situations in which the two Conventions are possibly applicable, the Hague Convention will take precedence.

CHAPTER FOUR

RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS AND THE ASSOCIATED PROBLEM OF INTERNATIONAL PARENTAL KIDNAPPING AT SOUTH AFRICAN LAW

1 THE ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS IN GENERAL

The South African common law position regarding recognition and enforcement of foreign judgments is briefly set out in chapter two above. Statutory provisions have supplemented the common law position and the Enforcement of Foreign Civil Judgments Act,¹ which came into operation on 8 August 1990, allows for the registration of certain foreign civil judgments under the Act. Such judgments, once registered, may be treated as civil judgments of the South African court.² This section of the Act thus creates an exception to the principle that foreign judgments are without direct effect in South Africa. The Act does not, however, extend to status-related matters. The inapplicability of the Act to status-related matters serves to highlight the need for serious consideration to be devoted to this area of the law.

2 CUSTODY ORDERS ISSUED BY THE SOUTH AFRICAN COURTS

Under South African law a custody order is an order giving custody of a minor child to one or both parents or to a third party. Such orders are generally, but not always, granted in consequence of matrimonial proceedings.³ In all such cases the overriding

1 32 of 1988. For a discussion of this Act see Spiro E "The Enforcement of Foreign Civil Judgments Act 1988" 1989 22 *CILSA* 104 (Spiro *CILSA*); Forsyth CF *Private International Law* 3rd ed Juta & Co, Cape Town (1996) 378ff (Forsyth).

2 S 3.

3 Spiro E "Variation and Enforcement of Custody Orders" 1957 *Butterworths SA LR* 56 (Spiro *Butterworths*).

consideration is the best interests of the child.⁴ Custody is not solely determined by the wishes of the parties.⁵ Roman-Dutch writers do not specifically deal with recognition and enforcement of foreign custody orders and the first South African case in which the matter was properly considered was *Mitchell v Mitchell*.⁶ In that case the appellant argued that the court, as upper guardian of minor children, could vary the custody order of another court on good cause. Innes CJ emphasised that either party could apply for such a variation.⁷ Thirty-six years later, in *Simleit v Cunliffe*,⁸ the practice of treating custody orders as modifiable in the interests of the child was regarded as established.⁹ The original order need not reserve leave to apply for variation.¹⁰

Interlocutory orders are only subject to appeal with the leave of the court that granted the order.¹¹ At South African law a custody order that is the only subject matter of

4 Spiro E "Joint Guardianship of Parents" 1970 *Acta Juridica* 1 (Spiro "Joint Guardianship"); Sornarajah M "Parental Custody: The Recent Trends" 1973 90 *SALJ* 131 134ff (Sornarajah); Clark B "Custody: The Best Interests of the Child" 1992 109 *SALJ* 391 (Clark B 1992 *SALJ*); Clark B "Joint Custody: Perspectives and Permutations" 1995 112 *SALJ* 315 (Clark B 1995 *SALJ*); Lambiase EEA and Cumes JW "Do Lawyers and Psychologists have Different Perspectives on the Criteria for the Award of Custody of a Child?" 1987 104 *SALJ* 704 (Lambiase and Cumes); Heaton J "Some General Remarks on the Concept 'Best Interests of the Child'" 1990 53 *THRHR* 95 (Heaton); Robinson JA "Divorce Settlements, Package Deals and the Best Interests of the Child: *van Vuuren v van Vuuren* 1993 1 SA 163 (T)" 1993 56 *THRHR* 495 (Robinson "Package deals"); Robinson JA "Die Beste Belang van die Kind by Egskeiding: Enkele Gedagtes na Aanleiding van *McCall v McCall* 1994 3 SA 201 (K)" 1995 58 *THRHR* 472 (Robinson "Beste belang van die kind"); Singh D "*Kougianos v Kougianos* on Appeal" 1996 113 *SALJ* 701 (Singh); *Cronje v Cronje* 1907 TS 871; *Fletcher v Fletcher* 1948 1 SA 130 A. The factors that will be examined by a South African court in determining which parent is best suited to advance and promote the physical, moral, emotional and psychological needs of the child were set out in *McCall v McCall* 1994 3 SA 201 C 204J. The Constitution of the Republic of South Africa Act 108 of 1996 reiterates the paramountcy of the best interests of the child in making custody awards: S 28(2).

5 Spiro *Butterworths supra* n 3 56.

6 1904 TS 128.

7 at 130.

8 1940 TPD 67.

9 per Solomon J at 78.

10 English custody orders are interlocutory: Spiro *Butterworths supra* n 3 58.

11 Spiro *Butterworths idem* 59.

proceedings cannot be of an interlocutory nature. Where the order is sought as part of other proceedings it is regarded as an issue on its own, even where custody is to be determined *pendente lite*.¹²

At South African law the sole basis of jurisdiction in status-related matters is generally domicile.¹³ This general rule is subject to qualification in relation to status matters affecting children. In such cases the High Courts of South Africa are vested with jurisdiction to act as the upper guardian of all minor children present within their jurisdiction. Clearly therefore, the court of the child's domicile cannot have exclusive jurisdiction in such matters, the courts of the place where the child is present for the time being may exercise jurisdiction.¹⁴ The High Courts are also empowered to make custody orders of a declaratory nature which can only be effected by foreign courts.¹⁵ The jurisdiction exercised in issuing such declaratory orders is a further qualification to the general rule that jurisdiction in status-related matters is exclusively determined by domicile.¹⁶

In the absence of exclusive jurisdiction in custody matters the problem of concurrent jurisdiction may arise in relation to such matters. The court of the matrimonial cause may compete with that of the place where the child is resident.¹⁷ In such instances the principle of effectiveness should be applied, but not to the exclusion of considerations

12 Spiro *Butterworths idem* 60; Forsyth *supra* n 1 391; *Bashford v Bashford* 1957 1 SA 21 N.

13 Spiro E *Conflict of Laws* Juta, Cape Town (1973) 205 (Spiro *Conflicts*).

14 Spiro *ibid*; Van Winsen L, Cilliers AC and Loots C *Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa* 4th ed Juta and Co, Cape Town (1997) 80 (Herbstein and Van Winsen); Pistorius D *Pollak on Jurisdiction* 2nd ed Juta & Co, Cape Town (1993) 141 (Pollak). See too *Eilon v Eilon* 1965 1 SA 703 A 726H-727B; *Littauer v Littauer* 1973 4 SA 290 W; *Dickinson v Dickinson* 1971 2 SA 507 R.

15 Silberberg H *The Recognition and Enforcement of Foreign Judgments in South Africa* IFCOL Unisa, Pretoria (1977) 9-10 (Silberberg); *Coombe v Coombe* 1909 TH 241; *Riddle v Riddle* 1956 2 SA 739 C 745; Spiro *Butterworths supra* n 3 56.

16 Spiro *Conflicts supra* n 13 205.

17 *Idem* 206.

of what is in the best interests of the child.

There exists at South African law a general jurisdictional principle that no High Court will overrule, recall or amend the judgment or order of another High Court. This ensures that the jurisdiction to vary a custody order granted in consequence of matrimonial proceedings will be retained by the court of matrimonial cause despite any subsequent change in the domicile or residence of the parties.¹⁸ The common law situation was amended by the Divorce Act which stated that a court, other than the original court may rescind, vary or suspend, inter alia, a custody order if the parties are domiciled within its jurisdictional area or the applicant is so domiciled and the respondent has consented to the jurisdiction.¹⁹

When the court of the place of a minor child's residence exercises its jurisdiction as upper guardian of all minor children within its jurisdiction, any custody order made by the court will be regarded as a new order and not a variation of an existing order.²⁰

Where parties seek to enforce the custody order of one High Court in another, the Supreme Court Act²¹ may have to be applied. This Act provides that the civil process of a High Court will run throughout the Republic of South Africa.²²

In circumstances where a trial court has made a finding on the facts and has issued a discretionary judgment, an appeal court may not interfere with the judgment unless the

18 Spiro *Butterworths supra* n 3 58-59; *Watson v Cox* 1917 WLD 151; *Crow v Cuthbert and Cuthbert* 1948 1 PH B 20 T; *McConnell v McConnell* 1981 4 SA 300 Z; *Matthews v Matthews* 1983 4 SA 136 E; *Desai v Desai* 1987 4 SA 178 T.

19 Divorce Act 3 of 1992 s8.

20 Spiro *Butterworths idem* 59.

21 59 of 1959. On the jurisdiction of the High Court see Herbstein and Van Winsen *supra* n 14 80ff.

22 S 26(1).

discretion was not judicially exercised.²³ Appeals against custody orders are decided upon the existing evidence. The appeal court must thus decide whether or not the court of first instance made the correct decision based upon the evidence that existed at the time. New circumstances that came into existence after the determination was made will only be considered in exceptional circumstances.²⁴

3 RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY CUSTODY ORDERS IN SOUTH AFRICA

When the South African courts are approached to enforce a foreign-country custody order they are always entitled to independently assess what is in the best interests of the child.²⁵ Foreign orders are not final unless they are *res judicata* in the *forum* in which they were granted.²⁶ At South African law custody orders remain variable on good cause.²⁷ The effect of a foreign custody order arose in the Privy Council decision of *McKee v McKee*²⁸ in which recognition of a custody order issued by a court of matrimonial cause was sought. In this case the minor child was resident within the foreign court's jurisdiction (that of Ontario) at the date of institution of the proceedings. His presence was sufficient to entitle him to the protection of the courts of the King who acts as *parens patriae* to infants.²⁹ Having established jurisdiction on the basis of

23 Spiro *Butterworths supra* n 3 60.

24 *Ibid.*

25 Silberberg *supra* n 15 26, 44; *Jagoe v Jagoe* 1969 4 SA 59 R; *French v French* 1971 4 SA 298 W; *Märtens v Märtens* 1991 4 SA 287 T.

26 Silberberg *idem* 33.

27 Spiro *Conflicts supra* n 13 215; *R v Middlesex Justices, ex parte Bond* [1930] 1 KB 72, [1933] 2 KB (CA) 1 9; *Burman v Woods* [1948] 1 KB (CA) 111 114; *Fletcher v Fletcher* 1948 1 SA 130 A; *Fortune v Fortune* 1955 3 SA 348 A; *Hubert v Hubert* 1960 3 SA 181 W; *Jagoe v Jagoe* 1969 4 SA 59 R; *French v French* 1971 4 SA 298 W; *Manning v Manning* 1975 4 SA 69 (A); *Baart v Malan* 1990 2 SA 862 (OK); *Märtens v Märtens* 1991 4 SA 287 T; *McCall v McCall* 1994 3 SA 201 C.

28 [1951] AC 352 (PC). See further *infra*.

29 *McKee idem* 360.

residence the court had to determine whether or not it was bound by the custody order of the American court. In *McKee* the plaintiff appears to have sued on the original judgment.³⁰ The Privy Council assumed the validity of the foreign custody order³¹ but did not regard it as a foreign judgment.³² Spiro, endorsing the view of Dicey,³³ indicated that the concept of a foreign judgment merely means the exercise by a court of its powers of investigation and decision in a "manner akin to judicial proceedings of the country called upon to enforce it". The emphasis here is placed upon the procedure followed, not on the nature of the particular jurisdiction.³⁴ If this is correct then there appears to be no cogent reason to treat the custody order as an exception. Spiro further characterised custody judgments as judgments *in rem*, relating to status and binding upon everybody.³⁵

As indicated above, finality is a requisite for the recognition and enforcement of foreign judgments. This means the matter must be *res judicata* in the court making it.³⁶ Custody orders are not *res judicata*.³⁷ The custody order of the Californian court in the *McKee* case was not final.³⁸ The Ontario court in *McKee*³⁹ was therefore, not required to recognise and enforce the judgment of the Californian court with regard to custody as it lacked finality. The Privy Council stated in that case that even in instances in which

30 She affixed a copy of the judgment to her affidavit. See Spiro *Conflicts supra* n 13 215ff.

31 *McKee v McKee* [1951] AC 352 (PC) 362.

32 *Idem* 365.

33 Dicey AV *A Digest of the Law of England with Reference to the Conflict of Laws* 6th ed Stevens and Sons, London (1949) 346 (Dicey).

34 Spiro *Conflicts supra* n 13 217-218.

35 *Idem* 218.

36 *Ibid.*

37 *Ibid*; Silberberg *supra* n 15 26, 33; Spiro *Butterworths supra* n 3 57.

38 *McKee v McKee* [1951] AC 352 (PC) 365.

39 *Ibid.*

a foreign judgment complies fully with all the requisites for recognition and enforcement the court seised of the matter has a discretion to refuse recognition and enforcement in circumstances where the judgment violates the public policy of that legal system. The paramount consideration of all courts in custody matters is the welfare of the child. All other considerations must yield to this.⁴⁰ Custody orders are, however, of persuasive value.⁴¹

The *McKee* decision⁴² did not identify which legal system would be best placed to determine the best interests of the child. In that case contacts existed with a number of legal systems: The place of the matrimonial cause; the place of residence of the father and his son; the domicile of the father and his son; and the *lex patriae* of the father and the son.⁴³ In *McKee* the Ontario court, within whose jurisdiction the child resided at the institution of proceedings, clearly only applied Canadian law in determining the best interests of the child.⁴⁴ Spiro approved of this approach on the basis that establishing the best interests of the child is a matter of fact, not of law, and thus calls for the application of the *lex fori*.⁴⁵ As custody orders are designed to protect the interests of minors, existing orders must, in the opinion of Spiro, be presumed to do so. This being so, such orders will only be varied if new circumstances have arisen which call for a different order.⁴⁶ A lapse of time may or may not be considered a change in circumstances.⁴⁷ In *McKee* the court found, *inter alia*, that the lapse of two

40 *Ibid*; Spiro *Conflicts supra* n 13 218-219.

41 *McKee v McKee* [1951] AC 352 (PC) 363ff; Spiro *Conflicts idem* 220.

42 *Ibid*.

43 Spiro *Conflicts supra* n 13 220-221.

44 [1951] AC 352 (PC) 360.

45 Spiro *Conflicts supra* n 13 221.

46 *Ibid*.

47 *McKee v McKee* [1951] AC 352 (PC) 364.

years was a relevant consideration.⁴⁸ Of particular importance in that case was the finding that the actions of the father in taking his son out of the country with the sole objective of avoiding the order of the Californian court was not decisive. The father's actions affected only the interests of the child's mother and not those of the child.⁴⁹

The South African courts have been called upon to consider foreign custody orders on a number of occasions. Competence to deal with a matter involving a foreign custody order resides in the court of the present domicile of the minor or that of his present residence or physical presence.⁵⁰

It may be that jurisdiction based upon the physical presence of the child will only be exercised in exceptional cases where it is in the interests of the child.⁵¹ The court of present physical presence of the child and the respondent has a discretion to order that the child must be handed over in terms of an existing order.⁵² The court has no jurisdiction if both the child and the respondent are physically without its jurisdictional territory.⁵³ This approach accords with the principle of effectiveness. Controversy rages over whether or not a court may exercise jurisdiction where the respondent, but not the

48 *Ibid.*

49 *Idem* 363-364. See too Spiro *Conflicts supra* n 13 221-222.

50 Spiro *Butterworths supra* n 3 59; see too Kahn 1952 ASSAL 312-313 (Kahn 1952 ASSAL); Pollak *supra* n 14 176-177.

51 *Littauer v Littauer* 1973 4 SA 290 W; *Eilon v Eilon* 1965 1 SA 703 A, per Potgieter AJA (as he then was) 726B; *McConnell v McConnell* 1981 4 SA 300 Z.

52 Pollak *supra* n 14 177; *Leyland v Chetwynd* (1901) 18 SC 239; *De Costa v De Costa* 1913 EDL 134; *Crow v Cuthbert & Cuthbert* 1948 1 PH B 20 T; *Righetti v Pinchen* 1955 3 SA 338 D *semble*; *Riddle v Riddle* 1956 2 SA 739 C; *Van Rensburg v Van Rensburg* 1957 3 SA 283 N. See too *Ex Parte Jensen* (1901) 18 SC 154; *Kramarski v Kramarski* 1906 TS 937; *Mashaoane v Mashaoane* 1963 3 SA 604 N 607.

53 *Coombe v Coombe* 1909 TH 241; *Handford v Handford* 1958 3 SA 378 SR; *Ceronio v Snyman* 1961 4 SA 294 W; *Vandermaelen v Vandermaelen* 1973 4 SA 584 T 585; *Tromp v Tromp* 1956 4 SA 738 N 742.

minor child, is physically present within the court's jurisdiction.⁵⁴

In *Leyland v Chetwynd*⁵⁵ a guardian of a minor child, appointed by an English court, was possessed of an English court order instructing that the child, who had been removed to South Africa, be handed over to him. The order authorised him to take any steps necessary to enforce the order in England or abroad. The guardian applied to the South African courts for an order compelling the mother to deliver the child to him. The order was granted. It seems that in arriving at its decision the South African court paid particular attention to the British nationality of the parties. Spiro was critical of the importance afforded this factor and indicated that in his view the English order authorising enforcement abroad could not possibly bind the South African court today.⁵⁶ Spiro indicated further that, as the court neither enquired into the merits of the case nor made an independent investigation into what would be in the best interests of the child, the case cannot be followed.⁵⁷ Although this case was mentioned in argument in *Berlyn v De Smidt*⁵⁸ it was not referred to in the judgment. In that case the Rhodesian court assumed jurisdiction on the basis of the residence of the respondent and the minor child. It refused to follow a South African court order awarding custody of a minor child to her father. The court found that the South African judgment formed a *prima facie* case and that, without further proof that the custodial parent was an improper person to have custody, or without any indication that the custodial parent had forfeited the right to custody, the order of the South African court would have to be endorsed. The

54 This basis of jurisdiction was rejected in *Anderson v Van Vuuren* 1930 TPD 118 where the child was abroad, but in *Allan v Allan* 1959 3 SA 473 SR 498, 1959 1 R & N 499 at 506 Hathom J indicated that *Anderson's* case did not establish a definite rule. Jurisdiction was assumed in *Camel v Dlamini* 1903 TH 17; *Johnson v Johnson* 1940 1 PH B 7 C; *Mashaoane v Mashaoane* 1963 3 SA 604 N. The justification for assuming jurisdiction here is that the court has control over the respondent and may entertain contempt proceedings for failure to comply. See too Kahn E in *Hahlo Husband and Wife* 4th ed Juta & Co, Cape Town (1975) 575 (Kahn in Hahlo).

55 (1901) 18 SC 239.

56 Spiro *Butterworths supra* n 3 61.

57 *Ibid.*

58 1911 SR 117.

learned judge thus granted the application. Spiro regarded the decision as correct, but cautioned that a foreign order cannot always be said to create a *prima facie* case as it does not always represent the present best interests of the child. He also called for caution in applying the ordinary rules of evidence to cases involving the best interests of minor children.⁵⁹ The decision in *Leyland v Chetwyno*⁶⁰ was distinguished in *Fairfield v Fairfield*⁶¹ on the basis that in the latter case the foreign order did not purport to have force abroad. The true reason for refusing to enforce the English court order and return the children to England in *Fairfield* was that there was a prior English custody order in existence in favour of the mother, who was caring for the children, at the time the father applied for their delivery to England. The children had been well looked after in South Africa for three years and, moreover, there was no one to whom the children could be handed over. The court was thus influenced by the best interests of the child and had limited regard to the merits of the case in arriving at its decision.

Yet another case in which the South African courts proceeded to order the return of children in accordance with a foreign custody order was *Crow v Cuthbert and Cuthbert*.⁶² In that case a wife had been awarded custody of the minor children of a marriage during divorce proceedings in England. The children were in South Africa. The custody order was subject to the condition that the children were to be placed in the care and control of their maternal grandmother, stepmother to the first respondent. This condition was complied with. The children's mother's circumstances subsequently changed and she removed the children from the care of their grandmother and took them to live with herself and her new husband, the second respondent. The applicant father, through the maternal grandmother, sought a South African court order for the return of the children to the care and control of the grandmother. The court did not

59 Spiro *Butterworths supra* n 3 62.

60 (1901) 18 SC 239.

61 1925 CPD 297.

62 1948 1 PH B 20 T.

decide whether, on good cause shown, it would have jurisdiction to vary the English court order but, referring to *Coombe v Coombe*⁶³, held that although it had no jurisdiction to award custody *de novo*, the jurisdiction for such an order residing in the court of matrimonial cause, it did have jurisdiction to give effect to the English order. The court thus upheld the application for the return of the children to the maternal grandmother. In arriving at its decision the court referred to *Leyland v Chetwynd*⁶⁴ and *Coombe v Coombe*.⁶⁵ Spiro alleged that these decisions do not support the decision arrived at as the South African court always has the right to take whatever steps are necessary in the interests of the child.⁶⁶

None of the above cases examined whether or not the judgments in question were in fact capable of recognition and enforcement. Spiro expressed the view that such orders should be regarded as foreign judgments incapable of recognition and enforcement as they are always subject to variation on good cause shown and are thus not final.⁶⁷ It flows from *Fletcher v Fletcher*,⁶⁸ section 5 of the Matrimonial Affairs Act⁶⁹ and section 28(2) of the Constitution⁷⁰ that all custody determinations are governed by considerations of what is in the best interests of the child, an attitude which, in the view of Spiro, should extend to the determination of whether or not to recognise and enforce a foreign custody order.⁷¹ The Privy Council decision in *McKee v McKee*,⁷² mentioned

63 1909 TH 241.

64 (1901) 18 SC 239.

65 1909 TH 241.

66 Spiro *Butterworths supra* n 3 63.

67 *Idem* 63-64.

68 1948 1 SA 130 A 144ff.

69 37 of 1953.

70 Constitution of the Republic of South Africa Act 108 of 1996.

71 Spiro *Butterworths supra* n 3 64.

72 [1951] AC 352 (PC).

above, shed new light on the whole matter. Until that time South African courts seemed prepared to assume jurisdiction to recognise and enforce foreign custody orders in respect of children then present in their area, provided the original order had been issued by the domiciliary court. The courts reserved the right to vary such orders on proof by the respondent that the applicant was not a fit and proper person to have custody or guardianship of the child, or that such variation was in the best interests of the child. The court in *McKee*⁷³ stated that all considerations yield to the best interests of the child. The principles established in this case have been approved of both in South Africa⁷⁴ and Zimbabwe.⁷⁵

Comity calls for the earnest consideration of the foreign judgment, but not for its enforcement. The breach of the consent paper by the father in the *McKee* case⁷⁶ did not affect the interests of the child and thus did not carry great weight despite the father's removing the child to Ontario, without the consent of the mother, for the sole purpose of avoiding the judgment of the Californian court. In *Ferrers v Ferrers*⁷⁷ Morton J indicated that the court in *McKee's* case⁷⁸ was motivated by the provisions of the Infants Act⁷⁹ of Ontario which are similar to those of the Guardianship of Infants Act⁸⁰ of the UK which rank the interests of the child as the paramount consideration. This principle

73 *Ibid.*

74 *Righetti v Pinchen* 1955 3 SA 338 D; *Riddle v Riddle* 1956 2 SA 739 C; see too *Abrahams v Abrahams* 1983 3 SA 593 D discussed by Forsyth CF "Enforcement of a South African Custody Order in a Bophuthatswana Court" 1982 99 SALJ 34 (Forsyth "Enforcement in Bophuthatswana"); *Hubert v Hubert* 1960 3 SA 181 W 185B; *Ferrers v Ferrers* 1954 1 SA 514 SR 517A-D; *Ex Parte Gardner Thomson* 1966 2 PH F 99 D; *Märtens v Märtens* 1991 4 SA 287 T 290ff; *McCall v McCall* 1994 3 SA 201 C 204-5; Forsyth *supra* n 1 391.

75 Spiro *Butterworths supra* n 3 64 ns70-71.

76 [1951] AC 352 (PC).

77 1954 1 SA 514 (SR).

78 [1951] AC 352 (PC).

79 1937.

80 1925.

exists also in the common law of Zimbabwe.⁸¹ The South African judgment in *Riddle v Riddle*⁸² went beyond the *McKee* decision in that Van Winsen J indicated that the court has to take cognisance not only of the existence of a judgment, but also of the reasoning and considerations which prompted it. He stated that the South African court was competent to give effect to a Rhodesian order without first making it an order of the South African court or issuing its own order.⁸³

The most recent case in which the South African courts were requested to enforce a foreign custody order was that of *Märtens v Märtens*.⁸⁴ In that case both parties were German citizens. In 1984 the applicant took the four children of the marriage and left the marital home. In 1985 custody of all the children was awarded to their mother, the applicant. Shortly thereafter the respondent abducted the two youngest children, the twins, in contempt of the custody order, and took them to the USA. The applicant pursued him and had a warrant for his arrest issued. In the meantime the applicant's divorce from the respondent was finalised and the custody order was confirmed. The respondent appealed the custody order in respect of the twins, and the warrant of arrest was suspended pending the outcome of the appeal. In 1987 the appeal was dismissed and the applicant's custody of the children was confirmed. The respondent filed for an amendment to the custody order and again kidnapped the twins. His application for amendment was dismissed and a warrant for his arrest was issued.

The respondent took the children to England and then brought them to South Africa in 1988. In 1990 the applicant was made aware of the respondent's whereabouts and she initiated proceedings in the South African court. The South African court found that it was not bound by the German court orders relating to custody although comity required

81 Spiro *Butterworths supra* n 3 65-67.

82 1956 2 SA 739 C.

83 *Idem* 746-747.

84 1991 4 SA 287 T.

that it take cognisance of such orders.⁸⁵ The court followed a line of South African cases in deciding that it had a duty to establish what is in the best interests of the child and to make an order accordingly.⁸⁶ The court thus found that, while it viewed the respondent's contempt of the German court orders seriously, the circumstances of the children had changed since the German orders were issued and it would be in the best interests of the child to remain with their father.⁸⁷ This decision has been severely criticised.⁸⁸

Clark indicated that in her opinion a thorough examination of the character of the parents and their ability to offer the twins a safe, secure and loving home environment would have shown the respondent father to be less suitable to act as custodian than the applicant.⁸⁹ Clark calls for a re-examination of the best interests test as the focal point of child custody determinations for two reasons:

- custody cases are more person-oriented than other cases;
- adjudication in custody matters involves a prediction of the future not a determination of something past.⁹⁰

The best interests test involves a comparison of the parents and is both unpredictable and subjective. Clark also acknowledges the importance of the *Märtens* case in the area of parental kidnapping. She stresses that, in her opinion, in circumstances where a child has been abducted from one jurisdiction to another, and the courts in the latter jurisdiction are approached to make a custody order, the best interests of the child

85 *Idem per van Zyl* J 292E-F.

86 *Fletcher v Fletcher* 1948 1 SA 130 A; *Fortune v Fortune* 1955 3 SA 348 A; *Hubert v Hubert* 1960 3 SA 181 W; *French v French* 1971 4 SA 298 W.

87 *Märtens v Märtens* 1991 4 SA 287 T 293A-295D.

88 Clark B 1992 SALJ *supra* n4 391; Keyser B 1991 ASSAL 29ff (Keyser)

89 Clark B 1992 SALJ *idem* 391-392.

90 *Idem* 394-5.

would best be served by the custody determination being made by the court best placed to evaluate the evidence. This is usually the court of the place from which the child was abducted.⁹¹

Keyser is also critical of the decision of the court in *Märtens*.⁹² She endorsed the court's finding that it should not be unduly influenced by its anger regarding the respondent's contempt of court.⁹³ However, she stated that the decision demonstrates that a custodial parent may be unlawfully deprived of custody for a lengthy period of time and not be able to recover the child. The result of this is to make a mockery of the legal process.⁹⁴

4 THE SOUTH AFRICAN APPROACH TO PARENTAL CHILD ABDUCTION

In 1996 the Hague Convention on the Civil Aspects of International Child Abduction Act⁹⁵ was promulgated and was implemented on 1 October 1997.⁹⁶ This Act makes South Africa a member state of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).⁹⁷ The Central Authority for South Africa is the Family Advocate.⁹⁸

Until the promulgation of this legislation South Africa was regarded as a safe haven for parental child abductors. This perception will now change. The Hague Convention ensures prompt return of children wrongfully removed from their lawful custodians.

91 *Idem* 397.

92 1991 4 SA 287 T.

93 *Idem* 293D-E.

94 Keyser B 1991 ASSAL 29 31 (Keyser).

95 72 of 1996.

96 GNR 1282 GG 18322 1 Oct 1997.

97 See ch 3 *supra*.

98 S 3.

Despite the very welcome accession of South Africa to the Convention, however, it will appear from the chapters that follow that the Hague Convention will not solve all of the South African court's potential problems relating to recognition and enforcement of foreign custody orders and the associated problem of international parental kidnapping. There is not as yet any South African case in point, but the shortcomings of the Hague Convention, as it has been applied elsewhere, are patent. These shortcomings should be considered by the South African judiciary when applying the Convention here.

In summary, therefore, it seems that at South African law a foreign custody order, which by its nature is not a final order, will not be treated as a foreign judgment even though the South African court may recognise the competence of the foreign court to make the order. The matter is treated as *res integra* in South Africa and the foreign order will be accorded earnest consideration by the court in arriving at its decision of what is in the best interests of the child. Factors such as the time that has elapsed since the order was granted will be considered.⁹⁹ In all cases the court must have regard to the best interests of the child.¹⁰⁰ If the court does not approve of the decision of the foreign court it must make its own independent order assuming jurisdiction on the basis of domicile, residence, or, in exceptional circumstances, the physical presence of the child within its jurisdictional territory.¹⁰¹

The best interests and welfare of the child remain the most important considerations in determining custody of a child in circumstances where a foreign order exists. In *French v French*¹⁰² the factors to be taken into account in determining the best interests

99 *Riddle v Riddle* 1956 2 SA 739 C 750-751; *Righetti v Pinchen* 1955 3 SA 338 D per Henochsberg J 346; *Märtens v Märtens* 1991 4 SA 287 T per van Zyl J 291A.

100 *Märtens v Märtens* 1991 SA 287 T per van Zyl J 292E-G. The child's best interests are entrenched as the paramount consideration in all matters concerning a child in terms of s 28(2) of the Constitution: see n 70 *supra*.

101 Kahn in Hahlo *supra* n 54 661; Forsyth *supra* n 72 391.

102 1971 4 SA 298 W. "Best interests" is given its widest possible meaning: *Dunsterville v Dunsterville* 1946 NPD 594 per Broome J; not merely material welfare *Mbongwe v Mbongwe* 1949 1 PH B16 O per De Beer JP; *Allen v Allen* [1948] 2 All ER 413 (CA); *Ten Krooden v Ten*

of the child were spelt out in the head note, and in *Märtens v Märtens*¹⁰³ the court chose to give little weight to the father's kidnapping of his minor children from the mother in the face of a German court order and bringing them to South Africa. The court refused to hold itself bound by the foreign order. It indicated that the reprehensible conduct of the respondent in acting in contempt of the German orders and inflicting immense emotional distress on his former wife did not make him unsuited to act as the custodial parent. The court awarded custody of the children to the father on the basis that this was in the best interests of their physical and emotional well-being at the time the application was made.¹⁰⁴ The South African court is not, however, a court of appeal from foreign orders. A case with facts similar to *Märtens* would be decided differently today. The Hague Convention would be applied and the children would be returned without any decision on the merits having to be made.

In the chapters below the position of other legal systems in relation to foreign custody orders will be explored. A comparison of the South African legal position to these other legal systems will reveal the extent to which South Africa has lagged behind developments in other English common law systems.

Krooden 1955 2 PH B27 T per Bresler J; *Van Deijl v Van Deijl* 1966 4 SA 260 R per Young J 261 H.

103 1991 4 SA 287 T. See Clark B 1992 *SALJ supra* n4 391; Keyser B *supra* n 94 29ff.

104 At 293.

CHAPTER FIVE

RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS IN ENGLISH LAW AND THE ENGLISH SOLUTION TO INTERNATIONAL PARENTAL KIDNAPPING

1 INTRODUCTION

The courts of the United Kingdom (UK) whose sovereignty embraces three distinct legal systems, namely, those of England (including Wales), Scotland, and Northern Ireland, may be faced with applications for the recognition and enforcement of foreign court custody orders and applications for the enforcement of such orders made in one area of the UK within another area of the UK. This chapter will examine the legal position in the UK in this regard from the perspective of English law.

2 ENGLISH LAW RELATING TO CHILD CUSTODY IN GENERAL

2.1 General¹

Custody here means the right of parents, a parent, or a third party to determine the upbringing of a child, including the right to care for and control of the child. Generally this person or these persons may determine the place of residence of such a child. Custody is often found hand in hand with the wider concept of guardianship.

The Children Act 1989, which came into force in England and Wales on October 14 1991, introduced a uniform code of practice and procedure in all courts: The High

1 For a general discussion of guardianship, custody and orders pertaining to children, see Collier *JG Conflict of Laws* 2nd ed Cambridge University Press, Cambridge (1994) ch 20 333ff (Collier); McClean *D Morris Conflict of Laws* 4th ed Sweet & Maxwell Ltd, London (1993) ch 13 217ff (Morris); Jaffey *AJE Introduction to the Conflict of Laws* Butterworths, London (1988) ch 5 (Jaffey). For a historical sketch, see Scott *AW Private International Law: Conflict of Laws* 2nd ed MacDonald & Evans Ltd, Plymouth (1979) 197-198 (Scott).

Court, County Court and Magistrates Courts, in respect of matters pertaining to the general care of children and specific issues relating to their upbringing. It radically altered the existing English law in that it abolished the concepts of custody, care, and control and replaced them with the concept of parental responsibility. Parental responsibility, which vests in both parents of children born within a marriage, is defined as "all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to the child and his property".² Parental responsibility encompasses the right to take care of the child and to determine his or her place of residence and thus it includes the right to custody as defined in article 5(a) of the Hague Convention.

The underlying philosophy of the Children Act is that the child's interests are best served by the co-operation of parents in making arrangements for the child without court intervention. For this reason the Act provides that a court should refrain from making an order unless making such an order would be better for the child than making no order at all.³ Custody orders have been replaced by section 8 orders relating to residence, contact, prohibited steps, and specific issues. Section 8 orders may be awarded in family proceedings in respect of any child under 18 years of age, but will only be awarded in respect of persons between 16 and 18 years in exceptional circumstances. Such orders will not be issued as a matter of course in divorce proceedings where parents agree to arrangements for their children. The term "custody" will continue to be used where appropriate in this thesis as it is the term used in foreign law as well as in international conventions. This terminology is also used in the English law implementing such international conventions. It will thus be used as a generic term to refer to matters concerning a child which may be dealt with by an

2 Children Act 1989 s 3(1). See Hamilton C and Standley K (eds) *Family Law in Europe* Butterworths, London (1995) 104ff (Hamilton and Standley).

3 S 1(5).

English court in terms of a section 8 order.⁴

2.2 Jurisdiction of English courts

The High Court of England has inherent jurisdiction in custody matters in respect of children. This jurisdiction derived from the sovereign as *parens patriae*. Hence the court will protect all children who are:

- Present in England irrespective of domicile;⁵
- British citizens, even though they are not present in England;⁶ and
- children ordinarily resident in England although physically absent from the country.⁷

Problems may arise in relation to children who are present in England only by reason

4 For a detailed discussion of the Children Act 1989 and section 8 orders in particular see, Feldman L "Getting Ready for the Children Act" 1990 134 (41) *Sol Jour* 1142 (Feldman "Getting Ready"); Mitchels B "Children Act 1989 (1)" 1990 134 (7) *Sol Jour* 181 (Mitchels "Children Act (1)"); Mitchels B "Children Act 1989 (2)" 1990 134 (8) *Sol Jour* 206 (Mitchels "Children Act (2)"); Mitchels B "Children Act 1989 (3)" 1990 134 (9) *Sol Jour* 253 (Mitchels "Children Act (3)"); Mitchels B "Children Act 1989 (4)" 1990 134 (10) *Sol Jour* 270 (Mitchels "Children Act (4)"); Mitchels B "Children Act 1989 (5)" 1990 134 (11) *Sol Jour* 302 (esp part 2) (Mitchels "Children Act (5)"); Priest JA "Child Law Update" 1991 135 *Sol Jour* 821 (Priest); Young I "Children Act 1989 - How Are the Courts Coping?" 1992 136 (15) *Sol Jour* 358 (Young); Feldman L "Children Act 1989: The First 12 Months" 1992 136 (38) *Sol Jour* 967 (Feldman "Children Act"); Burrows D "The Children Act 1989: A Transitional Problem" 1992 22 *Fam Law* 6 (Burrows); Hedley J "Children Act Case Notes - Part 4" 1994 24 *Fam Law* 694 (Hedley); Hamilton and Standley *supra* n 2 109ff. See too Davis S, Rosenblatt J and Galbraith T *International Child Abduction* Sweet and Maxwell, London (1993) 40-42 (Davis *et al*).

5 *Johnstone v Beattie* (1843) 10 CL & Fin 42; *Stuart v Marquis of Bute* (1869) 9 HLC 440; *Nugent v Vetzera* (1866) LR 2 Eq 704; *Re D* [1943] Ch 305; *J v C* [1970] AC 668 720; *Re A* [1970] Ch 665; Collins L (gen ed) *Dicey and Morris on the Conflict of Laws* 12th ed Sweet & Maxwell, London (1993) and 1994 Supplement 812-814 (Dicey and Morris); North PM and Fawcett JJ *Cheshire & North's Private International Law* 12th ed Butterworths, London (1992) 724 (Cheshire and North).

6 *Hope v Hope* (1854) 4 De GM & G 328; *Re Willoughby (An Infant)* (1885) 30 Ch D 324; *Harben v Harben* [1957] 1 WLR 261; Dicey and Morris *ibid*.

7 *Hope v Hope* (1854) 4 De GM & G 328; *Armstrong v Armstrong*; *Huff v Huff* [1985] 1 FLR 95 (CA), [1986] Fam Law 21 (CA); Dicey and Morris *ibid*; Cheshire and North *supra* n 5 724; Jaffey *supra* n 1 91.

of their having been abducted by one parent from the custody of the other in another country.

Statutory rules regulating the jurisdiction of English courts to make section 8 orders in relation to children were enacted in the Family Law Act.⁸ These rules are uniform throughout England, Scotland and Northern Ireland and are applicable to all other countries, whether elsewhere in the UK or abroad. The courts vested with jurisdiction to make a section 8 order are, in order of priority:

- (i) The court in which the matrimonial proceeding is being heard;
- (ii) the court of the country of habitual residence of the child; or
- (iii) the court of a country, forming part of the UK, in which the child is present.⁹

It follows that an English court may only exercise jurisdiction in relation to the custody of a person under 18 years of age in circumstances where it is either considering matrimonial proceedings, or on one of the other listed grounds, where the matrimonial proceedings are not currently before the courts of Northern Ireland or Scotland.¹⁰ A court in which custody jurisdiction vests may refuse a custody application where the matter has already been determined by a foreign court, or stay proceedings where

8 1986 Part I. For a discussion of the Act see Prime T "Family Law Act 1986 - Part I" 1987 131 (3) *Sol Jour* 62 (Prime "Part I"); Prime T "Family Law Act 1986 -Part II" 1987 131 (4) *Sol Jour* 91 (Prime "Part II"); Prime T "Family Law Act 1986 - Part III" 1987 131 (5) *Sol Jour* 118 (Prime "Part III"); Prime T "Family Law Act 1986 - Part IV" 1987 131 (6) *Sol Jour* 156 (Prime "Part IV"). Section 8 orders are discussed in Cheshire and North *supra* n 5 721-722; Stone P *The Conflict of Laws* Longman London (1995) 94-96 (Stone). For a discussion of the jurisdictional conflicts affecting children, in historical perspective, see Jones GH "Conflicts of Jurisdiction in the United Kingdom Affecting Children" 1960 9 *JCLQ* 15 (Jones *Conflicts of Jurisdiction in the UK*); "Reports of Committees: Conflicts of Jurisdiction Affecting Children" 1960 23 *MLR* 64.

9 Collier *supra* n 1 336; Cheshire and North *idem* 722ff. These rules were premised upon the recommendations of the Law Commission Report on Custody of Children in the United Kingdom (no 138) Cmnd. 9419 (1984) and were devised to make the jurisdictional rules in such matters uniform throughout the UK. The effect has been that the matter is most often determined by the courts of the country to which the child has been connected for the longest period of time.

10 Family Law Act *supra* n 8 ss 2 and 3. See Dicey and Morris *supra* n 5 818-819; Cheshire and North *idem* 723.

there are concurrent proceedings before a foreign court which is a more convenient forum.¹¹ The court is empowered to order the disclosure of a child's whereabouts, the recovery of the child, or the restriction of the removal of the child from the jurisdiction.¹² The High Court, vested with child custody jurisdiction, may make an emergency order in respect of a child present within its jurisdiction where it feels such an order is necessary for the protection of the child.¹³ The Act also provides for the duration and variation of custody orders.¹⁴

In exercising jurisdiction in relation to custody the court applies the English law rule which identifies the welfare of the child as the paramount consideration.¹⁵

2.3 Orders of other courts in the United Kingdom

The Family Law Act¹⁶ contains rules pertaining to the recognition and enforcement of the custody orders of Scotland and Northern Ireland which relate to children under the age of 16.¹⁷ In instances in which such orders have been registered with the High Court they will be recognised in England as having the same effect as an English order. They will be enforced by the High Court as if they were orders of its own for as long as the

11 Family Law Act *ibid* s 5. For a discussion of *forum non conveniens* cases see Schuz R "The Hague Child Abduction Convention: Family Law and Private International Law" 1995 44 *JCLQ* 771 784-788 (Schuz).

12 Family Law Act *idem* ss 33-35.

13 Family Law Act *idem* s 2(3); Cheshire and North *supra* n 5 725.

14 Family Law Act *idem* s 6. Cheshire and North *idem* 725-726; Jaffey *supra* n 1 91-92; Stone *supra* n 8 96.

15 Children Act *supra* n 2 s 1(1). See Stone *idem* 96-97.

16 *Supra* n 8 part I.

17 For a detailed discussion of these provisions see, Cheshire and North *supra* n 5 731-733; Cretney SM "Child Abduction: The New Law" 1986 130 *Sol Jour* 827 (Cretney); Prime "Part I" and "Part II" *supra* n 8. The age limit is in deference to the fact that Scots law only permits such orders in respect of persons below that age.

order remains in effect in that part of the UK in which it was made.¹⁸ The English court will not be required to give effect to any provision within the foreign order which purports to regulate the means by which the rights therein should be enforced. The High Court is empowered by the Act to make any interim order it may deem necessary to protect the welfare of the child and to prevent any change in the relevant circumstances pending the outcome of the application for enforcement.¹⁹ The High Court is also permitted to stay proceedings if an interested party has instituted or intends to institute proceedings on the matter in another part of the UK which might lead to the revocation or variation of the order.²⁰ In other words, the existence of a foreign custody award does not prevent an English court from making a custody order that it deems appropriate to ensure the welfare of a minor child.²¹

2.4 Foreign custody orders

Until recently recognition of foreign custody orders, whether made outside the UK or in a part of the UK other than the part of the UK in which enforcement is sought, was regulated by the common law. In 1986 statutory provisions were enacted to regulate recognition and enforcement of custody orders awarded by courts in other parts of the UK and, in 1985, the Child Abduction and Custody Act was enacted. This legislation enacted rules regulating recognition and enforcement of custody orders of courts of countries outside the UK which are parties to either the Hague Convention of 1980 on the Civil Aspects of International Child Abduction (the Hague Convention), or the Council of Europe Convention of 1980 on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children

18 Family Law Act *supra* n 8 s 25, read together with ss 27, 28, 30, 31 and 32.

19 S 29(3).

20 S 30.

21 See *Re B's Settlement* [1940] Ch 54; *McKee v McKee* [1951] AC 352 (PC); *Re Kernot* [1965] Ch 217; *Re T (An Infant)* [1969] WLR 1608; *J v C* [1970] AC 668 700; *Re R (Minors)* (1981) 2 FLR 416, (CA).

(the Council of Europe Convention). However, the common law continues to regulate the recognition and enforcement of custody decrees issued by the courts of foreign countries which are not party to either of the abovementioned conventions.²²

Foreign custody orders, whether made outside the UK or in a part of the UK other than the part of the UK in which enforcement is sought, are neither final nor conclusive and, furthermore, the Children Act²³ requires that the child's welfare be the paramount consideration in deciding whether or not to recognise and enforce a foreign custody order. This attitude of the English courts to foreign custody orders may result in uncertainty and, in this way, encourage litigation in that a non-custodial parent may seek a more favourable order from the English court. For these reasons the Family Law Act²⁴ provides for the registration, recognition and enforcement of custody orders made in any part of the UK in any other part thereof. The Child Abduction and Custody Act²⁵ gives effect to the Hague Convention and the Council of Europe Convention in England. It creates a mechanism to enforce a custody order made outside the UK in another contracting state when a parent flouts that order by keeping the child in England.²⁶ In instances in which the Conventions do not find application, the weight afforded foreign custody orders varies according to the circumstances of each

22 See further "3. Non-Convention countries" *infra*.

23 *Supra* n 2.

24 *Supra* n 8.

25 Child Abduction and Custody Act 1985. See Cretney *supra* n 17 827-828; "News: Child Abduction and Custody Act 1985" 1985 129 *Sol Jour* 559 (Anonymous); Lavery R "Child Abduction and the Law of Custody" 1987 38 *NILQ* 170 (Lavery).

26 The Hague Convention was implemented by Part I of the Act and the Council of Europe Convention by Part II. See *Morris supra* n 1 224-225; Cheshire and North *supra* n 5 733. In respect of foreign custody orders see Hall JC "Defiance of a Foreign Custody Order" 1989 48 *Cambridge LJ* 189-191 in which *F v F (Minors) (Custody: Foreign Order)* [1988] 3 *WLR* 959 is discussed (Hall); Jeavons H "Family Law: Child Abduction Act" 1990 134 (46) *Sol Jour* 1332 (Jeavons); Bruch CS "Child Abduction and the English Courts" in Bainham A and Pearl D (eds) *Frontiers of Family Law* Chancery Law Publishing, London (1993) ch 4 (Bruch).

individual case.²⁷ Cases of international parental child abduction have often been treated as cases in which special circumstances have strongly influenced the application of the welfare principle. Time is of vital importance in such cases as evidence often has to be obtained from abroad and a lapse of time can result in the child's becoming settled in England, strengthening the kidnapper's claim for custody. For this reason the English courts are prepared to make peremptory orders for the return of the child without first examining the merits of the case.²⁸ More recently, there is a trend to apply the principles of the Hague Convention to all child abduction cases irrespective of whether or not the foreign country is a party to the Convention.²⁹

2.5 The Child Abduction and Custody Act 1985

As indicated above, this Act was promulgated in order to enable the UK to become a party to the Hague Convention and the Council of Europe Convention. The primary objective of these two Conventions is to discourage parental kidnapping.³⁰

27 *McKee v McKee* [1951] AC 352 (PC) 364; *Re H (Infants)* [1965] 3 All ER 906, [1966] 1 All ER 886, [1966] 1 WLR 381 399, (CA); *Re T (An Infant)* [1969] 1 WLR 1608. Stone *supra* n 8 points out at 97 that the English courts now proceed in analogy with the Hague Convention in abduction cases where the Convention does not apply. See *Re S (Minors)(Abduction)* [1993] 1 FCR 789 (CA); *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478 (CA).

28 See in this regard, The Hon Mr Justice Wall "International Child Abduction" *Liverpool LR* 167 (Wall); *Re H (Infants)* [1965] 3 All ER 906, [1966] 1 WLR 381 399; [1966] 1 All ER 886, (CA); *Re E (D) (An Infant)* [1967] Ch 761, (CA). The factors that will be considered in the making of such a peremptory order include recognition of the reciprocal principle of international comity and the assumption that the foreign court will conduct a fair hearing: *J v C* [1970] AC 668 ; *Re L (Minors)* [1974] 1 WLR 250; [1974] 1 All ER 913, (CA); *Re C (Minors)* [1978] Fam LR 105, [1978] 2 All ER 230, [1977] 3 WLR 561, (CA); *Re R (Minors)* (1981) 2 FLR 416, (CA); *Re G (Abduction: Striking out application)* [1995] 2 FLR 410; *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478, (CA).

29 *G v G (Minors) (Abduction)* [1991] 2 FLR 506, (CA); *Re F (A Minor) (Abduction: Jurisdiction)* [1991] 1 FLR 137; *Re S (Minors) (Abduction)* [1994] 1 FLR 297, (CA); *D v D (Child Abduction: Non-Convention Country)* [1994] 1 FLR 137, (CA); *S v S (Child Abduction: Non-Convention Country)* [1994] 2 FLR 681; *Re M (Abduction: Non-Convention Country)* [1995] 1 FLR 89, (CA); *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478, (CA); Stone *supra* n 8 97; Harte E "Child Abduction - Undertakings" 1995 25 *Fam Law* 38 (Harte).

30 Some of the provisions were enacted into UK law by the Child Abduction and Custody Act 1985 (the Act), *supra* n 25, sch 1 (Hague Convention) and sch 2 (the European Convention). See Ch 3 *supra*. See too Jaffey *supra* n 1 92-94; Evans S "International Child Abduction" 1992 142 *NLJ*

The Hague Convention³¹ has wider geographical scope than the Council of Europe Convention, since it applies to any of the member states of the Hague Conference on Private International Law, irrespective of their geographical location. It may also find application in relation to any other state which chooses to accede in relation to any member state that accepts the accession. The Council of Europe Convention, by comparison, only applies to states that are members of the European Council.³² These states do not include Australia, the USA or South Africa.³³

2.5.1 *The Hague Convention at English law*

The object of the Hague Convention is to facilitate the restoration of children wrongfully removed from one country to another. It is not dependent upon an existing custody order. The Council of Europe Convention³⁴ is complementary to the Hague Convention and applies to cases where there is an existing custody determination. Its objective is to ensure the recognition of foreign custody orders irrespective of whether or not a wrongful removal is involved. Where the two Conventions, both of which are applicable to the UK, overlap, it is more advantageous to proceed under the Hague Convention

232 (Evans); Hamilton and Standley *supra* n 2 113ff.

31 For a discussion of the Hague Convention see Morris *supra* n 1 227-229 and ch 3 *supra*.

32 The Council of Europe Convention countries are: Austria; Belgium; Cyprus; Denmark; Finland; France; Germany; Greece; The Republic of Ireland; Luxembourg; Malta; The Netherlands; Norway; Poland; Portugal; Spain; Sweden; Switzerland: 1996 April *Fam Law* 258.

33 Collier *supra* n 1 339; Morris *supra* n 1 225ff. Section 15(2)(b) of the Child Abduction and Custody Act directs that under the Council of Europe Convention only a decision registered with the High Court of England in terms of section 16(1)(2) of that Act will be enforced. Once the decision has been duly registered it will have the same force and effect as a decision of the High Court. If the decision is in the process of being registered the court may make any interim order it feels fit to secure the child's welfare: s 19. Making application for registration of a foreign order has the effect of suspending the powers of the English courts in proceedings commenced after the commencement of the foreign proceedings to make care or custody orders: Dicey and Morris *supra* n 5 830-833. For an example of an application under the Council of Europe Convention see *Re S (Abduction: European Convention)* [1996] 1 FLR No 4.

34 Prepared under the auspices of the Council of Europe and signed on 20 May 1980; Comment on this Convention is to be found in Jones RL "Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children" 1981 30 *ICLQ* 467 (Jones 1981).

which places fewer restrictions on restoration.³⁵ Hence the Child Abduction and Custody Act³⁶ gives effect to the provisions of the Council of Europe Convention dealing with recognition and enforcement but not to those dealing with abduction. Instead, the Act prefers the Hague Convention's provision in this regard.³⁷ The Act provides further that where applications are made in terms of both Conventions the application under the Hague Convention will be given priority.³⁸

The Conventions and the Child Abduction and Custody Act³⁹ all apply to the removal of children to or from the UK as well as to the recognition and enforcement of UK custody orders abroad and foreign orders in the UK. The Act establishes the Central Authorities required to ensure the proper functioning of the Conventions and to coordinate requests from other countries regarding child kidnaps.⁴⁰ In the UK the Lord Chancellor is the Central Authority for England, Northern Ireland and Wales, while the Secretary of State for Scotland fulfils that role in Scotland. The envisaged procedure is that, upon receipt of an application from the parents, the Central Authority of a country from which a child has been removed will forward their application to its counterpart in the country where the child is thought to be. The latter Central Authority would then initiate steps for the location and return of the child.

35 *Ibid.*

36 1985 *supra* n 25.

37 Dicey and Morris *supra* n 5 830.

38 Child Custody and Abduction Act *supra* n 25 s 16(4)(c).

39 *Ibid.*

40 For a discussion of the workings of the Hague and Council of Europe Conventions in general see ch 3 *supra*. See also Cheshire and North, Morris, Dicey Morris, Stone and North P *Private International Law Problems in Common Law Jurisdictions* Martinus Nijhoff Publishers, Dordrecht (1993) 92-101 (North).

The Hague Convention deals with custody rights⁴¹ arising from:

- A court decision in a contracting state;
- an agreement having legal effect under the laws of that state; or
- an administrative determination.⁴²

It applies to any child under 16 years of age who was habitually resident in the contracting state immediately before the interference with the custody rights.⁴³ Removal or retention of a child is regarded as wrongful where it is in breach of the custodial rights lawfully vesting in another person, institution, or body in terms of the law of the contracting state in which the child was habitually resident. This is subject to the proviso that the rights were being exercised at the time of the retention or removal or would have been exercised but for the removal or retention.⁴⁴

41 Hague Convention art 5(a) includes rights relating to the care of the person of the child, particularly the right to determine his or her place of residence. Cheshire and North *supra* n 5 735; *Re NB (A Minor) (Abduction)* [1993] 1 FCR 271, (CA).

42 Collier *supra* n 1 339-340; Cheshire and North *ibid*.

43 See Hague Convention art 4. For the meaning of "habitual residence" see, Crawford EB "Habitual Residence of the Child as the Connecting Factor in Child Abduction Cases: A Consideration of Recent Cases" 1992 June *Juridical Rev* 177 (Crawford *Juridical Rev*); Hague Convention art 11. Habitual residence is a question of fact: Stone *supra* n 8 31-33; *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 (HL) 578-579. In this case the court determined, inter alia, that habitual residence of a child is ordinarily determined by his or her parents and thus it may be changed with the consent of both parents despite the fact that one or other of them may later change his or her mind. Thus habitual residence cannot be changed unilaterally by a wrongful removal: *Dickson v Dickson* 1990 SCLR 692; Crawford *Juridical Rev op cit* 182ff; *Re S (A Minor) (Abduction)* [1991] FCR 656, [1991] 2 FLR 1, (CA); *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, (CA) 484-485. The courts will go to considerable lengths to avoid finding that a person is without a habitual residence: *V v B* [1991] 1 FLR 266; *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548; *Re R (Wardship: Child Abduction)* [1992] 2 FLR 481, (CA); *Re E* [1993] Fam Law 15, [1992] 1 FCR 541; *Re A v A (Child Abduction) (Habitual Residence)* [1993] 2 FLR 225; *Re N (Child Abduction: Habitual Residence)* [1993] 2 FLR 124, (CA); *Re O (A Minor) (Abduction: Habitual Residence)* [1993] 2 FLR 594; *Re B (Child Abduction: Habitual Residence)* [1994] 2 FLR 915.

44 Hague Convention *idem* art 3; *B v B (Abduction: Custody Rights)* [1993] 2 All ER 144, (CA). Note that retentions and removals are single, mutually exclusive events and must occur across international boundaries: *Cruse v Chittum* [1974] 2 All ER 940; *Kapur v Kapur* [1984] FLR 920 926; *Re C (A Minor)(Abduction)* [1989] 1 FLR 403; *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562 (HL) 578-579; *C v S* [1990] 2 AC 562; *Dickson v Dickson* 1990 SCLR 692; *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, (CA); *Re H and Another (Minors) and*

The authorities of the state in which the child is habitually resident must act expeditiously to secure the return of the child.⁴⁵ Where less than one year has elapsed from the date upon which the child was wrongfully removed or retained to the date on which proceedings for the return of the child are instituted the court or administrative authority must order the return of the child⁴⁶ unless any or all of the following three grounds of refusal exist:⁴⁷

- The person with care and control of the child was not exercising custody rights at the time of the removal or retention, or consented to or subsequently acquiesced in the retention.⁴⁸ Only a person aware of the rights being enforced

Re S and Another (Minors) [1991] 3 All ER 230, discussed in Priest *supra* n 4 821; *Re S (A Minor) (Abduction) (Joint Custody)* [1991] 2 FLR 1, (CA); *C v C (Minors) (Child Abduction)* [1992] 1 FLR 163; *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993; *B v B (Abduction)* [1993] 1 FLR 238; *Re S (Minors) (Convention on the International Aspects of International Child Abduction: Wrongful Retention)* [1994] 2 WLR 228; Cheshire and North *idem* 734; Crawford *Juridical Rev idem* 181. The Children Act, *supra* n 2, has not affected the Hague Convention. The Act did away with the concept of custody, but removal of a child from the control of a parent who has a residence order or parental responsibility in respect of the child will amount to a wrongful removal under the Hague Convention. Likewise any person having a residence order in respect of a child may, subject to any "prohibited steps order" that may have been issued, take the child abroad for a period not exceeding one month, without the consent of the other parent. Should the child be kept abroad after the expiry of that period any failure to return the child to the UK will constitute a wrongful retention and the Hague Convention may be invoked: Davies *et al supra* n 4 41. A removal may be declared wrongful after the date of the abduction in terms of the Child Custody and Abduction Act: *Re P (Abduction: Declaration)* [1995] FLR 831, (CA).

45 *Re G (Abduction: Striking Out Application)* [1995] 2 FLR 410; *Re R (A Minor)* April 12 1995, (CA) cited in 1996 Feb *CLD* 108 par 308.

46 Hague Convention art 12.

47 *Idem* art 13. See too *B v B (Abduction: Custody Rights)* [1993] 2 All ER 144, (CA). Proceedings may be stayed where it is believed that the child has been removed to another state.

48 Art 13 (a). See in this regard *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106, [1992] 2 WLR 536, [1992] 1 All ER 929, [1992] 2 FLR 14, [1992] 2 FCR 9, (CA); *Re CT (A Minor) (Abduction)* [1992] 2 FCR 92; *Re A (Minors) (Abduction: Custody Rights) (No 2)* [1992] 3 WLR 538, (CA); *Zenel v Haddow* 1993 SLT 975 cited in *CLY* 1993 1434 par 4797; *Re AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682, (CA); *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211; *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993; *Re R (Minors) (Abduction)* [1994] 1 FLR 190; *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819; *Re K (Abduction: Child's Objections)* [1995] 1 FLR 927; *Re W (A Minor: Abduction)* [1996] 1 FCR 46 (Fam); *Re C (Abduction: Consent)* [1996] 1 FLR 414 (Fam). As regards consent obtained by fraud see *Re B (A Minor) (Child Abduction: Consent)* [1994] 2 FLR 249, (CA).

- may acquiesce. Acquiescence may be active or passive;⁴⁹
- there is a grave risk that the return of the child would expose it to physical or psychological harm or otherwise place it in an intolerable situation.⁵⁰ In such instances the court's primary consideration is to return the child to the country whose courts are most suitable to determine the welfare of the child. They are not concerned with determining the best interests of the child. A parent who wrongfully removed or retained the child cannot claim that a separation of the child from him or herself will result in psychological harm to the child;⁵¹ or
 - the child, who is old and mature enough to have his or her opinion considered, objects to the return.⁵²

Where application for the return of a child is made after the elapse of more than a year

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- 49 *Re A (Minors) (Abduction: Acquiescence)* [1992] Fam 106, [1992] 1 ALL ER 929, [1992] 2 WLR 536, (CA). In studying this case regard should also be had to *Re S (A Minor)(Abduction)* [1991] 2 FLR 1, (CA); *Re A (Minors) (Abduction)* [1991] FCR 460, [1991] 2 FLR 241, (CA).
- 50 Art 13(b). At English law the courts have found that the harm must be substantial, see *Gsponer's Marriage* (1988) FLR 164, and the risk grave, see *Re A (A Minor)(Abduction)* [1988] 1 FLR 365. An intolerable situation must be "extreme and compelling": *Re N (Minors) (Abduction)* [1991] 1 FLR 413. See also *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, (CA) 664; *Re E (A Minor)(Abduction)* [1989] 1 FLR 135; *Re C (A Minor) (Abduction)* [1989] 1 FLR 403; *Re G (A Minor)(Abduction)* [1989] 2 FLR 475; *Re C* unreported April 11 1990 Fam cited in *Davis et al supra* n 4; *B v B (Child Abduction: Custody Rights)* [1992] 3 WLR 865; *B v B (Abduction)* [1993] 1 FLR 238, [1993] Fam Law 198; *Re L (Child Abduction) (Psychological Harm)* [1993] 2 FLR 401; *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349; *N v N (Abduction: Article 13 Defence)* [1995] 1 FLR 107; *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021; *Re K (Abduction: Child's Objections)* [1995] 1 FLR 927; *Re K (Abduction: Psychological Harm)* [1995] 2 FLR 550; *Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64; *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31. Financial difficulties will not constitute reasonable grounds to apply this exception: *G v G (Minors)(Abduction)* [1991] 2 FLR 506, (CA); *Re A (Minors)(Abduction: Custody Rights)* [1992] 2 WLR 536, (CA); *B v B (Child Abduction: Custody Rights)* [1992] 3 WLR 865; *S v S (Child Abduction) (Child's Views)* [1992] 2 Fam LR 492, (CA).
- 51 *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, (CA).
- 52 Art 13(2); Sachs T "The Views of the Child in Abduction Cases: *Re R and S v S*" 1993 5 JCL 43; *Re G (A Minor) (Abduction)* [1989] 2 FLR 475; *Re S (A Minor) (Abduction)* [1991] 2 FLR 1, (CA); *Re SR (A Minor) (Abduction)* [1992] FCR 101; *Re R (A Minor) (Abduction)* [1992] 1 FLR 105; *P v P (Minors) (Child Abduction)* [1992] 1 FLR 155; *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, (CA); *Re S (A Minor: Abduction: Custody Rights)* [1993] 2 WLR 775, (CA); *Re B (Minors)(Abduction)(No 2)* [1993] 1 FLR 993; *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211; *B v K (Child Abduction)* [1993] Fam 17; *Re A (Minors) (Abduction: Acquiescence)(No 2)* [1993] 1 FLR 396; *Re R (Minors: Child Abduction)* The Times Dec 5 1994; *Re M (A Minor) (Child Abduction)* [1994] 2 FLR 1; *Re K (Abduction: Child's Objections)* [1995] 1 FLR 927.

since the wrongful removal or retention the court has a discretion to refuse the child's return on the basis that the child has settled in his or her new environment.⁵³ Article 20 of the Hague Convention, which provides for the refusal to return a child in circumstances where the return would contravene the requested state's conception of fundamental rights and freedoms, is not enforced in the UK.⁵⁴ England lacks a written constitution and a bill of rights, hence this ground of exclusion is meaningless in the English context. The article does, however, remain relevant where England seeks the return of a child from another contracting state.⁵⁵

Where courts of the requested country have made a custody determination and have before them a custody determination entitled to recognition, the fact that they have made their own custody determination will not constitute a basis for the refusal to return the child. The reasons for the determination may however be taken into account in deciding whether or not to apply the rules of the Convention.⁵⁶ A decision to return a child is not a custody determination on the merits.⁵⁷ The English courts have respected the underlying principles of the Hague Convention and have restrictively interpreted the exceptions to the rule that the child must be returned.⁵⁸

53 Hague Convention art 12; *Re S (A Minor) (Abduction)* [1991] 2 FLR 1, (CA) 23-24; *Re N (Minors) (Abduction)* [1991] 1 FLR 413. The English courts have ordered the return of a child after the elapse of 16 months from date of the wrongful removal: *Re K* [1990] 1 FLR 387 and have refused to return a child under the European Convention after the elapse of 21 months from the date of the wrongful removal: *F v F* [1989] 1 FLR 335.

54 Dicey and Morris *supra* n 5 837-838.

55 *Ibid.*

56 Hague Convention art 17.

57 *Idem* art 19.

58 *Re A (A Minor) (Abduction)* [1988] 1 FLR 365; *Evans v Evans* [1989] 1 FLR 135; *Re G (A Minor) (Abduction)* [1989] 2 FLR 475; *V v B* [1991] 1 FLR 266; *Re N (Minors) (Abduction)* [1991] FLR 413; *Re S (A Minor) (Abduction)* [1991] 2 FLR 1, (CA); *Re H* 16 July 1991, (CA); *Re A (Minors) (Abduction)* [1991] 2 FLR 241, (CA); *Re AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682, (CA); *S v S* [1993] 2 WLR 775. A very wide interpretation of acquiescence was accepted by the court of appeals in *Re A (Minors)(Abduction: Acquiescence)* [1992] Fam 106, (CA); *Re A (Minors) (Abduction: Acquiescence)(No 2)* [1993] 1 FLR 396 and in *B v K (Child Abduction)* [1993] Fam 17.

2.5.2 *The Council of Europe Convention at English law*

The Council of Europe Convention places an obligation upon Central Authorities to locate the whereabouts of any person under 16 years of age who does not have the right to determine his or her own residence.⁵⁹ The Convention then requires the Central Authority to secure recognition and enforcement of the foreign custody order and to deliver the child to the applicant if the enforcement order is granted.⁶⁰

The provisions of this Convention apply to determinations of judicial or administrative authorities relating to the care of the person of a child, the right to determine where he or she is to reside and the right of access to him or her.⁶¹ An improper removal is the removal of a child across an international frontier, or the refusal to return him or her across such a frontier at the end of a period of access rights, in contravention of an existing, valid, and enforceable custody order made and enforceable in a contracting state. It also includes any removal subsequently declared unlawful by a custody decision.⁶²

The Council of Europe Convention further provides that a custody determination of any contracting state will be recognised and, where it is enforceable in the state in which it was made, be enforceable in every contracting state.⁶³ Provision is made for the restoration of custody of a child who has been improperly removed, subject to limited exceptions.⁶⁴ Article 17 of the European Convention allows a country to reserve its right

59 Council of Europe Convention art 1. The right of a person under the age of 16 to determine his or her own residence may be granted by the law of his or her nationality or place of habitual residence, or by the internal law of the state in which he or she finds him or herself.

60 *Idem* art 5. For a brief discussion of the workings of the Council of Europe Convention see ch 3 *supra*; Cheshire and North *supra* n 5 737-740; Jones 1981 *supra* n 34.

61 *Idem* art 1(b)(c).

62 *Idem* arts 1(d) and 12; *Re S (Abduction: European Convention)* [1996] 1 FLR No 4.

63 *Idem* art 7.

64 *Idem* arts 7 and 8.

not to apply article 8 and to apply article 9 instead. The UK exercised this reservation of rights and chose to apply article 9 exceptions in cases of improper removals and article 10 exceptions in cases where removals or retentions were not improper. Hence the UK may refuse to recognise or enforce a custody determination, whether the removal or retention is proper or improper, on any of the following seven grounds:

- The decision was taken in the absence of the defendant whose right of defence was ignored;
- the foreign court exceeded its international competence;
- the decision of that court is incompatible with one which became enforceable in the UK before the removal of the child, unless the child had been habitually resident within the territory of the requesting state for one year before the removal;
- the effects of the decision are fundamentally in conflict with the laws of family and children in the UK;
- by reason of a change in the circumstances, other than a change in the child's residence after improper removal, which renders the provisions of the decision no longer in accordance with the welfare of the child;
- the nationality or place of the habitual residence of the child is that of the UK; and
- the decision is incompatible with that of the UK, or a third state in which proceedings were instituted before the request for recognition and enforcement was made, and refusal would accord with the welfare of the child.⁶⁵

Article 9(3) provides that the substance of a foreign determination must not be re-examined, however the fifth exception, relating to changed circumstances, comes close

⁶⁵ For a discussion of these exceptions see Collier *supra* n 1 342-343; North *supra* n 40 99-101; *Re M (Child Abduction)(European Convention)* [1994] 1 FLR 551, (Fam).

to permitting the requested court to conduct such an examination.⁶⁶

It should be noted that enforcement of a foreign order under this Convention must be sought separately in each individual part of the UK.

3 NON-CONVENTION COUNTRIES

The common law rules of recognition and enforcement still apply in respect of foreign custody awards made outside of the UK by the courts of non-Convention countries. The court must thus have been vested with international competence. It appears that the English courts have never been required to determine which foreign court would have jurisdiction to entertain an application for custody or guardianship. In the absence of any clear rule, the court may possibly base its jurisdictional determination upon the same rules applicable in respect of English courts.

What is clear, however, is that the obligation upon the English court, faced with a foreign custody or guardianship order in respect of which recognition and enforcement is sought, is to decide whether or not compliance with that order is in the best interests of the child. This remains so irrespective of the circumstances of the child's removal to the UK.⁶⁷ In the leading common law authority, *McKee v McKee*,⁶⁸ the Privy Council found that no judge should ever take a foreign judgment for granted but should always regard the best interests of the child as the paramount consideration. The court would

66 See in this regard *Re K (A Minor) (Abduction)* [1990] 1 FLR 387; *Re G (A Minor) (Child Abduction: Enforcement)* [1990] 2 FLR 325, (CA); *Re M (Child Abduction) (European Convention)* [1994] 1 FLR 551, (Fam); *Re H (A Minor) (Foreign Custody Order: Enforcement)* [1994] 1 FLR 512.

67 *Re B's Settlement* [1940] Ch 54; *Re T (Infants)* [1968] Ch 704, (CA); *Re A* [1970] Ch 665; *Re L* [1974] 1 WLR 250, (CA); *C v C (Abduction: Jurisdiction)* (1993) 23 Fam 185. See too Dicey and Morris *supra* n 5 826-827; Cheshire and North *supra* n 5 741; Bromley PM and Lowe NV *Bromley's Family Law* 8th ed Butterworths, London (1992) 486-487 (Bromley and Lowe).

68 [1951] AC 352 (PC).

thus sometimes be justified in reversing the foreign judgment.⁶⁹ The *McKee* case was not a kidnapping case as the child was lawfully in the care of the parent who removed him or her.

The English courts will express their disapproval of kidnapping and may return the child without an examination of the merits of the case where this is in the interests of the child. This certainly has been the principle followed in cases where there was an existing foreign custody order.⁷⁰ Where there was no existing foreign custody order the Court of Appeal has also emphasised the need for a speedy return of the child to his or her place of habitual residence from which he or she had been kidnapped.⁷¹ In instances where the child has been wrongfully removed from a country which was not a party to the Hague Convention at the time, the UK has applied the same principles to the determination of the matter as it would have applied had the country been such a party.⁷² The reasoning underlying this decision is that the welfare of the child will best be served by the speedy return of the child. Thus, preliminary to an English court's determination of the best interests of the child in terms of an existing custody award, the court must identify the court which should determine the best interests of the child, namely the English court or the foreign court. A section 8 order in terms of the Children Act⁷³ will only be made once the English court has refused to return the child to the foreign country.⁷⁴

In determining the welfare of the child in cases of abduction all the circumstances must

69 *McKee v McKee* [1951] AC 352 (PC) 364-365; *J v C* [1970] AC 668 700-701, 714, 720, 728; *Re L* [1974] 1 WLR 250 264; *Re C* [1978] FLR 105, [1978] 2 All ER 230; *Re R* (1981) 2 FLR 416 425; *Sinclair v Sinclair* 1988 SLT 87.

70 *Re H* [1966] 1 WLR 381, (CA); *Re E (D) (An Infant)* [1967] Ch 761, (CA); *Re R (Minors)* (1981) 2 FLR 416, (CA).

71 *Re F (A Minor)(Abduction)(Custody Rights)* [1991] Fam 25, (CA).

72 *Ibid.*

73 *Supra* n 2.

74 *Collier supra* n 1 344-345; *Cheshire North supra* n 5 742.

be considered.⁷⁵ Thus cases of child abduction are set apart from other child custody issues, even when the child is abducted in the absence of a custody award. The court is compelled to consider the following; the hurt to the child and the parent who has been left behind; any previous custody award; whether the child has become settled in the UK; and the possible harm if the child is returned. To minimise the risk of the child becoming settled the English courts have, on occasion, issued a peremptory order for the return of the child without an examination of the merits of the case.⁷⁶ Hence the courts have compromised between blindly following the foreign judgment and re-adjudicating the merits of the case.⁷⁷ More recent cases have applied the principles of the Hague Convention to cases of international abduction where the country from which the child was removed or retained was not a party to the Hague Convention.⁷⁸ Generally the child will be returned to the place of habitual residence unless a compelling ground such as those set out in article 13 of the Convention is present.⁷⁹ As the aim of the Convention is the speedy return of abducted children the onus is on the abducting parent to prove, by obvious and incontrovertible evidence, that one of the exceptions

75 *J v C* [1970] AC 668; Dicey and Morris *supra* n 5 828.

76 *Re H (Infants)* [1966] 1 WLR 381, (CA); *Re E (D) (An Infant)* [1967] Ch 761, (CA); cf *Re A (Infants)* [1970] Ch 665, (CA); *Re L (Minors)* [1974] 1 WLR 250, (CA); *Dalshaug v Dalshaug* (1973) 41 DLR (3d) 475 (Alta CA); *Re C (Minors)* [1978] FLR 105, (CA); *In the Marriage of P and B* (1978) 32 FLR 350. Contrast *Norman v Norman (No 1)* (1968) 12 FLR 29; *Re B (Infants)* [1971] NZLR 143.

77 *Re H (Infants)* [1966] 1 WLR 381, (CA) 399; *Re T (Infants)* [1968] Ch 704, (CA); *Re E D (An Infant)* [1967] Ch 761, (CA). The court would only grant an order other than for the peremptory return of the child in instances where it was convinced that any other order would cause serious harm to the child. In *J v C* [1970] A C 668 (not a kidnapping case) the Appeal Court stated that the welfare of the child is of paramount importance and that, in making a peremptory order, the court must consider the same things as in any other decision relating to the welfare of the child: Beevers K "Child Abduction - Welfare or Comity?" 1996 26 *Fam Law* 365 (Beevers); *Re F (A Minor) (Abduction: Jurisdiction)* [1991] 1 FLR 1; *Re M (Abduction: Non-Convention Country)* [1995] 1 FLR 89, (CA); *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478, (CA).

78 *G v G (Minors)(Abduction)* [1991] 2 FLR 506, (CA); *Re F (A Minor)(Abduction)(Custody Rights)* [1991] Fam 25, (CA) (Israel); *Re S (Minors) (Abduction)* [1993] 1 FCR 789, (CA); *Re S (Minors) (Abduction)* [1994] 1 FLR 297, (CA); *D v D (Child Abduction: Non-Convention Country)* [1994] 1 FLR 137, (CA); Beevers *ibid*.

79 *Re F (A Minor) (Abduction)(Custody Rights)* [1991] Fam 25, (CA).

exists.⁸⁰ The situation in Scotland differs slightly from that which applies in England but will not be discussed further here.⁸¹

The English court is not bound by the interpretation of the provisions of the Convention by a foreign court.⁸² Where the English court has issued a custody order that was followed by a series of abductions and re-abductions, the English court may well be compelled to return a child to a foreign jurisdiction despite its own award. Hence an existing English award or an award that is enforceable in England will not suffice to prevent a return under the provisions of the Convention.⁸³

Section 2(2) of the 1985 Act provides that the Convention will only apply in respect of matters arising after its implementation in the UK.⁸⁴ Hence, as retention is not a continuing offence, the initial act in breach of the custody rights must have taken place after the implementation date.

4 CRIMINAL REPERCUSSIONS

Until 1984 and the promulgation of the Child Abduction Act the only offence of which a parental child abductor could be convicted was contempt of a court's power over a ward, (criminal contempt).⁸⁵ In the past, English courts seemed to view the parents of a child in respect of whom no custody award had been made as entitled to possession

80 Dicey and Morris *supra* n 5 838; *Re D (A Minor)(Child Abduction)* [1989] 1 FLR 97.

81 Dicey and Morris *idem* n 5 829-830.

82 *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562 (HL) 568.

83 In *Sheikh v Cahill* 145 Misc 2d 171, 546 NYS 2d 517 (Sup Ct 1989) the New York court found itself in this position.

84 Dicey and Morris *supra* n 5 838.

85 Lowe NV "Child Abduction and Child Kidnapping- The New Laws Affecting Parents" 1984 *NLJ* 960 (Lowe); Cretney *supra* n 17 827; *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456, (CA).

of the child.⁸⁶ Hence there existed a perception that one biological parent could lawfully seize his or her child from the other, even against the wishes of the child and with the use of force.⁸⁷ The accuracy of this conception was cast into doubt in *R v Austin*⁸⁸ in which the criminal offence of child-stealing in terms of section 56 of the Offences Against the Person Act 1861 was examined. In his judgment in the case Watkins LJ stated that the notion that one parent may, after a separation, forcibly remove a child of the marriage from the other must be dispelled.⁸⁹ In that case a father made use of detectives to snatch his child from the mother. The four detectives were convicted under section 56 of the Act but there was a proviso in the Act which stated that a father of an illegitimate child could not be prosecuted in terms of the Act. The interpretation of the proviso has been such as to exclude the father of a legitimate child too.⁹⁰ Watkins LJ agreed that the section should be widely interpreted to include either of the parents of a legitimate or an illegitimate child.⁹¹ This did not however mean that the behaviour was lawful, merely that the unlawful behaviour would not give rise to criminal prosecution. It seems that the rationale here was to avoid wholesale criminal prosecutions arising from marital discord.⁹² This point of view is strengthened by the fact that the Family Law Reform Act⁹³ has now largely abolished the distinction between legitimate and illegitimate children.⁹⁴

The above attitude reveals an ambivalence on the part of the courts. The courts uphold

86 See Montgomery J "Children as Property?" 1988 51 *MLR* 323 (Montgomery).

87 Allen NF "The Parental Right to Possession of a Child" 1986 8 *Liverpool LR* 97 97-100 (Allen).

88 [1981] 1 All ER 374.

89 At 375.

90 Allen *supra* n 87 101-102.

91 *R v Austin* [1981] 1 All ER 374 378.

92 Allen *supra* n 87 102.

93 Family Law Reform Act of 1987 (The Reform Act).

94 Stone *supra* n 8 87.

a parent's right to possess his or her child, but withhold the right to forcibly exercise this right. In *Regina v D*,⁹⁵ for the first time in English law, a father was charged with, and convicted of, common law kidnapping in circumstances where he had abducted his own child. He successfully appealed to the Court of Appeal but the conviction was finally restored by the House of Lords.⁹⁶ In the House of Lords Lord Brandon stated that the Court of Appeal was incorrect in indicating that kidnapping could not be committed against a child under 14 and that a parent could not kidnap his or her own child. He stated that since the nineteenth century the position of the father within the family has gradually diminished until by the mid-twentieth century he no longer has a paramount position.⁹⁷ This fundamental shift in the position of fathers in respect of their children has been recognised under English law. For this reason the nineteenth century situation that a father's position as head of the household may well have afforded him a lawful excuse to forcibly remove his child is no longer available to him in modern times. The House of Lords decision thus supports the view that a parent can in fact be guilty of kidnapping his or her own child. His or her right to possession of the child is limited and cannot be unlawfully enforced by self help in the face of the child's objections.

The case of *Regina v D*⁹⁸ was before the English courts at the same time as the Child Abduction Act 1984 was being processed by the legislature. This Act does not affect the common law offence of kidnapping in any way.⁹⁹ It was unfortunate that the legislators did not take time to consider the decision of the House of Lords more extensively as the Act was designed to provide for seizure of a child by his or her own

95 [1984] 1 AC 778; [1984] 2 All ER 249. See the discussion of the case in Allen *supra* n 87 103-113; Lowe *supra* n 85 960.

96 *Ibid.* The Court of Appeals judgment was criticised by Glanville Williams "The Kidnapping of Children" 1984 124 *NLJ* 277 (Glanville Williams).

97 At 805.

98 [1984] 1 AC 778.

99 Allen *supra* n 87 107.

parent and to replace section 56 of the Offences against the Person Act¹⁰⁰ which essentially dealt with abduction of children by third parties. The legislation was influenced by the Fourteenth Report of the Criminal Law Revision Committee¹⁰¹ which devoted an extensive section to abduction. It was also greatly inspired by the growing number of child abductions. This Act makes it an offence for a parent to take a child under the age of 18 years out of the UK without the consent of the other parent.¹⁰² Such an offence is punishable by imprisonment of up to seven years.¹⁰³ The Act applies only to cases where the child is removed from the country. This reflects a preoccupation on the part of the legislators with transnational abductions.¹⁰⁴ There appears to have been a feeling that domestic child abductions should be resolved by civil rather than criminal means.¹⁰⁵ This could be problematical in that the common law offence of kidnapping does not draw the same distinction between transnational and domestic kidnapping as the Act does. Thus, a parent who takes the child from the country could be guilty of child abduction and kidnapping while a snatching within the UK could lead to a conviction on the basis of kidnapping only and not child abduction.¹⁰⁶

When charged with child abduction a parent may raise the defence that he or she

100 Offences against the Person Act 1861.

101 Entitled "Offences Against the Person" (Cmnd 7844).

102 S 1.

103 S 4(1)(b).

104 See Allen *supra* n 87 109-110; Greenhouse G "International Child Abduction and the Enforcement of Foreign Custody Orders" 1985 12 *NLJ* 710-711 (Greenhouse); *M v M (Contempt: Committal)* [1992] 1 FCR 317, (CA) in which a parent who breached a court order by removing the child from the jurisdiction of the court was sentenced to twelve months imprisonment. This penalty was found to be reasonable. In *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252, (CA) the court had to determine whether or not a kidnapping charge was appropriate. Normally the charge of child abduction is sufficient and kidnapping charges will only be brought in exceptional cases. Here the kidnapping conviction was overturned on appeal. In *R v Khan (Riasat)* (1993) 14 Cr App R (S) 571, (CA) a father was sentenced to five years imprisonment for the offence of child abduction. This sentence was found to be appropriate in the circumstances.

105 Allen *idem* 110; Cmnd 7844 247.

106 Allen *ibid*; Lowe *supra* n 85 960ff.

removed the child in the belief that the other parent had consented to the removal, or would have consented if he or she had been aware of the circumstances. Furthermore, if a parent has taken all reasonable steps to communicate with the other parent but has failed to do so, this too will constitute a defence to such charges.¹⁰⁷ Another defence to a charge of child abduction is that the consent of the parent from whom the child was abducted was unreasonably withheld. This of course will be determined by the court.

The Act weakens the right of a parent to possession of a child. One parent cannot simply remove the child from the other with impunity.¹⁰⁸ Criminal law has begun to make self-help an unattractive option. The "left behind" or "aggrieved" parent may have recourse to a court order for the return of the child or to seek the help of the police. Before the Child Abduction and Custody Act of 1985 the best course of action was to approach the courts for return of the child on the basis of the child's welfare.¹⁰⁹

Sequestration is another useful tool in obtaining the return of an abducted child.¹¹⁰ Here the abducting parent's assets are attached and, should the abductor not show reasons why his or her property should not be sold, then the property will be sold and the proceeds used in the effort to obtain the return of the child. The abducting parent may well return to England to defend the action and may consequently be forced to bring the child along with him or her. In cases of imminent removal parents may seek a port alert.¹¹¹ Police assistance may also be sought.¹¹²

Practical steps that can be taken to prevent a child's removal include:

107 Allen *ibid*; Lowe *idem* 961.

108 Allen *idem* 111.

109 Allen *idem* 112-113. For a discussion of the position of parents in relation to the rights of third parties and local authorities see Allen 113ff.

110 *MIR v MIR* [1992] 2 WLR 225; *Re S (Abduction: Sequestration)* [1995] 1 FLR 858.

111 See Cretney *supra* n 17 827; Lowe *supra* n 85 961.

112 *Practice Direction (Minor: Preventing Removal Abroad)* [1986] 1 WLR 475.

- Stopping of the issue of a passport to the child, or obtaining an order for its surrender;¹¹³ or
- informing the police of the danger, or obtaining an injunction prohibiting the removal of the child.

If the child is abducted, practical steps exist to ascertain the abductor's address.¹¹⁴ The Conventions may be invoked or, in the case of non-Convention countries, the provisions of the common law may be applied.

5 OTHER LEGISLATION

The Family Law Act of 1996 emphasises a new focus under English law on children's needs. The Act provides that divorcing couples who request an order in respect of children of a marriage must attend an information meeting before making a statement of marital breakdown. At this meeting the importance of the welfare and feelings of the children will receive consideration. The Act allows the court to evaluate the arrangements for the children and to determine whether or not court intervention in the form of a section 8 order under the Children Act¹¹⁵ is appropriate.¹¹⁶

113 Family Law Act *supra* n 8 s 37. See Bromley and Lowe *supra* n 67 484 ff.

114 *Practice Note (Disclosure of Addresses)* [1973] 1 WLR 925; *Publicity: Order to Disclose Whereabouts: Family Law Act* *supra* n 8 s33.

115 *Supra* n 2.

116 On the Family Law Act 1996 see Conway HL "In Practice: Abused Cohabitees, Property Disputes and the Family Law Act 1996" 1996 26 *Fam Law* 499 (Conway); Fisher T "A Guide to the Family Law Act 1996" 1996 26 *Fam Law* 493 (Fisher).

6 CONCLUSION

From the above it is apparent that English legal experts have accepted the challenge of finding a solution to the problems associated with child custody awards and parental kidnapping. Despite this all the steps that have been taken in promulgating legislation and acceding to treaties and conventions have failed to discourage parental child abduction altogether. In fact statistics reveal that parental child abduction is on the increase in the UK.¹¹⁷

117 White R "Family Practice: The Abduction and Evidence of Children" 1996 6752 *NLJ* 1025 (White): There are between 100 and 200 new abduction cases in the UK each year, double the figures of 5 years ago. Wall *supra* n 28 182-183 also records statistics that reveal a marked increase in parental abductions to and from the UK.

CHAPTER SIX

RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS AND THE ASSOCIATED PROBLEM OF INTERNATIONAL CHILD ABDUCTION: THE AUSTRALIAN EXPERIENCE

1 INTRODUCTION

Australia, like all other nations, experiences conflict of laws problems. These conflicts may arise at an international or an interstate level. Interstate conflicts are a result of the diversity jurisdiction existing amongst the federation of states and territories which comprise the Commonwealth of Australia. These states and territories are subject to a constitution which drew heavily upon the American experience. The reliance of Australian law upon America for guidance in resolving conflict of laws problems is logical because both countries are required to deal with problems associated with diversity jurisdictions and the Australian jurist may profitably refer to the American experience in resolving such problems. One example of the strong parallel between the American and Australian conflicts law is apparent in the reliance both systems place upon a full faith and credit clause within their constitutional schemes. The clauses themselves differ in important respects, but the Australian clause is clearly based upon the American.

In this thesis the Australian approach to resolving international and interstate (inter-jurisdictional) conflicts problems arising from foreign custody orders will be examined. Both the common law and statutory positions regarding conflict of laws in relation to recognition and enforcement of foreign custody orders as well as the effect of international treaties and conventions on the Australian position will be discussed.

2 THE DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL CONFLICT OF LAWS

Certain areas of Australian law, such as matrimonial causes, are regulated by federal legislation. The court which exercises jurisdiction in such matters is exercising federal jurisdiction, irrespective of whether it is the High Court or a state court. In family matters there is thus no autonomy of Australian states, Australia is a single *rechtskring*.¹ For all other legal purposes Australia is, after the enactment of the Territories (Law Reform) Act of 1992 (Cth), comprised of nine independent *rechtskringen*, in which relations between citizens are regulated by the legislative authorities of the individual state or territory.²

It was only in the latter part of the 1980's that Australia distinguished between international and domestic conflicts law.³ Until then international conflicts rules were applied to all conflicts problems regardless of their nature.⁴ In *Breavington v Godleman*⁵ the majority of the Australian High Court favoured a conflicts approach that would distinguish between international and domestic conflicts. The High Court in *McKain v RW Miller & Co (SA) Pty Ltd*⁶ endorsed this approach and reasserted the view that the common law rules of choice of law are not displaced by the Constitution or the fact of federalisation.

1 Nygh P *Conflict of Laws in Australia* 6th ed Butterworths, Sydney (1995) 8 (Nygh *Conflicts*).

2 *Ibid.*

3 *Ibid*; *Pedersen v Young* (1964) 110 CLR 162 per Windeyer J 170.

4 Nygh *Conflicts supra* n 1 9; *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20; *Breavington v Godleman* (1988) 80 ALR 362 per Mason CJ 366.

5 (1988) 80 ALR 362. For a discussion of this case see Nygh P "Full Faith and Credit: A Constitutional Rule for Conflict Resolution" 1991 13 *Sydney LR* 415 421ff (Nygh *Sydney LR*) and Howard M "Interstate Conflicts and the Enforcement of Australian State's "Governmental Interests" Within Australia" 1992 21 *Fed LR* 90 94ff (Howard).

6 (1991) 174 CLR 1 35-36. For an evaluation of this judgment see Howard *ibid.*

The development of a set of domestic rules for Australia was complicated by the fact that jurists could not agree whether the distinction between domestic and international choice of law rules was:

"mandated by a federal rule derived from the constitution or federal legislation, or by a judicial policy based on the reasonable expectations of persons resident within the Australian federation"⁷

The Australian constitution⁸ permits parliament to legislate the recognition of laws, public Acts and records, and the judicial proceedings of the states throughout the Commonwealth. The federal parliament is also possessed of plenary powers in respect of the territories that enable it to provide for the recognition, enforcement and effect of state laws and judgments throughout the territories and vice versa.⁹

The provisions of the constitution, read together, may well enable federal parliament to enact statutory rules for the resolution of interstate conflict of laws problems within Australia. The matter remains unresolved.¹⁰

3 THE EFFECT OF A FOREIGN JUDGMENT IN AUSTRALIA

In *Godard v Gray*¹¹ Blackburn J authoritatively stated that a foreign judgment may never be impeached on the merits or on the basis of any mistake of fact or law which the foreign court may have made.¹² Although most foreign judgments awarded today have

7 Nygh *Conflict of laws in Australia* 5th ed Butterworths, Sydney (1991) 10.

8 The Commonwealth of Australia Constitution Act 1900 P 1(xxv) of s 51.

9 S 122 of the Constitution.

10 See in this regard Nygh *Conflicts supra* n 1 12. For a contrary view read Wynes *WA Legislative, Executive and Judicial Powers in Australia* 5th ed The Law Book Company, Sydney (1976) 174 (Wynes).

11 (1870) LR 6 QB 139.

12 *Idem* 150.

most of the attributes of *res judicata* that attach to domestic judgments¹³ they cannot bind the Australian court to recognise the court's international jurisdiction.¹⁴ As was illustrated above, there are a limited number of defences to recognition and enforcement of foreign judgments which meet the common law requirements for enforcement.¹⁵

4 STATUTORY RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS

In an attempt to overcome problems associated with the common law, legislation was passed in each of the states and territories of Australia providing for direct enforcement of foreign judgments in the *forum* by registration rather than action on a judgment debt.¹⁶ This legislation, which continues to apply in instances where a judgment was registered under state or territorial law prior to 27 June 1991, has now been largely superseded by the Foreign Judgments Act of 1991 (Cth), which was modelled upon the English Foreign Judgments (Reciprocal Enforcement) Act of 1933. This federal legislation relies heavily upon the principles of reciprocity.¹⁷ It does not, save in exceptional cases, apply to judgments given in a foreign court before the date on which

13 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No2)* [1967] 1 AC 853 per Lord Reid 917 and Lord Hodson 925.

14 *Harris v Harris* [1947] VLR 44.

15 See ch 2 *supra*.

16 Nygh *Conflicts supra* n 1 162. NT: Foreign Judgments Act 1955; Qld: Reciprocal Enforcement of Judgments Act 1959; Tas: Foreign Judgments Act 1963; Vic: Foreign Judgments Act 1962; WA: Foreign Judgments Act 1963; ACT: Foreign Judgments Act 1954; NSW: Foreign Judgments Act 1973; SA: Foreign Judgments Act 1971. See too Sykes EI and Pryles MC *Australian Private International Law* 3rd ed The Law Book Company, New South Wales (1991) 124ff (Sykes and Pryles *Private International Law*); Platto C and Horton WG *Enforcement of Foreign Judgments Worldwide* 2nd ed Graham & Trotman and International Bar Association, London, Dordrecht and Boston (1993) 24ff (Platto); *Hunt v BP Exploration Co (Libya) Ltd* (1980) 54 ALJR 205; *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104.

17 Nygh *Conflicts supra* n 1 162.

the Act was extended to the country of that court.¹⁸ In addition, the old intra-imperial enforcement scheme based on the Administration of Justice Act of the UK¹⁹ remains in force in Tasmania, the Northern Territories and New South Wales.²⁰ Where both pieces of legislation are found to be applicable to the judgment, the new legislation prevails.²¹ Queensland, Victoria and Western Australia immediately brought all existing arrangements under the new Act.²² The Act creates a scheme which embraces the United Kingdom, New Zealand, and other countries within and outside the Commonwealth, but does not extend to interstate judgments.²³

4.1 Reciprocal enforcement legislation

The Australian legislation, which provides for reciprocity of enforcement,²⁴ requires the enforcement of judgments rendered by the superior courts of proclaimed countries.²⁵ Countries will only be proclaimed if they have made reciprocal arrangements for the enforcement of judgments of the superior courts of Australia.²⁶ The legislation only

18 Foreign Judgments Act 1991 (Cth) s 5(8). The exceptions are judgments given by the courts of the UK; New Zealand, and judgments of countries to which the state and territorial laws already applied. For a detailed discussion of the Act see Nygh *Conflicts supra* n 1 162ff.

19 1920.

20 Tas: Supreme Court Civil Procedure Act 1932 Pt X; NT: Reciprocal Enforcement of Judgments Ordinance 1925; NSW: Administration of Justice Act 1924.

21 See s 17 of the Tas legislation; s 11 of the NT legislation and s 13 of the NSW legislation.

22 Qld: s 2(2); Vic: s 2(2); WA: s 4(2).

23 Nygh *Conflicts supra* n 1 162; Sykes & Pryles *Private International Law supra* n 16 126. On interstate judgments see further 5 *infra*.

24 Not to be confused with the reciprocity theory discussed *supra*, to which this legislation lends support. See *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819. See too Sykes and Pryles *ibid*.

25 "Judgment" here includes certain arbitral awards: Foreign Judgments Act 1991 (Cth) s3(1). See, Nygh *Conflicts supra* n 1 163.

26 ACT: s5(2); NSW: s 5(3); NT: s 5(1); Qld: s 4(2); Tas: s 3(1); Vic: s 4(2); WA: s 6(2); *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819; *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760. See further, Nygh *Conflicts idem* n 1 162-163.

applies to courts of first instance with the status of superior courts and, in limited instances, to specified inferior courts.²⁷

The legislation provides for enforcement by registration of certain money judgments and prescribed non-money judgments of specified countries only.²⁸ Custody orders clearly fall outside the ambit of the legislation which will thus not be discussed further here.

5 INTER-JURISDICTIONAL CONFLICT OF LAWS PROBLEMS WITHIN AUSTRALIA

As already indicated, the Australian constitution contains a full faith and credit clause²⁹ which provides that the laws, public Acts and records and the judicial proceedings of every state will be afforded full faith and credit throughout the Commonwealth. Based upon the American full faith and credit clause,³⁰ the Australian provisions are to be found in sections 118 and 51(xxv) of the Australian Federal Constitution. Furthermore, a federal legislative directive³¹ requires that the duly proved and authenticated public acts, records and judicial proceedings of any state or territory will have such faith and credit in every court and public office as they have in the court or public office of the state or territory from whence they were taken. This provision ensures that a sister Australian state or territory will not be treated entirely as a foreign jurisdiction in relation

27 Foreign Judgments Act 1991 (Cth) s5(3).

28 For a general discussion of the legislation and the procedures provided for therein see Nygh *Conflicts supra* n 1 164-170.

29 S 118. For a full discussion of federal jurisdiction and the full faith and credit clause see Sykes and Pryles *Private International Law supra* n 16 ch 7; Kelly D St.L *Localising Rules in the Conflict of Laws* Woodley Press, Adelaide (1974) ch IV; Campbell E "Res Judicata and Decisions of Foreign Tribunals" 1994 16 *Sydney LR* 311 322ff (Campbell "Res Judicata"); Nygh *Sydney LR supra* n 5 415-434.

30 Art IV s1 United States Constitution. See Campbell "Res Judicata" *idem* 322ff.

31 S 18 of the State and Territorial Laws and Records Recognition Act 1901. (the Recognition Act 1901)

to recognition and enforcement of judgments. Although the American and Australian full faith and credit provisions are not identical there is clear evidence that the Australian constitutional provision was substantially copied from the American.³² There remain however some extremely important bases upon which the two provisions differ:

- The full faith and credit provision of the United States (US) Constitution is directed to states and applies only to the public Acts, records and judicial proceedings of states. The Australian provision is directed at the entire Commonwealth of Australia (including at least some of the territories of Australia) and applies to the public Acts, records and judicial proceedings of every state.³³
- The obligations imposed by the US Constitution do not have direct effect upon federal courts, whilst those imposed by the Australian constitution bind both federal and state courts.³⁴
- The American Congressional statute, enacted pursuant to article IV section 1, provides for the mode of authentication of the records and judicial proceedings, and extends the effect of the constitutional obligations under the full faith and credit clause to federal and territorial courts in relation to the "records and judicial proceedings of courts".³⁵ The Australian Recognition Act³⁶ defines the bodies to which it applies far more broadly.

32 Cowen Z *Bilateral Studies in Private International Law no 8 American-Australian Private International Law* Oceana Publications, New York (1957) 19-29, 84 (Cowen); Campbell "*Res Judicata*" *supra* n 29 323ff.

33 Campbell "*Res Judicata*" *idem* 323.

34 *Idem* 323-324.

35 28 USC s1738. For a detailed discussion of the American full faith and credit provisions see ch 7 *infra*.

36 *Supra* n 31 s 18.

Australian courts have also, on occasion, followed English approaches to conflicts where an American approach would perhaps have been more appropriate.³⁷

The provisions of the Constitution and section 18 of the Recognition Act impose an obligation upon the territories to afford full faith and credit to the laws, public Acts, records and judicial proceedings of every state. They do not, however, impose a similar obligation upon the states in respect of the territories.³⁸ Section 18 of the Recognition Act refers to both states and territories but does not refer to "laws". It refers to "public acts" not "public Acts". Wilson and Godron JJ in *Breavington v Godleman*³⁹ are of the opinion that, as the Recognition Act⁴⁰ was not intended to echo the Constitution, section 18 has no operation in respect of the laws or Acts of either states or territories. This view was supported by most of the other judges.⁴¹

According to *Harris v Harris*⁴² the full faith and credit provisions of the Recognition Act compel courts to substantially recognise interstate judgments,⁴³ but they may not grant remedies that were not available in the rendering state.⁴⁴ Hence section 18 of the Recognition Act continues to play an important role in the recognition and enforcement of judgments within Australia, mandating recognition of interstate judgments without reference to the common law conflicts rules. The judgment need not be final and

37 Cowen *supra* n 32 84.

38 Nygh *Conflicts supra* n 1 171; *Lamshed v Lake* (1958) 99 CLR 132 per Dixon CJ 142.

39 (1988) 80 ALR 362 384.

40 *Supra* n 31.

41 *Breavington v Godleman* (1988) 80 ALR 362 per Mason CJ 373; Brennan J 399; Dawson J 424. See too Nygh *supra* n 1 173.

42 [1947] VLR 44.

43 *Idem* 59. This decision was followed in *The Estate of Searle (dec'd)* [1963] SASR 303; *G v G* (1985) 10 FLR 718. This last case involved the recognition of an interstate custody decree which was recognised despite the lack of finality of such judgments.

44 *Bond Brewing Holdings Pty Ltd v Crawford* (1989) 1 WAR 517 529.

conclusive in order for it to be recognised,⁴⁵ nor will recognition be refused on the basis that it affronts the public policy of the enforcing court.⁴⁶ This issue is now only of importance in relation to judgments that cannot be enforced under Part 6 of the Service and Execution of Process Act.⁴⁷

5.1 Statutory provisions

Part IV of the Service and Execution of Process Act 1901⁴⁸ provided for the enforcement, by registration, of judgments of the courts of the Australian states or territories, or other states or territories to which the Act extended. At repeal the Act extended to the six Australian states, the two internal territories, and the external territories of Christmas Island, the Cocos Islands and Norfolk Island.⁴⁹

The Act was confined to the enforcement of civil judgments made in any suit.⁵⁰ As a judgment was defined as a judgment, decree, rule or order given or made by a court in any suit whereby a sum of money is made payable, or a person is required to do or not to do any act or thing other than the payment of money, it was not confined to money judgments.⁵¹ This Act could therefore have been applied to custody awards. A simple enforcement procedure was provided for in this Act.⁵²

45 *G v G* (1985) 10 FLR 718.

46 *Breavington v Godleman* (1988) 169 CLR 41 per Dawson J 150.

47 Service and Execution of Process Act 1992 (Cth).

48 For a discussion of this legislation see Sykes and Pryles *Private International Law supra* n 16 135-139.

49 Until 1976 the Act also extended to Papua New Guinea.

50 As defined in s 3.

51 For a discussion of the meaning see *Re E and B Wool Chemicals and Wool Treatment (Pty) Ltd* [1940] SASR 267; *Winchcombe v Winchcombe* [1955] QWN 16.

52 Ss 20-21.

The provisions of part IV of the Service and Execution of Process Act 1901⁵³ were included in the considerations of the Australian Law Reform Commission on Service and Execution of Process.⁵⁴ The Commission found no convincing reason to depart from the scheme of Part IV but recommended clarification of certain points, *inter alia*, the total exclusion of the common law rules on the enforcement of foreign judgments,⁵⁵ and registrability of judgments that are not final.⁵⁶

The Commission also recommended that the provisions of the Act be extended to certain criminal proceedings⁵⁷ and orders of tribunals.⁵⁸ A simplified registration procedure in respect of interstate judgments was recommended⁵⁹ together with an abolition of the requirement that leave to register a judgment was required if a period of twelve months had elapsed from the date on which the judgment was granted.⁶⁰

The commission attempted to resolve difficulties associated with the determination of an appropriate court of like jurisdiction. It recommended that the judgment should be registered in a court that would have had jurisdiction to award a like judgment or remedy, subject to the proviso that the jurisdiction was not based on the consent of the parties. In the event that more than one such court existed, the commission recommended that the copy be filed with the court of more limited jurisdiction.⁶¹

53 Service and Execution of Process Act 1901.

54 Australian Law Reform Commission, Report No 40, Service and Execution of Process, 1987(The Australian Report No 40).

55 The Australian Report No 40 *idem* par 519.

56 *Idem* par 516.

57 *Idem* par 515.

58 *Idem* par 517.

59 *Idem* par 523.

60 *Idem* par 528.

61 *Idem* par 535.

The Service and Execution of Process Act⁶² was subsequently amended by, inter alia, the Service and Execution of Process Amendment Acts 115 of 1990 and 124 of 1991 and was repealed and replaced by the Service and Execution of Process Act 172 of 1992.⁶³ This Act operates in respect of the whole of Australia including the external Territories.⁶⁴ Its application, like that of the 1901 Act,⁶⁵ is not restricted to money judgments.⁶⁶ It extends to certain orders arising from criminal proceedings⁶⁷ and to judgments rendered by any body with the status of a court according to the law of the state in which it is located.⁶⁸ For purposes of this Act a judgment is defined as:

"(a) a judgment, decree or order made by a court in a civil proceeding whereby any sum of money is made payable or any person is required to do or not to do an act or thing other than the payment of money,"⁶⁹

The definition of "judgment" then proceeds to expressly exclude any order relating to the care, control or welfare of a child.⁷⁰ Thus the Act does not apply to enforcement of custody orders and will not be discussed further.

62 1901.

63 which commenced on 10 April 1993.

64 Ss 5(1) and 7(2), Part 6 of the Service and Execution of Process Act 1992 (Cth) (hereafter Part 6).

65 *Supra* n 48.

66 S 3(1), part 6.

67 See s 3(1)(b), part 6; Nygh *Conflicts supra* n 1 174.

68 See definitions of "court" and "authority" in section 7(2), part 6.

69 S3(1), part 6.

70 S3(1)(k), part 6. See in general Nygh *Conflicts supra* n 1 ch 27.

6 CUSTODY OF CHILDREN⁷¹

6.1 Jurisdiction

6.1.1 Common law

At common law the ultimate responsibility for minor children born in the realm and foreign children physically present or ordinarily resident within the realm vested in the crown.⁷² This function was traditionally fulfilled by the Court of Chancery. The superior courts of Australia have inherited a similar inherent jurisdiction.⁷³ The importance of the common law rules has diminished in recent years. The jurisdiction of both the family law courts of Australia and Western Australia is now governed by statute. From 1 April 1988 jurisdiction in relation to all children not under the custody, guardianship, care and control of a state or territorial child welfare agency⁷⁴ has been transferred to the Family Court of Australia.⁷⁵ Thus common law jurisdiction is only of importance in relation to children who are under the custody, guardianship care and control of a state or territorial child welfare agency in terms of section 60H of the Family Law Act.⁷⁶ In terms of section 63B (1)(e) of the Family Law Act the common law may be relevant where the

71 See in general Nygh *Conflicts ibid.*

72 Nygh *Conflicts idem* 432; Sykes and Pyles *Private International Law supra* n 16 529; *R v Gyngall* [1893] 2 QB 232 239. On the extent of this responsibility see *Re P (GE) (An Infant)* [1965] Ch 568, (CA) 584-585.

73 Sykes and Pyles *Private International Law ibid. Re Raffel, Infants* [1967] QWN 39.

74 Family Law Act 1975 s60H.

75 In New South Wales, Tasmania, South Australia, Victoria and (from 1 August 1990) Queensland: Commonwealth Powers (Family Law-Children) Act 1986 (NSW); Commonwealth Powers (Family Law-Children) Act 1986 (Vic); Commonwealth Powers (Family Law-Children) Act 1986 (SA); Commonwealth Powers (Family Law-Children) Act 1987 (Tas); Commonwealth Powers (Family Law-Children) Act 1990 (Qld). This transferred power was exercised by the Family Law Amendment Act 1987 (Cth) s 24.

76 *Supra* n 74.

jurisdiction extended thereby is wider than that extended statutorily.⁷⁷

At common law jurisdiction may be exercised on the basis of physical presence (no matter how transitory) within the jurisdiction at the date of institution of action.⁷⁸ The child may be an alien who is domiciled abroad.⁷⁹ In such cases the Australian courts will exercise jurisdiction on the sole basis of presence if the child's welfare or safety is at stake. The second common law ground for jurisdiction is that the child is ordinarily resident within the jurisdiction at the time of institution of proceedings even though he or she is not physically present there at that date.⁸⁰ Where parents are separated the child is generally regarded as being ordinarily resident at the place of ordinary residence of the custodial parent. Only a parent with sole custody may unilaterally change the ordinary residence of a child.⁸¹

The Court of Chancery also exercised jurisdiction over children who were British subjects, irrespective of their place of residence or physical presence.⁸² The status of "British subject" no longer exists and it has been suggested that the term "Australian citizen" should be substituted for it.⁸³ In *Moses v Stephenson*⁸⁴ Gallop J held that the Supreme Court of the Northern Territory had jurisdiction over a child that had never

77 *Ibid.*

78 Sykes and Pryles *Private International Law supra* n 16 531; *A v B* [1979] 1 NSWLR 57.

79 *In re C (an Infant)* (1981) 8 Fam LR 257.

80 Ordinary residence is defined as a person's abode in a particular country which that person voluntarily adopted for settled purposes as part of his or her regular order of life for the time being, irrespective of the duration: per Lord Scarman *Akbarali v Brent London Borough Council* [1983] 2 AC 309 343. See too *McM v C* (1980) 5 Fam LR 650; *Corin v Corin* (1991) 7 SR (WA) 124.

81 Sykes and Pryles *Private International Law supra* n 16 531; *Re P (GE) (An infant)* [1965] Ch 568, (CA); *Glasson v Scott* (1973) ALR 370.

82 *Re Willoughby (An Infant)* (1885) 30 Ch D 324; *Corin v Corin* (1991) 7 SR (WA) 124.

83 *Kelly v Panayiotou* [1980] 1 NSWLR 15; *McManus v Clouter* (1980) 29 ALR 101 118 per McLelland J; *Romeyko v Whackett* (1980) 6 Fam LR 400 404 per Matheson J.

84 (1981) 10 NTR 32.

lived in the territory and whose mother had moved there after separation from her husband. The court declined to exercise this jurisdiction on the basis of *forum non conveniens*.⁸⁵ Likewise, a writ of *habeas corpus* issued by a state supreme court in respect of an Australian child runs throughout the Commonwealth.⁸⁶

Nationality has been doubted as a jurisdictional basis.⁸⁷ It has been proposed that in an application for a writ of *habeas corpus* ordinary residence within the state or, in certain limited circumstances, physical presence may found jurisdiction.⁸⁸ This point of view has found some support⁸⁹ but has not been finally resolved.⁹⁰

6.1.2 By statute

All proceedings concerning the custody, guardianship, welfare of, or access to a child born in or out of wedlock in the states of New South Wales, Victoria, South Australia, Tasmania, Queensland, and the territories must be brought under the Family Law Act of 1975, as amended by the Family Law Reform Act.⁹¹ Section 63B of the Family Law

85 Situations of *forum conveniens* and *forum non conveniens* arise where an alternate court exists to hear the matter. The alternate court may be a court of a foreign country or the court of another state or territory of Australia. For a detailed discussion of the concept see Finch WM "Forum Conveniens and Forum Non Conveniens - Judicial Discretion and the Appropriate Forum" 1990 6 *QLD Uni of Tech LJ* 67-95 (Finch); Stickley A "Conflict of Laws: A Comparative Analysis of the Forum Non Conveniens Doctrines in the USA, the UK and Australia" 1994 15 *Queensland Lawyer* 19-33 (Stickley).

86 *Denaro v Denaro* [1954] QWN 17; *Re Cabassi* [1955] QWN 71; *Glasson v Scott* (1973) 1 ALR 370 per Larkins J 378-380. See too Sykes and Pryles *Private International Law supra* n 16 532ff.

87 *A v B* [1979] 1 NSWLR 57 per Powell J 62; *McM v C* (1980) 5 Fam LR 650 per Powell J 658; *Ex Parte TMW* [1981] Qd R 436. See too, *Brown v Kalal* (1986) 11 Fam LR 349 per Young J 350.

88 *McM v C* *ibid*.

89 *Ex Parte TMW* [1981] Qd R 436 per Dunn J.

90 *Brown v Kalal* (1986) 11 Fam LR 349 per Young J 350. See too Nygh *supra* n 1 433-434.

91 Family Law Reform Act 1995 (Cth), (the Reform Act). This Act was passed by the Australian parliament on 21 November 1995 and received royal assent on 1 December 1995. Most of the Act (save for ss 1, 2 and 54, which commenced on assent, and s52, replacing s114M, which commenced on 25 Jan 1996) commenced on 11 June 1996. The major function of the Act is to replace Pt VII of the Family Law Act 1975 (Cth): Nygh P "The New Part VII - An Overview" 1996

Act states that proceedings in terms of the Act may be brought in respect of any child if:

- The child is present within the jurisdiction;
- the child is an Australian citizen or ordinarily resident in Australia;
- a parent of the child is either an Australian citizen, an ordinary resident of Australia or is physically present in Australia.
- a party to the proceedings is an Australian citizen, is ordinarily resident in Australia or is present in Australia; or
- it would accord with the provisions of any treaty or arrangement between Australia and a foreign jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the case.⁹²

Sections 63B(1)(a) and (b) reflect the common law bases for jurisdiction, the latter confirming that nationality may found jurisdiction in this context.

The Supreme Court of the Northern Territories will only exercise jurisdiction in respect of a child where one of the parties to the proceedings is ordinarily resident within that jurisdiction.⁹³

The Family Court of Australia has a discretion to decline jurisdiction in respect of children who are ordinarily resident or present outside its jurisdiction.⁹⁴ The High Court

10 *AJFL* 18-35 (Nygh *The Reform Act*); Bailey-Harris R "Family Law Reform Down Under" 1996 April *Fam Law* 214-216 (Bailey-Harris). For a discussion of the considerations giving rise to the Reform Act see *The Law Reform Commission Report No 58 Choice of Law Commonwealth of Australia* Robert Burton Printers, Sydney (1992) (The Australian Report No 58).

92 Nygh *Conflicts supra* n 1 432-434.

93 Family Law Act *supra* n 74 s63(7).

94 See in this regard Nygh *Conflicts supra* n 1 435; Bates F "Child Abduction: Australian Law in International Perspective" 1988 Oct *CILQ* 945ff (Bates). *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *In the Marriage of Soares* (1989) 13 Fam LR 163 168; *In the Marriage of Schwarz* (1985) 10 Fam LR 235. (*Forum non conveniens*); *In the Marriage of Clague* (1987) Fam LR 494; *In the Marriage of B (Kidnapping)* [1986] FLC 91-749; *Re R (Minors)* (1981)

held in *ZP v PS*⁹⁵ that this discretion may be exercised in the interests of the child's welfare, save where the court is restricted by statutory provisions such as those relating to child abduction.⁹⁶ This authority overrules the decisions in which the court applied the principles of *forum conveniens* which emphasised the welfare of the litigants, not the child.⁹⁷ The Australian court is not barred from exercising jurisdiction in matters where an action is already pending before another court. In such cases the court must have regard to the best interests of the child when making a decision whether or not to exercise jurisdiction. The court will consider the child's ordinary place of residence and the ready availability of evidence.⁹⁸ Despite the discretion afforded the courts they have proved hesitant to exercise jurisdiction in relation to children who are neither ordinarily resident nor present within the court's jurisdiction.⁹⁹ All considerations are subject to the best interests of the child. It may thus be better for the custody of a child unlawfully removed from Australia to be determined by the Australian court of the child's last settled residence.¹⁰⁰ The Australian court will exercise jurisdiction over children who are Australian citizens and have been abducted from one foreign place of residence to

2 Fam LR 416.

95 (1994) 122 ALR 1. See "7.5 Non-Convention countries" *infra*.

96 Family Law (Child Abduction Convention) Regulations (Cth); *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680 683; *In the Marriage of Schwarz* (1985) 10 Fam LR 235; *In the Marriage of Taylor* (1988) 12 Fam LR 423; see too *In the Marriage of Gilmore* (1993) 16 Fam LR 285 per Fogarty J 294.

97 *In the Marriage of Scott* (1991) 14 Fam LR 873 at 879; *In the Marriage of Erdal* (1992) 15 Fam LR 465 468-9; *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680.

98 *Norman v Norman (No 1)* (1968) 12 FLR 29; *In the Marriage of Schwarz* (1985) 10 Fam LR 235.

99 *Szintay v Szintay* (1956) 73 WN (NSW) 330. The circumstances under which an Australian court will decline to exercise jurisdiction in respect of a foreign child include: Where there is no likelihood of enforcing the court order; the child has resided in the foreign jurisdiction for a considerable period of time and the parents are no longer resident in Australia; and the child was brought to Australia in breach of an existing foreign custody order with the consent of the abducting parent: *In the Marriage of Taylor* (1988) 12 Fam LR 423 428; *In the Marriage of Scott* (1991) 14 Fam LR 873; *In the Marriage of Soares* (1989) 13 Fam LR 163; *In the Marriage of Chong* (1992) 15 Fam LR 629; *In the Marriage of Erdal* (1992) 15 Fam LR 465; *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680.

100 *Nygh Conflicts supra* n 1 437; *In the Marriage of El Alami* (1987) 11 Fam LR 852 856; *In the Marriage of Antoniou* [1990] FLC 92-146.

another jurisdiction with which they are entirely unconnected.¹⁰¹

6.2 Choice of law

The law of the *forum* applies in this context.¹⁰²

It should be noted that the Reform Act¹⁰³ focuses on rephrasing the welfare principle and redesigning parental rights, emphasising parenting plans and primary dispute resolution.¹⁰⁴ To this end it replaces the concepts of guardianship, custody and access with parental responsibility, residence orders, contact orders and specific issues orders respectively.¹⁰⁵ In terms of section 64(1)(a) of the Family Law Act¹⁰⁶ the welfare of the child is the paramount consideration of the court. This concept is redefined in section 65 of the Act to require the court to consider the best interests of the child, including matters relating to his care, welfare and development. This does not change the law, it simply changes the wording of the Act.¹⁰⁷

The Reform Act avoids the use of the concept of "custody", thus confirming a move

101 See *In the Marriage of Taylor* (1988) 12 Fam LR 423.

102 Sykes & Pryles *Private International Law supra* n 16 533; *J v C* [1970] AC 668 per Lord Upjohn 720. The contrary view was taken in *R v Langdon* (1953) 88 CLR 158 per Taylor J 160.

103 *Supra* n 91. Discussed in Ingleby R "The Family Law Reform Act - A Practitioner's Perspective" 1996 10 *AJFL* 48 (Ingleby "The Reform Act"); Bailey-Harris *supra* n 91 214-216; Davis B "The New Rules on International Child Abduction: Looking Forward to the Past" 1990 14 *AJFL* 31-59 (Davis).

104 Ingleby *idem* 48. For a discussion of parenting plans see Nygh The Reform Act *supra* n 91 11-12.

105 Nygh *idem* 4; Dickey A "Family law: Aspects of the New Law on Children" 1996 70 *ALJ* 453 454-456 (Dickey "Family law").

106 *Supra* n 74.

107 Ingleby "The Reform Act" *supra* n 103 49. For a discussion of the best interests test see, Nygh "The Reform Act" *supra* n 91 12-14; Swain P "In the Best Interests of Children - Alternative Decision Making and the Victorian Children's Court" 1994 8 *AJFL* 237 (Swain).

away from the idea of ownership of children that pervaded the existing legislation.¹⁰⁸ Residence orders replace custody orders.¹⁰⁹ The Reform Act also introduces the idea of parental responsibilities. The idea underlying the legislation is to eliminate the proprietorship and power ideas inherent in traditional language where the non-custodial parent feels deprived of any lawful concern in the child. It encourages a move from the conception of parenthood as a position of entitlement to a conception of privilege. The legislation focuses on parental responsibility rather than parental rights and stresses the ongoing, shared nature of such responsibility which is essentially equal between the parents. Parental responsibility survives separation and divorce.¹¹⁰ The Reform Act mirrors the provisions of the UK Children Act of 1989 in this regard as well as in regard to the removal of custody disputes from the courtroom as far as possible. The objective of the legislation was to strengthen the position of the "non-custodial" parent and to encourage continued parental involvement with the child. This legislation, because of its similarity to its English cousin, suffers from some of the same weaknesses as the English law provision in that no one knows what constitutes all the duties, powers, responsibilities and authorities of a custodian.¹¹¹ The Australian Act does however differ

108 Ingleby *Ibid.* Guardianship also disappears in terms of s63F(1) of the Reform Act, but this concept is retained by s3(2) of the Children Act 1989 (UK) for certain limited purposes: Nygh "The Reform Act" *supra* n 149 5, 7; Nicholes S "The Family Law Reform Act and the Hague Convention" 1996 70 *LIJ* 35 (Nicholes).

109 The Reform Act *supra* n 91 s64B(2)(a).

110 Ingleby "The Reform Act" *supra* n 103 50; Nygh "The Reform Act" *supra* n 91. S 61C(1), as amended, now vests parental responsibility, in respect of children born of married parents, in both parents severally. This responsibility continues to exist despite any changes in the nature of the relationship between the child's parents: Nygh "The Reform Act" *op cit* 5; S61C(2) Family Law Act *supra* n 74. This increases the ability of each parent to exercise authority over the child without consulting the other parent: Nygh "The Reform Act" *op cit* 5. There is no reference to parental rights which are specifically referred to in s 3(1) of the UK Children Act 1989. The parents have powers and authority to carry out their duties and responsibilities as opposed to the rights and duties of parents and guardians referred to in the United Nations Convention on the Rights of the Child: Nygh "The Reform Act" *op cit* 6. See too, Doolan PA "Cilento and Cilento Revisited - In the Best Interests of the Child?" 1996 10 *AJFL* 86 109-110 (Doolan).

111 Ingleby *idem* 50ff; Bailey-Harris *supra* n 91 214. For a discussion of the UK provisions see ch 5 *supra*.

in material respects from the UK legislation.¹¹² Most notably the Australian legislation is characterised by a willingness to apply the provisions of the United Nations Convention on the Rights of Children to domestic law. Previously this was partially achieved casuistically.¹¹³ The Reform legislation is prefaced by a general statement of principles which incorporates a number of the children's rights contained within the Convention. A natural result of this adherence to the United Nations Convention on the Rights of Children is that the Reform Act does not distinguish between children born of married parents and those born out of wedlock. It automatically confers parental responsibility by operation of law on biological and adoptive parents, irrespective of their marital status at the time of the child's birth. This contrasts sharply with the UK position. No such statement prefaces the UK legislation.

Many of the profound differences between the two Acts can be attributed to the special protective model of dealing with child custody that prevails in Australia. This protective model is evidenced by the special Family Court and the therapeutic approach of that court to family disputes.¹¹⁴ This model contrasts sharply with the English law approach, devoid of a specialist court and with limited counselling and mediation facilities.¹¹⁵

The Reform Act further provides that no person may remove a child from the care of a person, refuse or fail to deliver or return the child to a person, or interfere with the exercise or performance of the powers, duties or responsibilities in contravention of an existing residence order.¹¹⁶ Like parental responsibility, the powers, duties and responsibilities are not defined in the Act. This failure to define the meaning of certain

112 For a detailed comparison see Dewar J "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared - Twins or Distant Cousins?" 1996 10 *AJFL* 18-34 (Dewar); Bailey-Harris *supra* n 91 214.

113 *Re Marion* (1990) FLC 92-193.

114 Dewar *supra* n 112 18.

115 *Idem* 18-19.

116 Reform Act *supra* n 91 s65R(2).

terms results in uncertainty and prevents the giving of sound legal advice.¹¹⁷

The Reform Act¹¹⁸ provides that parents must agree about the future parenting of their children. In consequence of this provision Ingleby calls for additional funding of the Family Court of Australia to enable it to fulfil this stated objective of the Act.¹¹⁹

Despite the predominantly semantic nature of the legislative changes to the Australian law they may be of great symbolic value. Some of the changes increase the potential for a non-residential parent to make an increased input into the child's life. Hence the residence order confers residence and does not automatically confer parental responsibility.¹²⁰ While the Australian legislation does not have an equivalent to the "no order" principle of the Children Act of 1989 which provides that a court should refrain from making an order unless making such an order would be better for the child than making no order at all, the welfare checklist directs the court making an order to be cognisant of the order least likely to lead to relitigation.¹²¹ It also provides for formal parenting plans.¹²²

7 ABDUCTION OF CHILDREN WITHIN AUSTRALIA

Modern living, with the increase in multi-national marriages, coupled with ease of travel, has facilitated the kidnapping of children by disappointed, non-custodial parents, in circumstances surrounding the breakdown of their marriage. Such abductions may

117 Ingleby "The Reform Act" *supra* n 103 51.

118 *Supra* n 91 s60B(2)(d).

119 Ingleby "The Reform Act" *supra* n 103 52. For a discussion of the various parenting orders that the court may issue under the Reform Act see Nygh "The Reform Act" *supra* n 91 8-11.

120 Bailey-Harris *supra* n 91 214.

121 Reform Act *supra* n 91 S68F.

122 Bailey-Harris *supra* n 91 214-215. For further discussion of the "no-order" principle see ch 5 *supra*.

occur across international borders or from one Australian jurisdiction to another. Where the child of a marriage is abducted within Australia prior to the issue of a custody or access order, the first step taken by a parent is to apply for such an order and to apply for the issue of a warrant for the possession of the child.¹²³ Where an order already exists at the date of the abduction the parent seeking return of the child need only obtain a warrant. Once the warrant has been issued the recipient may hand it to the Australian Federal Police or, where appropriate, the Western Australian Police. Where the child's location is known the police will immediately execute the warrant. Although the police may assist, the principal responsibility for locating the child rests with the parent seeking delivery of the child.¹²⁴ The warrant is valid for a period of twelve months.¹²⁵ If a child who has been abducted to another Australian state is apprehended by the federal police in the state to which he or she was abducted, the party in whose favour the warrant was issued must be available to take custody of the child and to pay all the related expenses. In urgent matters the child may be placed temporarily in the care of welfare authorities.

The Act¹²⁶ provides that a person may be ordered to furnish information relating to the whereabouts of the child or the person the court has reason to believe is in possession of the child. It further enjoins the Commonwealth Department to release pertinent information to an officer of the court.¹²⁷

123 Family Law Act *supra* n 74 ss64(9) or 64(10).

124 Martin C "Abduction of Children - Some National and International Aspects" 1986 1 *AJFL* 125 126 (Martin).

125 Order 35 Family Law Rules. Note that the warrant issued by the Family Law Court of Western Australia is only valid for six months: s47(b) Family Court Act 1975-1982. For further discussion on warrants see Cooper PK gen ed *Family Law Children* Blackstone Press Pty Ltd, New South Wales (1993) 10-13 (Cooper).

126 Family Law Act *supra* n 74 s64(11A).

127 *Idem* s64(11B).

Other preventative enforcement measures include a provision in the Act¹²⁸ that an injunction, whether conditional or not, may be issued to restrain a person from removing a child from the jurisdiction of the courts of a state or from Australia. Furthermore, in terms of section 70(6)¹²⁹ a person who wrongfully interferes with the custody of another in respect of a child may be fined or sentenced to a short period of imprisonment. Contempt of court may also be punished.¹³⁰ In *G v G*¹³¹ the court indicated that in child abduction cases the punishment should be of deterrent value both in respect of the contemner and in respect of others. However, the court indicated that, in general, sentences in abduction cases in excess of two years imprisonment should only be imposed in exceptional cases.¹³² There is no power to arrest a person who abducts or assists in abducting a child unless the child is removed from Australia.¹³³

8 INTERNATIONAL ABDUCTION OR RETENTION¹³⁴

To combat the ever-increasing problems associated with international abduction the common law, which is uncertain in this regard, has been reinforced by section 68 of the Family Law Act¹³⁵ and the Hague Convention on the Civil Aspects of International Child

128 *Idem* s114(3).

129 Family Law Act *supra* n 74.

130 *Idem* s70(8).

131 (1981) 7 Fam LR 267.

132 per Watson J & Evatt CJ, see too *In re Sealey* (1986) FLC 96-736, discussed in Martin *supra* n 124 129 n13.

133 Martin *idem* 129. For a discussion of the procedures to be followed in obtaining the necessary orders under the Family Law Act *supra* n 74 see Cain L "Child Abduction Within Australia: Steps the Solicitor can Take" 1994 68 *LIJ - Melbourne* 364 (Cain).

134 See in general Nygh *Conflicts supra* n 1 437ff; Sykes and Pryles *Private International Law supra* n 16 542ff; Bates *supra* n 94 945-952; Chaikin DA "International Extradition and Parental Child Abduction" 1993 5 *Bond LR* 129-151 (Chaikin); Davis *supra* n 103 and Developments and Events: "International Child Abduction Outside the Convention: The High Court Pronounces in *ZP v PS*" 1994 8 *AJFL* 211-263 (Events: "International child abduction"). For a discussion of the position before the accession of Australia to the Hague Convention see Martin *supra* n 124 131ff.

135 *Supra* n 74.

Abduction of 1980.

8.1 The common law

The approaches of the courts at common law have been various. The leading authority in this regard is *McKee v McKee*,¹³⁶ a Privy Council decision. In that case the court found that jurisdiction of a court could be founded upon the child's presence within the jurisdiction even if the child had been brought there wrongfully and in contravention of an existing custody order. The court found further that the primary consideration in determining custody in such cases is the best interests of the child. The court was thus entitled to give an independent judgment, giving due weight to the existing order.¹³⁷

Section 64(1)(a) of the Family Law Act¹³⁸ reiterates the paramountcy of the child's welfare in any custody determination and indicates that it finds application also in relation to determinations of whether or not to return a child who has been abducted

136 [1951] AC 352. See in this regard, Sykes and Pryles *Private International Law supra* n 16 535; Martin *supra* n 124 135-136. The general principle in *McKee* was approved by the High Court of Australia in *Kades v Kades* (1961) 35 ALJR 251. It should be noted that while *McKee* is deserving of respect from the Australian court the Privy Council's appellate jurisdiction over Australia has ceased and the judgment is thus not binding: *Re H (infants)* [1966] All ER 886 890, (CA); Davis *supra* n 103 40.

137 *McKee idem* 364. The Australian Family Court had to consider the weight to be given a Californian custody order in *Khamis v Khamis* (1978) 4 Fam LR 410. In making its evaluation the court is careful not to give the abducting parent unfair advantage through his wrongful actions: *Re H (Infants)* [1965] 3 All ER 906 per Cross J 912-913; [1966] 1 All ER 886, (CA) per Willmer LJ 889 and Harman LJ 892; *Re T (Infants)* [1968] 3 All ER 411 per Harman LJ 413. The principle set out in these two cases, that a child should promptly be returned to the place from whence he or she was abducted unless it is shown that to do so would inflict serious harm on the child, was disapproved of in *Re C (Minors)* [1978] 2 All ER 230. The paramount consideration remains the welfare of the child: *Re L (Minors)* [1974] 1 All ER 913, (CA) 925. When *Re R (Minors)* (1981) 2 Fam LR 416, (CA) was decided the authorities were confusing. Ormrod LJ decided the appeal on the basis of the welfare of the children at that time. This case is discussed at length in Davis *supra* n 103 42-43. In *Re O* [1982] 3 Fam LR 146 Ormrod and Templeman LJJ, in making a decision in the matter, indicated that children should not be used as weapons in the battle between their parents (150-151). The position in practice is to give paramountcy to the welfare of the child despite the kidnapping which remains only one factor to be considered: *Schenk v Schenk* (1981) 7 Fam LR 170 178; *Marra v Marra* (1987) FLC 91-845.

138 *supra* n 74.

to, or is wrongfully being retained within, the court's jurisdiction.¹³⁹ Ordinarily where the matter is before the court shortly after the child has been brought to the jurisdiction, the court will consider the summary return of the child to the jurisdiction from whence he or she was abducted or retained to be in the child's best interests.¹⁴⁰ The kidnapping of the child is merely considered as a factor in so far as it relates to the future welfare of the child.¹⁴¹

Subsequent to the accession of Australia to the Hague Convention on the Civil Aspects of International Child Abduction the courts adhere to the policy of the Convention to speedily return abducted children and those wrongfully retained. This policy is adhered to irrespective of whether the child was removed from a convention country or a non-convention country. In the latter case, however, the welfare of the child remains of paramount importance.¹⁴² Immediate return will not necessarily be granted where:

- The child has resided in Australia for a substantial period preceding the institution of action;¹⁴³
- there is doubt about how expeditiously the court of the place of ordinary residence will deal with the matter;¹⁴⁴ or
- the country of normal residence would allow the custody issue to be determined

139 See in this regard, *In the Marriage of Schwarz* (1985) 10 Fam LR 235 237.

140 *In the Marriage of Reihana* (1980) 6 Fam LR 134; *In the Marriage of Mittelman* (1984) 9 Fam LR 724; *In the Marriage of Schwarz* (1985) 10 Fam LR 235. Ormrod LJ indicated in *Re R (Minors)* (1981) 2 Fam LR 416, (CA) 427 that the pull of the country of origin diminishes with the passage of time. For a discussion of the welfare requirement and the influence of the passage of time see Davis *supra* n 103 33-34.

141 *B v B (Kidnapping)* (1986) FLC 91-749; see too *In the Marriage of Schwarz* (1985) 10 Fam LR 235.

142 *In the Marriage of Barrios and Sanchez* (1989) 13 Fam LR 477 per Nicholson CJ, Murray & Rowlands JJ 484; *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680; *ZP v PS* (1994) 122 ALR 1.

143 *In the Marriage of Schenck* (1981) 7 Fam LR 170.

144 *Clague v Graves* (1987) 11 Fam LR 494.

by a religious tribunal which does not consider the welfare of the child.¹⁴⁵

Where the court decides to make a full investigation in relation to custody, the actions of the abducting parent will be taken into account in determining the welfare of the child but will not be viewed in a punitive sense.¹⁴⁶

These rules of the common law are still applicable to foreign custody orders that are not regulated by the Family Law Act¹⁴⁷ or the Hague Convention.

8.2 Section 68 of the Family Law Act 1975

Section 68 of the Family Law Act of 1975 provides for the registration of overseas custody orders in Australia. The section is applicable to the custody or access orders of prescribed jurisdictions¹⁴⁸ in respect of children under 18 years of age, and to orders varying these orders.¹⁴⁹ It is unclear whether proceedings in terms of section 68 require that the welfare of the child be the paramount consideration. The common law rules of recognition and enforcement apply to overseas judgments that do not fall within the ambit of section 68.

Section 68 provides that the custody or access order of the prescribed jurisdiction may, provided it is not an interim or an *ex parte* order,¹⁵⁰ be registered in a court having jurisdiction under the Family Law Act in accordance with the terms of the Family Law

145 *In the Marriage of Raja Bahrin* (1986) 11 Fam LR 233.

146 *In the Marriage of Kress* (1976) 2 FLR 11.

147 *Supra* n 74.

148 The prescribed jurisdictions are New Zealand (s 4(1) Family Law Act *supra* n 74), Papua New Guinea and most states of the US (Family Law Regulations (Cth) sch 1A). For a general discussion of s68 see Sykes and Pryles *Private International Law supra* n 16 538-541.

149 See s60 of the Family Law Act *supra* n 74.

150 *Idem* s 68(7).

Regulations.¹⁵¹ Registration may be effected in one of two ways: First, a copy of the judgment, certified in writing by an officer of the rendering court to be currently enforceable,¹⁵² is sent to the Secretary of the Attorney General's Department in Canberra. He or she will transmit the certified copy to the registrar of the appropriate court. The registrar will then register the order.¹⁵³ Second, a certified copy of the judgment, accompanied by the prescribed certificate of enforceability, may be presented directly to the court for registration. The court may register it.¹⁵⁴

Registration of the order has the effect of making the order of the same force and effect as if it were an order of the registering court.¹⁵⁵ The Australian court has limited jurisdiction to investigate anew the claims of parties to a registered order. The Australian courts will only exercise jurisdiction in custody proceedings in relation to a child subject to such an order if every person having custody rights in relation to the child under the foreign order consents to the jurisdiction of the court, or the court is satisfied that there are substantial grounds to believe that the child's welfare will be adversely affected by a failure of the court to exercise such jurisdiction.¹⁵⁶

If the court exercises jurisdiction in accordance with section 68(3) the onus is on the party approaching the court to prove that the welfare of the child will be adversely affected if the order sought is not granted, or that there has been a change in the circumstances of the child since the order was made that necessitates the granting of

151 Reg 23.

152 All applications for registration of a judgment must be accompanied by such a certificate. See *In the marriage of Trnka* [1984] FLC 91-535.

153 Reg 23(2).

154 Reg 23(2).

155 Family Law Act *supra* n 74 s 68(2). The provisions of ss70, 64(9)-(10) and the sections under Pt XIII A of the Act will also be available.

156 Family Law Act *idem* s 68(3). Note that the meaning of "substantial grounds" remains uncertain: *In the Marriage of Greenfield and Pawson* (1984) 9 Fam LR 606. The court may call for a family report: *In the Marriage of Trnka* [1984] FLC 91-535; *In the Marriage of Greenfield and Pawson op cit*.

the new order.¹⁵⁷ If the court declines to exercise jurisdiction it is compelled to order the child to be returned to the custodial parent in terms of the registered order. No inconsistent order may be made.¹⁵⁸

Provision is also made in the Act for the transmission of Australian custody orders to prescribed foreign jurisdictions.¹⁵⁹ Reciprocal arrangements for the enforcement of Australian orders exist in each such jurisdiction.¹⁶⁰

Division 8(c) of the Reform Act¹⁶¹ makes provision for location orders, Commonwealth information orders and recovery orders.¹⁶² The first of these is an order that obliges a person to supply any information he or she may have or obtain about the location of a child.¹⁶³ The primary consideration in making such an order is the best interests of the child.¹⁶⁴ Such an order remains in effect for 12 months or such other period as the court deems appropriate.¹⁶⁵ A Commonwealth information order is a location order directed at a Commonwealth instrumentality.¹⁶⁶ A recovery order is an order requiring the return of the child, the entry and search of premises or vehicles, the day-to-day arrangements

157 Family Law Act *idem* s 68(4).

158 *In the Marriage of Mentor* (1981) 7 Fam LN No 19.

159 Family Law Act *supra* n 74 s69. See Sykes and Pryles *Private International Law supra* n 16 541.

160 New Zealand: Guardianship Act 1968 ss22A-22L; Papua New Guinea: Custody Orders Reciprocal Enforcement Act 1978; USA: Uniform Child Custody Jurisdiction Act, discussed in ch 7 2.1 *infra*.

161 *Supra* n 91.

162 Nygh "The Reform Act" *supra* n 91 15.

163 Reform Act *supra* n 91 s67.

164 Family Law Act *supra* n 74 s67L.

165 *Idem* s 67M(4).

166 For a discussion of Commonwealth information orders see Nygh "The Reform Act" *supra* n 91 15-16.

pending return of the child and the prohibition of subsequent removal.¹⁶⁷ In the event that the child is returned in the meantime, the court issuing the recovery order should be notified immediately.¹⁶⁸

8.3 The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction was implemented in Australia by the Family Law (Child Abduction Convention) Regulations.¹⁶⁹ The Hague Convention came into force in Australia on 1 January 1987.¹⁷⁰ It is designed to deal with a problem which is numerically relatively small but which causes enormous mental anguish to those involved.

The purpose of the Hague Convention is:

... to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in certain specified circumstances, the judicial and administrative authorities in a country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of form or on a consideration of what is in the best interests of the child or otherwise.¹⁷¹

167 Family Law Act *supra* n 74 s67Q.

168 *Idem* s 67Y.

169 (Cth) SR 1986 N0 85, made pursuant to s111B of the Family Law Act *supra* n 74. (Hereafter the Family Law Child Abduction regs). As this Convention is discussed in detail in ch 3 *supra* only a brief overview will be included here as a basis for the discussion of the areas of difficulty experienced by the courts in implementing it in Australia. See Curtis L "The Hague Convention on the Civil Aspects of Child Abduction: The Australian Experience" 1989 15 *Cth Law Bulletin* 627 (Curtis). The Hague Convention on the Civil Aspects of International Child Abduction shall be referred to as the Hague Convention hereafter.

170 For a discussion of the Hague Convention and its application to Australia see Davis *supra* n 103 47ff; Sykes and Pryles *Private International Law supra* n 16 542ff; Ch 3 *supra*.

171 *Re A (A Minor)* [1988] 1 FLR 365 per Nourse LJ 369.

8.3.1 *Application of the Hague Convention on the Civil Aspects of International Child Abduction*¹⁷²

The Hague Convention applies to children under the age of 16 who are ordinarily resident in a Convention country immediately before any breach of custody rights.¹⁷³ The principles of the Hague Convention are also relevant in instances of abductions from non-Convention countries.¹⁷⁴ As the Hague Convention is without retroactive effect it is only applicable to wrongful removals or retentions where the initial wrongful act occurred after the Hague Convention came into operation in respect of the states concerned.¹⁷⁵

In Australia the Attorney General's department is the Central Authority appointed in terms of the Hague Convention. It is to this department that ordinary applications for the return of children may be made at national level. The heads of state and territorial departments concerned with child welfare act as local Central Authorities. An aggrieved party may also apply directly to the Australian court for relief.¹⁷⁶ The Hague Convention does not preclude any competent authority from making an order for the return of a child otherwise than in terms of the Convention.¹⁷⁷

Applications for the return of children are made in a prescribed form to the Central

172 The Hague Convention is discussed in detail in chapter 3 *supra*.

173 Hague Convention art 4. Convention countries include Argentina, Austria, Belize, Canada, France, Germany, Greece, Hungary, Ireland, Israel, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Sweden, Switzerland, South Africa, Spain, the UK, and the USA.

174 *In the Marriage of Barrios and Sanchez* (1989) 13 Fam LR 477; *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680.

175 Art 35 and the Family Law Child Abduction regs *supra* n 169 sch 2. There cannot be continuing removal or retention: *In the Marriage of Gollogly and Owen* (1990) 13 Fam LR 622; *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, (CA).

176 The Family Law Child Abduction regs *idem*, reg 14. *In the Marriage of Barraclough* (1987) 11 Fam LR 773.

177 The Family Law Child Abduction regs *idem* reg 25.

Authority in Canberra or one of the local Central Authorities.¹⁷⁸ This body will then transmit the application to the Central Authority of the Convention country where the child is believed to be present. Likewise, the Commonwealth Central Authority receives applications in respect of children believed to be present in Australia. The Central Authority will take action directly, or through the offices of a state or territorial authority to return the child to the applicant.¹⁷⁹ The Authority may apply to a competent court for an order for the issue of a warrant to apprehend or detain the child, or prohibit the child's removal from a specified place. It may require that appropriate measures be taken to facilitate the placing of the child with a suitable person, institution or body to ensure his or her welfare pending a determination under regulation 13 or an order for the return of the child.¹⁸⁰ In an application for the return of the child the applicant will ordinarily be the foreign Central Authority and not the complainant parent.¹⁸¹ An order for the return of the child will be made by a competent court where the court is satisfied as to the wrongfulness of the removal or retention and that the application was made within one year of the removal to Australia.¹⁸² If application was made after the lapse of one year the court has a discretion to refuse to return the child on the basis that he or she is settled in the new environment.¹⁸³

A removal or retention is wrongful if it is in breach of custodial rights granted to a person, institution or body under the law of the state of habitual residence of the child

178 The Family Law Child Abduction regs *idem* reg 11.

179 The Family Law Child Abduction regs *idem* reg 13.

180 The Family Law Child Abduction regs *idem* reg 15(1).

181 *In the Marriage of Gsponer* (1988) 12 Fam LR 755; *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982.

182 The Family Law Child Abduction regs *supra* n 169 reg 16(1).

183 The Family Law Child Abduction regs *idem* reg 16(2).

immediately before the removal or retention,¹⁸⁴ which rights were being exercised or would have been exercised but for the removal or retention.¹⁸⁵ The application and any documentary attachments are admissible as evidence of the facts stated therein.¹⁸⁶ A properly drawn application may form its own *prima facie* case for return.

It bears mention here that the Hague Convention, unlike section 68 of the Family Law Act,¹⁸⁷ is not limited to the enforcement of existing orders.¹⁸⁸ As section 68 of the Family Law Act was designed to put a mechanism in place for recognition and enforcement of custody orders of prescribed overseas jurisdictions, its purpose is different to that of the Hague Convention which was designed to address the problem of parental child abduction, not recognition and enforcement of foreign custody orders. Section 68 of the Family Law Act shares the same objectives as the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children.¹⁸⁹ If a non-custodial parent has obtained a court order requiring that the custodial parent obtain the non-custodian's permission to remove the child from the jurisdiction any removal for which the non-custodial parent's consent was not obtained constitutes a wrongful breach of custodial rights for purposes of the Hague Convention.¹⁹⁰ Likewise, removal of a child by a custodial parent without the consent of the parent with guardianship rights constitutes a breach of the custody

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- 184 Whether removal or retention breaches custodial rights is a matter of law to be determined by the law of the country where the child was habitually resident. The Family Law Child Abduction regs *idem* reg 23(3) permits the Australian courts to take judicial notice of laws in force in Convention countries.
- 185 Hague Convention art 3.
- 186 The Family Law Child Abduction regs *supra* n 169 reg 23(1).
- 187 *Supra* n 74.
- 188 Nygh *Conflicts supra* n 1 443-444; see the Hague Convention arts 3 & 5; *In the Marriage of Gsponer* (1988) 12 Fam LR 755 762.
- 189 Hereafter the Council of Europe Convention. This Convention is not applicable to Australia.
- 190 *C v C (Abduction: Rights of Custody)* [1989] 2 All ER 465, [1989] 1 WLR 654, (CA); *In the Marriage of Resina* (unreported, Appeal No 52 of 1991, Fam Ct); *In the Marriage of Thompson* (1990) 14 Fam LR 542 547.

rights of the guardian.¹⁹¹ In the *Barracough* case¹⁹² a father who placed his children in the wardship of the English High Court was regarded as having lost his custodial rights. A residence order made in terms of the Family Law Act¹⁹³ as amended by the Reform Act¹⁹⁴ creates a custody right.

To assist a foreign court the Australian Central Authority may apply¹⁹⁵ to a competent court¹⁹⁶ for a declaration that the removal of the child from Australia to a Convention Country was wrongful within the meaning of article 3 of the Hague Convention. The Australian court may request that a foreign applicant obtain a similar declaration in his or her country.¹⁹⁷ The foreign court order, or a duly signed copy thereof,¹⁹⁸ and any record or summary of evidence led at proceedings¹⁹⁹ is admissible in evidence.²⁰⁰

Another question that has arisen is whether the Australian courts are empowered in terms of the Family Law (Child Abduction Convention) Regulations to order the return of a child whose presence within the court's jurisdiction is imminent but not yet actual. The English High Court has assumed such authority in terms of corresponding English legislation.²⁰¹ The Australian regulations appear to limit the power of the court to cases

191 *In the Marriage of Gsponer* (1988) 12 Fam LR 755 765.

192 *In the Marriage of Barracough* (1987) 11 Fam LR 773 per Kay J 779.

193 *Supra* n 74.

194 *Supra* n 91.

195 The Family Law Child Abduction regs *supra* n 169 reg 17.

196 Under the Family Law Act *supra* n 74.

197 The Family Law Child Abduction regs *supra* n 169 reg 17(2).

198 Signed by the judge or other proper officer.

199 Purported to be signed by the person before whom it was taken.

200 The Family Law Child Abduction regs *supra* n 169 reg 23.

201 *Re N* [1995] 2 WLR 233.

in which the child is actually present in Australia.²⁰²

8.3.2 *Grounds for refusal to return the child*²⁰³

As was the case in the UK, an Australian court which finds that the child was removed to Australia in excess of one year before the application was brought and has settled in his or her new environment may refuse to return the child. Likewise the mandatory return of the child may be refused under the following circumstances:

- The person, institution or body vested with custodial rights in the Convention country from which the child was wrongfully removed was not exercising custodial rights at the time of the removal and would not have been exercising such rights had the child not been removed, or such person, body or institution consented to or acquiesced in the removal.²⁰⁴
- There is a grave risk that the return of the child to the applicant (in these instances the Central Authority of the foreign country)²⁰⁵ would expose him or her to physical or psychological harm, or place him or her in an intolerable

202 See, Dickey A QC "Family Law: Order for Return of a Foreign Child Not Yet Within the Jurisdiction" 1995 69 ALJ 489-490 (Dickey "Return order").

203 See Nygh *Conflicts supra* n 1 445ff.

204 The Family Law Child Abduction regs *supra* n 169 reg 16(3). As regards whether or not the custodial rights must still exist at the date on which return is sought, see *In the Marriage of Barraclough* (1987) 11 Fam LR 773 per Kay J 779 where the court found that the retention must be in continuing breach of the custody rights of the applicant party. This interpretation is not wholly consistent with the wording of art 3(a) of the Hague Convention. See too *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 per Nicholson CJ and Fogarty J 993 and *In re A (Minors) (Abduction: Acquiescence)* [1992] Fam 106.

205 *In the Marriage of Gsponer* (1988) 12 Fam LR 755 768; *Director-General of Family and Community Services (NSW) v Davis* (1990) 14 Fam LR 381 per Nygh J 385; *Damiano v Damiano* [1993] NZFLR 548.

situation.²⁰⁶

In situations in which allegations of risk are in dispute the court of the place of habitual residence will best resolve the dispute.²⁰⁷ It is therefore unlikely that a defence under this paragraph of the Hague Convention would succeed.

- The child who has reached an age or degree of maturity that makes it appropriate to take account of his or her views objects to the return.²⁰⁸
- The return of the child would contravene Australian fundamental principles relating to the protection of human rights and fundamental freedoms. This constitutes a public policy reservation of limited scope.²⁰⁹

The fact that the respondent is possessed of an Australian custody order in his or her favour is not in itself a ground for refusal to return the child. The reasons for granting that order may be considered in determining whether or not any of the reservations listed above apply.²¹⁰

206 Hague Convention art 3(b). See *In the Marriage of Gsponer* (1988) 12 Fam LR 755 in which the full court of the Family Court of Australia found that it sufficed if the respondent proved a grave risk of either physical or psychological harm or of the child being placed in an intolerable situation. The provision is thus regarded distributively. The risk must be grave: *Re A (A Minor)(Abduction)* [1988] 1 FLR 365 per Nourse LJ 372; *In the Marriage of Raja Bahrin* (1986) 11 Fam LR 233; *C v C (Abduction: Rights of Custody)* [1989] 2 All ER 465, [1989] WLR 654, (CA) per Butler-Sloss LJ; *Director-General of Family and Community Services (NSW) v Davis* (1990) 14 Fam LR 381 per Nygh J 386.

207 *In the Marriage of Gsponer* (1988) 12 Fam LR 755 769.

208 Family Law Child Abduction regs *supra* n 169 reg 16(3). This accords with the provisions of the domestic law under s64 (1)(b) of the Family Law Act *supra* n 74.

209 Family Law Child Abduction regs *supra* n 169 reg 16(3), based upon art 20 of the Hague Convention. For a discussion of the public policy reservation see Nygh *Conflicts supra* n 1 448.

210 The Family Law Child Abduction regs *supra* n 169 reg 18.

In *In Re A (Minors) (Abduction)*²¹¹ the English Court of Appeal indicated²¹² that where the defence validly contests the return of the child the court has a discretion whether or not to return the child. Only once this discretion has been exercised can the court assume jurisdiction to determine the merits of the custody dispute. In exercising its discretion the court should be cognisant of the best interests of the child and the purpose of the Convention. The best interests are not the paramount consideration here.²¹³ Only in exceptional cases will the court exercise its discretion and refuse to return the child.²¹⁴ If no ground for defence is set forth in terms of article 13 the court has no alternative but to order the return of the child.²¹⁵ This appears to be the case in Australia too.²¹⁶ In Australia, otherwise than in England,²¹⁷ however, the Family Court has held that the court is not competent to impose conditions other than a temporary prohibition on the further removal of the child to another place before the return of the child is ordered.²¹⁸ Undertakings made to foreign courts cannot be enforced by the Australian court.²¹⁹ Nygh maintains that the Convention envisages that courts will not impose conditions upon its orders, save for those which relate to the travelling arrangements pertaining to the child.²²⁰

211 [1992] Fam 106 (CA).

212 *Idem* per Lord Donaldson 122.

213 *In Re A (Minors)(Abduction: Acquiescence)(No 2)* [1993] 1 FLR 396. For a discussion of the factors that the court will consider see *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211.

214 *Re S (A Minor: Abduction: Custody Rights)* [1993] Fam 242, [1993] 2 WLR 775, (CA).

215 *Re A (A Minor)(Abduction)* [1988] 1 FLR 365.

216 *Director-General of Family and Community Services (NSW) v Davies* (1990) 14 Fam LR 381.

217 See in this regard *C v C (Abduction: Custody Rights)* [1989] 2 All ER 465, [1989] 1 WLR 654, (CA).

218 *In Police Commissioner of South Australia v Temple* (1993) 17 Fam LR 144.

219 *In the Marriage of McOwan* (1993) 17 Fam LR 377.

220 Nygh *Conflicts supra* n 1 450.

8.4 Expense

There are a number of ways in which expenses incurred in the recovery of an abducted child may be recovered.²²¹ The Family Law Act makes provision for recovery of expenses under certain circumstances.²²² Likewise, the Commonwealth Government's Overseas Custody (Child Removal) Scheme provides financial assistance to those wishing to enforce an Australian custody order in a foreign country. Regulations 21 and 22 of the Family Law (Child Abduction Convention) Regulations provide that a person seeking to invoke the Hague Convention will not be required to furnish security for costs or expenses pursuant to the performance by the Central Authority of its obligations in terms of the Convention. These regulations also provide that the court that makes an order in respect of a child who has been wrongfully removed or retained may order the abducting parent to pay all costs including travelling expenses.

8.5 Non-Convention countries

In the case of a non-Convention country it is possible to enforce a custody order at common law or to obtain a court order within the jurisdiction in which the child is found.²²³ With the swing away from offering hospitality to child abductors the principles and policies underlying the Hague Convention have increasingly been applied to decisions involving abductions to and from non-Convention countries.

The recent High Court judgment in *ZP v PS*²²⁴ has caused academics to re-examine the Australian position with regards to non-Convention countries. In that case the court reaffirmed that foreign custody orders are respected but not entitled to recognition save

221 Martin *supra* n 124 149ff.

222 Family Law Act *supra* n 74 s117.

223 Chaikin *supra* n 134 129 n2. For notes on the common law position see 3 *supra*.

224 (1994) 17 Fam LR 600, 122 ALR 1, 68 ALJR 554 (HC); Events: "International child aduction" *supra* n 134 211-263.

where there is an international agreement ordering such recognition. The Hague Convention was not applicable in this case. Here both parties were Greeks who had spent considerable time in Australia and acquired Australian citizenship prior to their marriage.²²⁵ Their marriage was celebrated in Greece where a child was born to them. The child was registered as an Australian citizen. In 1993, after the separation of the parents, and in contravention of the terms of a temporary custody order in favour of the mother, the mother brought the child to Australia. The Australian Family Court granted her interim custody. The father of the child obtained a Greek custody order in his favour and sought return of the child to Greece although he did not want *de facto* custody.

The court was faced with a dilemma. In the absence of an international agreement the court was entitled to examine the welfare requirements of the child for itself. It was not obliged to recognise or enforce the foreign order. Despite this the Australian courts had taken to heart the idea that the abduction itself was potentially harmful to the child and had ordered the return of children without a full investigation of the merits of the case in the *Mittelman* case.²²⁶ In the *Schwarz* case²²⁷ the court reiterated that the welfare of the child was the paramount consideration. The advent of the Hague Convention's application to Australia led to the application of its principles to non-Convention countries in numerous cases.²²⁸ This line of authority was displaced by the full court in the *Scott* case²²⁹ in which the test of a "clearly inappropriate forum" was applied.²³⁰ This

225 Greece acceded to the Hague Convention on June 1 1993, subsequent cases would therefore fall within the scope of the Convention.

226 *In the Marriage of Mittelman* (1984) 9 Fam LR 724 per Nygh J 727.

227 *In the Marriage of Schwarz* (1985) 10 Fam LR 235 per Barblett, Bell and Nygh JJ 237.

228 *In the Marriage of Barrios and Sanchez* (1989) 13 Fam LR 477; *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680; see further *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, (CA).

229 *In the Marriage of Scott* (1991) 14 Fam LR 873.

230 The court relied on *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, (HC). This approach was also followed in *In the Marriage of Erdal* (1992) 15 Fam LR 465 and *In the Marriage of Chong* (1991) 15 Fam LR 629.

approach was questioned in the *Gilmore* case²³¹ and, in the *van Rensburg and Paquay* case,²³² the court attempted to combine the two approaches. In *ZP v PS*²³³ the justices agreed that the sole determinant in child abduction cases outside the Convention and other international agreements is the welfare of the child. The test of a clearly inappropriate forum is inapplicable to such cases. The High Court thus restored the law to the position declared in the *Schwarz* case.²³⁴ Questions of the relative appropriateness of forums to countenance the matter should be evaluated from the perspective of the welfare of the child and not that of the litigants. The court did not require a full examination of the merits of each individual case but did require that the trauma inflicted on the child by the abduction should be taken into account in determining whether or not return was in the child's best interests. *In casu* the court found that the return of the child to Greece would not be in the child's best interests. The justices felt that the principles underlying the Hague Convention were legitimate considerations for the court in making its determination. The case however left open the determination of whether section 64 of the Family Law Act is also applicable in relation to Convention cases. That is, is the welfare principle of paramountcy there too? It seems to me that the answer to this question should be an unequivocal yes.

9 Criminal liability and extradition orders

In 1984 the House of Lords first recognised parental child kidnapping as a kidnapping within the common law definition.²³⁵ To constitute the offence of kidnapping the child

231 *In the Marriage of Gilmore* (1993) 16 Fam LR 285 per Fogarty J 294 .

232 *In the Marriage of Van Rensburg and Paquay* (1993) 16 Fam LR 680. See Nygh P "Voth in the Family Court: *Forum Conveniens* in Property and Custody Litigation" 1993 7 *AJFL* 260 (Nygh "Voth in the Family Court").

233 (1994) 17 Fam LR 600; 122 ALR 1, 68 ALJR 554, (HC).

234 *In the Marriage of Schwarz* (1985) 10 Fam LR 235.

235 *Regina v D* [1984] 1 AC 778; [1984] 2 All ER 249. For a discussion of the situation under English law see "4 Criminal Repercussions" in ch 5 *supra*.

must have been removed or retained against his or her will.²³⁶ In *Regina v D*²³⁷ the court emphasised that this would only be so in exceptional cases where the abducting parent's conduct was so bad as to give rise to an immediate and necessary sense that the behaviour was criminal. Ordinarily such matters would be dealt with as contempt of court. This case constituted an important development as kidnapping is an infringement of the personal liberty of the individual and not an attack on the authority of the court which constitutes contempt of court.²³⁸ In 1991 the English Court of Appeal indicated that the courts should avoid charging child abductors with the common law offence of kidnapping as the offences under the Child Abduction Act 1984 were perfectly comprehensive.²³⁹

In Australia both federal and state law may be relevant in relation to criminal prosecutions in respect of parental child abductions. At state law the abductor may be guilty of child stealing²⁴⁰ or abducting a child under the age of sixteen.²⁴¹ In New South Wales there is an offence of abducting a child under the age of fourteen.²⁴² None of these offences was specifically designed to address the issues of parental child abduction. Hence the Australian courts have tended to allow such matters to be dealt with in terms of the federal Family Law Act.²⁴³ The Act provides that no person who was a party to custody proceedings in consequence of which a custody or access award

236 *Regina v D idem* 806. See further *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252 per Watkins LJ 258; *Gillick v West Norfolk and Wiesbech Area Health Authority* [1986] 1 AC 112, [1985] 3 All ER 402.

237 [1984] 1 AC 778 per Lord Brandon of Oakbrook 806.

238 *Chaikin supra* n 134 131.

239 *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252, (CA).

240 For example see the criminal codes of Queensland (s363) and Western Australia (s343) and the Crimes Act 1958 of Victoria s63.

241 Criminal Code of Queensland FLR 2S2 s363A, Criminal Code Consolidation Act 1935 (South Australia s80); Crimes Act 1900 (NSW) s90 (Abduction of a girl under 16).

242 Crimes Act 1900 (NSW) s91.

243 *Supra* n 74.

was made by an Australian court may remove or have any other person remove the child from Australia without the written consent of any person or persons entitled to custody or guardianship under the award or a valid court order.²⁴⁴ Breach of this provision could result in a heavy fine, a three year prison sentence, or both.²⁴⁵ The Act also provides for the offences of interfering with a person's custodial rights and illegally removing the child from a person legally entitled to custody.²⁴⁶ These offences apply to both domestic and international cases. In addition, section 70A of the Act provides for an aggravated form of contempt of court in cases where a child under eighteen years of age is removed from Australia to a foreign jurisdiction in contempt of an existing Australian order or while such an order was pending, or where such a removal is attempted. Such offences are treated very seriously.²⁴⁷ This is in sharp contrast to the UK and the US. In the UK prosecution under the Child Abduction Act²⁴⁸ carries a maximum penalty of seven years imprisonment on a conviction on indictment. A summary conviction carries with it a sentence of six-month's imprisonment or a fine of not more than two thousand pounds or both.²⁴⁹ The US does not identify international child abduction as a distinct criminal offence but state laws do make provision for offences.²⁵⁰

244 S70A(1).

245 S70A(2) enacts the same provisions in relation to pending proceedings. See further Cox F "International Custody Action After Abduction" 1986 60 *LJ* 816 (Cox).

246 *Idem* s63.

247 *R v Constantine* (1991) 25 NSWLR 431 esp 438-9.

248 1985, see ch 5 *supra*.

249 Child Abduction Act *idem* s1; Chaikin *supra* n 134 134 and chapter 5 "4 Criminal repercussions" *supra*.

250 E.g. Californian Penal Code Ch 4 "Child Abduction" provides for malicious interference by a person having custody rights to a child, with custody rights or visitation rights of any other person or body. The penalty for this offence is \$1 000 or imprisonment in a state prison for a period not exceeding 1 year, or both: S 277. S 278 provides that it is an offence for any person not having custody rights to detain, conceal or entice the child away from any person with lawful charge of the child. The penalty for this offence is imprisonment in a state prison for 2,3 or 4 years, a fine of \$10 000, or both, or imprisonment in a county goal for a period of up to 1 year, a fine of not more than \$1 000, or both: Chaikin *supra* n 134 135.

Prosecution of criminal offences in Australia are subject to the discretion of the Director of Public Prosecutions who will consider the following factors in deciding whether or not to prosecute:²⁵¹

- The seriousness of the offence;
- any circumstances that may act in mitigation or aggravation of the offence;
- the offender's history; and
- the need to deter the individual and the public in general.

Chaikin suggests that in cases of parental child abduction voluntary return of the child to Australia or voluntary surrender to the authorities would constitute mitigating factors in the making of such a determination.²⁵²

There is no obligation on a country to surrender a person within its jurisdiction to another state. Hence extradition is not a legal obligation. Locating a fugitive with an abductor parent can be exceedingly difficult and, in the absence of any criminal charge, the police are reluctant to become involved. Once the child has been located the first question to be asked is: Is there an extradition treaty between the requesting state seeking the return of the child and the requested state where the child has been located? Australia will only extradite to countries that are extradition countries in terms of the Extradition Act.²⁵³ It is next necessary to establish whether or not parental child abduction is an extradition offence, that is an offence against the law of Australia and the requesting country punishable by death or a period of imprisonment or other

251 Director of Public Prosecutions "Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process" January 1986

252 *Supra* n 134 138.

253 1988. Such countries are members of the Commonwealth of Nations, parties to bilateral treaties with Australia, countries to which the Extradition Act 1988 is applied on guarantee of reciprocity, and countries which are party to multilateral conventions to which Australia is also a party and which contain obligations to try or extradite for specified offences. See Chaikin *supra* n 134 139-140. South Africa is an extradition country.

deprivation of liberty for a period of not less than twelve months.²⁵⁴ The requirements may be varied by regulations applying the Act to a particular country.²⁵⁵ Another major stumbling block in the application of extradition laws to parental child kidnapping is to be found in the double criminality principle.²⁵⁶ The offence for which it is sought to extradite a person must be a criminal offence in both the requesting and the requested country. Extradition may thus be of limited value in the area of parental child abduction.

The Hague Convention has been acceded to by less than twenty percent of the countries of the world; most notable by their failure to accede are the Islamic and Asian states. The Convention requires the return of children abducted by relatives to the place from which they were removed or retained, but it is silent on the issue of extradition. Chaikin submits that the family policies of the Convention are inconsistent with the notion that the criminal process should be invoked in child custody matters.²⁵⁷ This policy, he argues, should not be given such weight as to preclude the extradition of persons in child abduction cases where great distress has been caused.²⁵⁸

254 Extradition Act 1988 s5.

255 Note that where a bilateral treaty lists kidnapping, abduction, and child stealing as extradition offences these may not include the offence of parental child abduction which the contracting states may not have contemplated: Chaikin *supra* n 134 141.

256 Chaikin *idem* 142-144.

257 *Idem* 149.

258 *Ibid.* See too Wilson J and Tomlinson M *Wilson: Children and the Law* Butterworths, Toronto (1986) 46 (Wilson and Tomlinson).

CHAPTER SEVEN

RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS AND PARENTAL CHILD ABDUCTION IN AMERICA

1 INTRODUCTION

The United States of America (US) has developed a sophisticated body of legislation to deal with the problems associated with the recognition and enforcement of foreign custody orders, both interstate and international. Despite this the US has not managed to eradicate parental child abductions of a domestic or international nature.

2 CHILD CUSTODY IN GENERAL

Child custody determinations in the US are traditionally state law matters.¹ The custody decrees of all states that do not altogether terminate the parental rights of one parent are always subject to modification where the circumstances of the parent or child have changed in some significant respect.² The universal basis for custody determinations centres on the best interests of the child. In modification proceedings little concern is shown as to how the first order came about, for any change in circumstance would open the door for a determination of the current best interests of the child.³ Thus a simple means to obtain a more favourable custody decree would be

1 DeMelis LM "Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard" 1994 45 *Hastings LJ* 1329 (DeMelis).

2 DeMelis *idem* 1331-1333.

3 Scoles EF and Hay P *Conflict of Laws* 2nd ed West Publishing Co, St Paul Minnesota (1992) 542-543 and s15.39 ns 1-2 (Scoles and Hay); McClean D "The Hague Child Abduction Convention - The Common Law Response" 1993 40 *Neth Int'l LR* 67 68 (McClean); Bodenheimer BM "Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications" 1977 65 *CLR* 975 981-982 (Bodenheimer *CLR*); Note: "Long-Arm Jurisdiction in Alimony and Custody Cases" 1973 73 *Col LR* 289 307 (Note: "Long-arm jurisdiction"); Wexler JG "Rethinking the Modification of Child Custody Decrees" 1985 4 *Yale LJ* 757 (Wexler).

to move to another state.⁴

American courts occasionally enforce foreign custody orders but are reluctant to do this for three primary reasons:

- The judge in the later case may disagree with the first award, especially where it is possible that a standard other than the "best interests of the child" was applied in making the determination;
- there is nationalistic competition flowing from the perception that a judge will look more favourably upon someone present within the jurisdiction; and
- judges and attorneys are inclined to become emotionally involved in custody disputes.⁵

For these reasons a *de novo* custody determination was made by the US court in most cases despite the existence of a previous award.⁶

4 DeMelis *supra* n 1 1329; Bodenheimer BM "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws" 1969 22 *Vand LR* 1207 1216 (hereafter Bodenheimer *Vand LR*); Silverman BS "The Search For a Solution to Child Snatching" 1983 11 *Hofstra LR* 1075ff (Silverman); *New York ex rel Halvey v Halvey* 330 US 610 (1947); *Ford v Ford* 371 US 187 (1962); *Kovacs v Brewer* 356 US 604 (1958). These cases are discussed in Katz SN *Child Snatching the Legal Response to the Abduction of Children* American Bar Association Press, Washington (1981) 56-68, 71 (Katz).

5 Morgenstern BR "The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification" 1985 10 *NCJ Intn'l L & Com Reg* 463 465 (Morgenstern); Bodenheimer BM "The International Kidnapping of Children: The United States Approach" 1977 11 *FLQ* 83 (Bodenheimer *FLQ*).

6 Morgenstern *idem* 466; *Rzeszofarski v Rzeszofarski* 296 A 2d 431 (DC 1972); *Anderson v Anderson* 234 So 2d 722 (Fla Dist Ct App 1970).

2.1 The Uniform Child Custody Jurisdiction Act (UCCJA)⁷

Traditionally only the court of a child's domicile had custody jurisdiction.⁸ The more modern view of custody jurisdiction stated in *Sampsell v Superior Court*⁹ and adopted into the Restatement, Second¹⁰ vested concurrent jurisdiction in several states to deal with certain aspects of custody. According to this view the state of the child's domicile may give a modifiable decree awarding custody; the state of physical presence may grant temporary custody in an emergency; and the state that has personal jurisdiction over both parents has the power to bind them both. Conflict was to be avoided by one state according respect to the decree of a prior forum and adhering to a clean-hands

7 9 ULA 115. The Uniform Child Custody Jurisdiction Act (UCCJA) was drafted in 1968 and was approved by the American Bar Association in August of that year. The full text and a commentary on the Act appears in Crouch RE *Interstate Custody Litigation: A Guide to Use and Interpretation of the Uniform Child Custody Jurisdiction Act* Bureau of National Affairs Inc, Washington (1981) 49ff (Crouch).

8 Scoles and Hay *supra* n 3 543; Note: "Long-arm jurisdiction" *supra* n 3 289 307. See too Morgenstern *supra* n 5 464; Katz *supra* n 4 13.

9 32 Cal 2d 763, 197 P 2d 739 (1948). Before the adoption of the UCCJA the Californian Supreme Court examined the *Sampsell* case in *Ferreira v Ferreira* 9 Cal 3d 824, 512 P 2d 304, 109 Cal Rptr 80 (1973). *In casu* the court, having dealt with jurisdiction, and having indicated that the *Sampsell* case left open the question of when a court should defer to a foreign decree and when it should re-examine the custody award, indicated that the second court could conduct such an examination in the face of the parental rights of the parent favoured by an existing decree where there is an allegation and proof that the existing order would endanger the health and safety of the child. The proper remedy here would be to provide for the protection of the child pending an enquiry into the matter elsewhere, eg in the home state. In this case, therefore, the temporary custody was retained by the father pending a determination by the trial court in California of the danger of returning the child to the mother. In effect, the temporary order by the Californian court would operate pending the outcome of the Alabama litigation. The Californian court would then enforce the Alabama determination by issuing its own writ. The court clearly stated that only in compelling circumstances should a parent with whom a child is visiting be permitted to take advantage of the opportunity to divest the custodial parent of his or her decreed rights of custody. To do otherwise would be to place a premium on the abuse of the right to visitation. This is a statement of the clean-hands doctrine adopted in numerous cases: Scoles and Hay *supra* n 3 545-546; Ehrenzweig AA *A Treatise on the Conflict of Laws* West Publishing Co, St Paul Minnesota (1962) 293ff (Ehrenzweig); Krause H *Family Law in a Nutshell* 1st ed (1977) 2nd ed West Publishing Co, St Paul Minnesota (1986) 268-269 (Krause); see too *In re Marriage of Saucido* 85 Wn 2d 653, 538 P 2d 1219 (1975); *Petition of Giblin* 304 Minn 510, 232 NW 2d 214 (1975).

10 Restatement of the Law, Second Conflict of Laws 2d vol 1 ss1-221 May 1969 American Law Institute Ch 5 s79 (Restatement 2d). See Note: "Long-arm jurisdiction" *supra* n 3 308.

doctrine.¹¹ The *Sampsell* approach gives rise to difficulties where the second forum did not give due deference to the decree of the first and made an award in favour of the locally resident parent.¹² One possible solution to the problems of interstate custody recognition was to assign priorities amongst the courts by self-restricting legislation. Section 3 of the UCCJA¹³ undertook to do this.

The UCCJA was a legislative attempt by the Conference of Commissioners on Uniform State Laws to reduce the incidence of children "caught in the middle" by introducing a uniform set of jurisdictional rules applicable in child custody cases to ensure that there would be a single court with jurisdiction to hear the matter.¹⁴ Although the UCCJA was eventually adopted by all the states of the Union by the promulgation of state legislation, each state has placed its own interpretation upon the meaning of the Act.¹⁵

11 Ehrenzweig *supra* n 9 293ff; Scoles and Hay *supra* n 3 543.

12 See Ratner "Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 1965 38 *SCLR* 183 193 (Ratner).

13 *Supra* n 7.

14 On the UCCJA see Young W "Parental Child-Snatching: Out of a No-Man's-Land of Law" 1981 13 *St Mary's LJ* 337 (Young); McDonald EC "More Than Mere Child's Play: International Parental Abduction of Children" 1988 6 *Dickinson Jour of Intr'l Law* 283 284-294 (McDonald); Bodzin MI "International Parental Child Abduction: The Need for Recognition and Enforcement of Foreign Custody Decrees" 1989 3 *Emory Journal of Intr'l Dispute Resolution* 205 206-210 (Bodzin); Cox JA "Judicial Wandering Through a Legislative Maze: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Child Custody Determinations" 1993 58 *Missouri LR* 427 (Cox); Bodenheimer *CLR supra* n 3 978ff & 982ff; Coombs RM "Curbing the Child Snatching Epidemic" 1984 *Fam Adv* 30 32 (Coombs "Curbing child snatching"); Morgenstern *supra* n 5 464ff; Herring LR Comments: "Taking Away the Pawns: International Parental Abduction & the Hague Convention" 1994 20 *NCJ Intrn'L & Com Reg* 137 142ff (Herring); Scoles and Hay *supra* n 3 547; Bodenheimer *Vand LR supra* n 4 1207ff; Blynn EL "In Re: International Child Abduction v Best Interests of the Child: Comity Should Control" 1986/87 18 *Uni Miami Inter-Am LR* 353 356-360 (Blynn); Silverman *supra* n 4 1081-1082; Crouch *op cit*; Goldstein AB "The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping (*sic*) Prevention Act" 1992 25 *Uni Cal Davis LR* 849 (Goldstein "The Inter-state child"); Katz *supra* n 4; Sampson JJ "What's Wrong with the UCCJA? Punitive Decrees and Hometown Decisions are Making a Mockery of this Uniform Act" 1981 3 *Fam Adv* 28 (Sampson); Behnke JA "Pawns or People? Protecting the Best Interests of Children in Interstate Disputes" 1995 28 *Loyola of LA LR* 699 (Behnke) 705ff.

15 See Bodenheimer *Vand LR supra* n 4 1207; Bodenheimer *CLR supra* n 3 978; Weintraub R *Commentary on the Conflict of Laws* 3rd ed Foundation Press, New York (1986) 269ff (Weintraub). For a discussion of the Texas version of the UCCJA see Solender EK "Family Law: Parent and Child" 1984 38 *Southwestern LJ* 173 (Solender); Sampson JJ and Tindall HL "The

The Act applies to all cases of custody and visitation whether of a temporary or final nature.¹⁶

The Act provides four jurisdictional bases:

- The home state of the child;
- a state with which the child and one or both of his or her parents has a significant connection;
- a state in which the child is physically present and in which he or she has been abandoned or threatened with child abuse. This is the so-called "emergency jurisdiction"; or
- if it appears that no other state has jurisdiction in terms of the other three prerequisites, or such other state has declined jurisdiction, then a particular court will have jurisdiction if it is in the child's best interests that the state exercise jurisdiction.¹⁷

UCCJA Comes to Texas - As Amended, Integrated and Improved" 1983 46 *Texas Bar Jour* 1096 (Sampson and Tindall). The UCCJA has been adopted in all the states of the Union but early case law remained uneven under the Act, especially as regards the deference to be accorded to decisions of prior courts: See *Turley v Griffin* 508 SW 2d 764 (Ky 1974) where the court failed to apply s 14 of UCCJA; *Wheeler v District Court In and For City & County of Denver* 186 Colo 218, 526 P 2d 658 (1974) 660, where the court disregarded an Illinois decree although Illinois was the home state under ss3 and 14 of the UCCJA; *In the Marriage of Weinstein* 87 Ill App 3d 101, 408 NE 2d 952 (1980); *Vanneck v Vanneck* 49 NY 2d 602, 427 NYS 2d 735 (1980). For a short synopsis of this last case see Cramton RC, Currie DP, Kay HH and Kramer I *Conflict of Laws Cases - Comments - Questions* 5th ed West Publishing Co, St Paul Minnesota (1993) 524-528 (Cramton *et al*).

16 *Miller v Superior Court* 22 Cal 3d 923, 151 Cal Rptr 6 (1978); *Kaiser v McClendon* 230 Kan 472, 639 P 2d 39 (1982); *Agnello v Becker* 42 Conn 51, 440 A 2d 172 (1981); Haralambie AM *Handling Child Custody, Abuse and Adoption Cases* 2nd ed McGraw-Hill Inc, New York (1993) vol I 12 (Haralambie vol I); Haralambie AM *Handling Child Custody, Abuse and Adoption Cases* 2nd ed McGraw-Hill Inc, New York (1993) vol II 318 (Haralambie vol II).

17 UCCJA s3. On jurisdiction see Hersha LS Note: "Child Snatching: The Federal Response" 1982 *Syracuse LR* 1103 1111-1112 (Hersha); Haralambie vol I *idem* 10-33; Blynn *supra* n 14 360ff; Silverman *supra* n 4 1082- 1086; Katz *supra* n 4 34-54. On when a court has declined jurisdiction

2.1.1 Home state jurisdiction under the UCCJA

The *Sampsel*¹⁸ call for deference to a prior decree and the UCCJA's identification of a court with paramount jurisdiction raises the issue of the reach and meaning of the court decision in *May v Anderson*¹⁹ in which the court refused to award comity to custody decrees in respect of which full faith and credit did not operate.²⁰ If the court of the first state lacked personal jurisdiction as required by *May*,²¹ the second court could modify the decree either on the basis of the first court's lack of jurisdiction or on the basis that the child's circumstances had changed. With the advent of the UCCJA's definition of the primary custody court as the court of the home state, the jurisdiction of the first court to grant the decree is again of vital importance.

see *Yost v Johnson* 591 A 2d 178 (Del 1991); *Moore v Moore* 463 NW 2d 230 (Mich Ct App 1990); *Stowers v Humphrey* 576 So 2d 138 (Miss 1991). In the latter two cases jurisdiction was declined on the basis of *forum non conveniens*. In *Albert v Phillips* 602 A 2d 104 (Del Fam Ct 1991) the court indicated that should it not be a convenient forum in terms of the UCCJA then jurisdiction may be declined in the best interests of the child. For a discussion of *forum non conveniens* see Katz *op cit* 20ff, 49-54.

18 32 Cal 2d 763, 197 P 2d 739 (1948).

19 345 US 528 (1953) discussed in Note: Long-arm jurisdiction *supra* n 3 309ff; Bodenheimer *Vand LR supra* n 4 1212-1213; Hazard GC "*May v Anderson: Preamble to Family Law Chaos*" 1959 45 *Virginia LR* 379 (Hazard); Brilmayer L and Martin J *Conflict of Laws Cases and Materials* 3rd ed Little Brown and Company, Boston (1990) 769-774 (Brilmayer and Martin); Sherman SB "Child Custody Jurisdiction and the Parental Kidnapping Prevention Act - A Due Process Dilemma" 1982 17 *Tulsa LJ* 713 (Sherman); Charlow AS "Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act" 1991 25 *FLQ* 299 302ff (Charlow); Silverman *supra* n 4 1077-1078.

20 Morgenstern *supra* n 5 464-465; Katz *supra* n 4 5-7. The jurisdictional problem raised by *May* *ibid* arises in instances where there is an uncontested custody award made by a court without personal jurisdiction over both parents. Such instances are rare. See Scoles and Hay *supra* n 3 547.

In the event that the requirements of *May* are not met then, assuming the court were to adhere to that decision, the decree issued in state A may not be recognised in state B as the requirement of due process would not be met in respect of the parent who was absent in the proceedings in state A. On due process see Silverman *supra* n 4 1092-1100; Katz *op cit* 28-29.

21 345 US 528 (1953).

If *May*²² is authority for the proposition that custody is a personal right of each parent that cannot be impaired without personal jurisdiction, and should this continue to be the Supreme Court's view, then it would follow that the primary custody court must have jurisdiction over both parents in addition to being the court of the child's domicile, etc. Some writers continue to express this view.²³ The case law however, overwhelmingly proclaims the constitutionality of the UCCJA.²⁴ The US Supreme Court has not yet addressed the matter but it is believed that with the acceptance of the UCCJA by all the states the issue is not whether or not the Act is constitutional but under which theory of constitutionality it will be upheld.²⁵

Home state jurisdiction does not require physical presence.²⁶ The significant date for determination of jurisdiction is that of commencement of the action.²⁷ The home state is the state which is the home state at the time of commencement of the action or at any time in the preceding six months.²⁸ This court may decline to exercise jurisdiction in the

22 *Ibid.*

23 Sherman *supra* n 19 and Coombs "Curbing child snatching" *supra* n 14.

24 See *inter alia*, *Mondy v Mondy* 428 So 2d 235 (Fla 1983); *In re Marriage of Agathos* 194 Ill App 3d 168, 141 Ill Dec 115, 550 NE 2d 1161 (1990).

25 See in this regard Comment: "The UCCJA: Coming of Age" 1983 34 *Mercer LR* 861 896 (Comment: "The UCCJA"). In *Webb v Webb* 451 US 493, 101 S Ct 1889, 68 L Ed 2d 392 (1981) the US Supreme Court declined to address the constitutional issues.

26 UCCJA s2(5); Haralambie vol I *supra* n 16 13; see too *inter alia*: *In re Marriage of Leonard* 122 Cal App 3d 433, 175 Cal Rptr 903 (1981); *Balestrier v Maliska* 622 So 2d 561 (Fla Dist Ct App 1993); *In re MLK* 13 Kan App 2d 251, 768 P 2d 316 (1982); *In re Marriage of Schuham* 120 Ill App 3d 339, 458 NE 2d 559 (1983); *In re Jackson* 562 So 2d 1271 (Miss 1990); *Harris v Harris* 504 NC App 574, 410 SE 2d 527 (1991); *Davidson v Davidson* 169 Wis 2d 546, 485 NW 2d 450 (1992).

27 See *inter alia*, *State ex rel Torres v Mason* 315 Or 386, 848 P 2d 592 (1993); *Missouri ex rel Laws v Higgins* 734 SW 2d 274 (Mo Ct App 1987); *Catlin v Catlin* 494 NW 2d 581 (ND 1992); *Utah ex rel DSK* 792 P 2d 118 (Utah Ct App 1990); Haralambie vol I *idem* n 16 18. See *In re Hopson* 110 Cal App 3d 884, 168 Cal Rptr 345 (1980) to the contrary. In that case the decisive date was that of the hearing.

28 Determined in accordance with UCCJA s3(a)(1)(i)(ii).

event that it is approached by a party with unclean hands.²⁹ The clean-hands doctrine, which grants to a court the discretion to refuse to hear an initial custody matter in the event that it is approached by a parent who has wrongfully removed the child from one state to another, has been developed by case law and the UCCJA. This doctrine, coupled with federal legislation, has resulted in an increasing deference to original orders and a concomitant increase in the importance of the jurisdiction of the court making that order.³⁰

2.1.2 Significant connection jurisdiction

Significant connection jurisdiction arises where the child and one parent, or other contestant, have, on substantial evidence, a significant connection with the state, and the child's best interests would be served by that court exercising jurisdiction.³¹ This jurisdictional basis is no longer as important as it was before the introduction of the Parental Kidnapping Prevention Act (PKPA) with its home-state preference.³²

2.1.3 Emergency jurisdiction

Emergency jurisdiction exists if the child is present within the jurisdiction of the court and has either been abandoned there or requires immediate protection from actual or threatened ill-treatment or abuse.³³ This jurisdictional basis vests jurisdiction in the court only to provide for temporary custody of the child pending a decree by an appropriate

29 Haralambie vol I *supra* n 16 14, 16-17; Crouch *supra* n 7 3-9, 22-26.

30 See Silverman *supra* n 4 1086-1087; UCCJA s8; Katz *supra* n 4 23.

31 UCCJA s3(a)(2); Haralambie vol I *supra* n 16 14, 17-18; Crouch *supra* n 7 9-13.

32 28 USC s1738A. Haralambie vol I *idem* 14. On this Act and its implications for the UCCJA see further "2.2.2 The interrelationship between the UCCJA and the PKPA" *infra*.

33 UCCJA s3(a)(3); Haralambie vol I *idem* 14-15; Crouch *supra* n 7 34-36; Katz *supra* n 4 19, 42-49; *Malik v Malik* 638 A 2d 1184 (Md 1994), discussed in Berman S "Child Custody" 1994/1995 *Uni Louisville Jour Fam Law* 177-182 (Berman).

court.³⁴ This is the only jurisdictional basis in terms of the UCCJA that requires physical presence.³⁵ The commissioners' commentary on this provision indicates that it was envisaged to apply in circumstances where the court should exercise the traditional role of *parens patriae*.³⁶ It seems that this jurisdictional basis will seldom be exercised.³⁷

2.1.4 Best interests of the child and absence of jurisdiction in any other court

A court may exercise jurisdiction where it is in the child's best interests that it do so and there is no other state with jurisdiction, or such other state has declined to exercise jurisdiction.³⁸ The most common basis upon which a court will decline jurisdiction is that another court is more appropriate. Jurisdiction will only be vested on this basis where an award of the court assuming jurisdiction would best serve the interests of the child. The commissioners regarded this jurisdictional basis as being of a subsidiary nature.³⁹

2.1.5 UCCJA jurisdictional bases

Although the UCCJA does not specify a home state preference such as is included in the PKPA, the Commissioners who drafted the legislation clearly intended that a preference should exist. They stated in their commentary on section three of the UCCJA that, in the first place, the home state has jurisdiction, and secondly, if there is

34 Haralambie vol I *idem* 15; Coombs "Curbing child snatching" *supra* n 14 32; Nakamura DS "Emergency Jurisdiction to Modify Out-of-State Child Custody Orders: Temporary Orders Under the Hawaii Uniform Child Custody Jurisdiction Act and the Federal Parental Kidnapping Prevention Act of 1980" 1987 20 *Hawaii Bar Jour* 115 (Nakamura).

35 See, inter alia, *Genoe v Genoe* 205 NJ Super 6, 500 A 2d 3 (App Div 1985).

36 UCCJA s3(a)(3); Haralambie vol I *supra* n 16 19.

37 See, inter alia, *Beebe v Chavez* 226 Kan 591, 602 P 2d 1279 (1979); *Commonwealth ex rel Zaubi v Zaubi* 492 Pa 183, 423 A 2d 333 (1980); *Breneman v Breneman* 92 Mich App 336, 284 NW 2d 804 (1979); *Duffy v Reeves* 619 A 2d 1094 (RI 1993).

38 UCCJA s3(a)(4); Haralambie vol I *supra* n 16 15; Crouch *supra* n 7 36-38; Katz *supra* n 4 19-20.

39 Haralambie vol I *idem* 21 .

no home state or there are equally strong ties between the child and its family with another state, then that court will have jurisdiction. The UCCJA thus provides for primary jurisdiction in the child's home state or the state with which he or she is significantly connected. This means that jurisdiction will vest on one of these two bases and the further jurisdictional bases will only be considered in the event that the first two jurisdictional bases fail to identify the appropriate court. The further jurisdictional bases will identify a state that has a close connection with the child or, for other reasons, is best qualified to evaluate the needs of the child. The "home state" appears to be similar to the "established home". It requires that the child have lived in a place with a parent for a sufficient period of time to have become an integrated part of that community. The reason that the courts of this place have been identified as the most appropriate to make child custody determinations is because the courts of this place are perceived to be best placed to have access to relevant information. It is difficult to determine the "home state" in situations of joint custody where each parent resides in a different state. The point at which "proceedings" commence is also not defined in the UCCJA and this too may complicate the determination of the "home state".⁴⁰ It should be noted that the UCCJA is aimed at resolving problems in post-custody decision removals, despite Bodenheimer's call that it also be applied to prevent pre-decree snatches.⁴¹

As the UCCJA stands, the jurisdictional bases are theoretically co-equal, but the significant connection jurisdictional basis should be used with caution in view of the fact that decrees issued by a court assuming jurisdiction on this basis will only be enforced under the PKPA where no other court has home state jurisdiction.⁴²

Parties cannot submit to jurisdiction where none exists.⁴³

40 DeMelis *supra* n 1 1342-1346; Bodenheimer *Vand LR supra* n 4 1221ff.

41 Bodenheimer *FLQ supra* n 5 226-227.

42 PKPA *supra* n 32 s1738A(c)(2)(B).

43 Haralambie vol I *supra* n 16 17; Katz *supra* n 4 52-54; *Sampsel v Superior Court* 32 Cal 2d 763, 197 P 2d 739 (1948).

The above mentioned four jurisdictional bases relate to initial jurisdiction.⁴⁴ The possibility of concurrent jurisdictions exist in cases where the parties have moved around and have not stayed in one place for six months, thus failing to establish a home state. Modification and enforcement jurisdiction is largely dependent upon the circumstances prevailing in the place of initial jurisdiction.⁴⁵ Because of the PKPA's home-state preference an attorney seeking a custody award should file custody papers in the home state whenever possible, or attempt to persuade the courts of the home state to expressly decline jurisdiction.⁴⁶

2.1.6 Modification jurisdiction

The court of initial jurisdiction generally retains jurisdiction to modify the order as long as one of the contestants or the child remains in that state and the state continues to have jurisdiction according to its own laws, or until it declines to exercise jurisdiction. This is so even if the child has lived in another state for six months or more and that state is now entitled to home-state status.⁴⁷ The continuing jurisdiction of the rendering court is exclusive.⁴⁸ The theory of exclusive continuing jurisdiction is known as the Bodenheimer theory.⁴⁹ It has been embodied in the PKPA⁵⁰ despite the fact that many courts have found that continuing jurisdiction is lost when significant connections

44 Haralambie vol I *idem* 22.

45 Haralambie vol I *idem* 22; Katz *supra* n 4 83ff.

46 Haralambie vol I *idem* 23.

47 Haralambie vol I *idem* 23; *In re Hendricks* 115 Or App 718, 839 P 2d 766 (1992).

48 UCCJA s14 (a)(1); Scoles and Hay *supra* n 3 544. See, inter alia, *Murphy v Woerner* 748 P 2d 749 (Alaska 1988); *DeBoer v Schmidt* 442 Mich 648, 502 NW 2d 649 (1993); *Hangsleben v Oliver* 502 NW 2d 838 (ND 1993); *Barndt v Barndt* 397 Pa Super 321, 580 A 2d 320 (1990); *Michalik v Michalik* 172 Wis 2d 640, 494 NW 2d 391 (1993); *Marquiss v Marquiss* 837 P 2d 25 (Wyo 1992).

49 Haralambie vol I *supra* n 16 24.

50 *Supra* n 32 s1738A(f).

between the child and the jurisdiction are severed.⁵¹ Most jurisdictions have accepted the Bodenheimer theory.⁵² Thus the UCCJA provides that a court may not exercise custody jurisdiction until the court that made an existing order has relinquished jurisdiction.⁵³ Where all the parties have severed their connections with the state of the rendering court that court becomes an inconvenient forum. It has been suggested that a rendering court should decline jurisdiction, despite a reservation thereof in a custody order, where the contacts between the state, the child, and parties ceased three or more years before the initiation of proceedings.⁵⁴

The UCCJA permits a court with continuing jurisdiction to refuse to exercise that jurisdiction where the petitioning party has unclean hands.⁵⁵

2.1.7 Concurrent jurisdiction

Where there is concurrent jurisdiction one court must be prepared to decline jurisdiction

:

- On the basis of one of the grounds set out in sections six, seven and eight of the UCCJA,⁵⁶

51 Inter alia, *Clark v Superior Court* 73 Cal App 3d 298, 140 Cal Rptr 709 (1977); *Siegel v Siegel* 84 Ill 2d 212, 417 NE 2d 1312 (1981); *GS v Ewing* 786 P 2d 1137 (Okla 1990).

52 See, inter alia: *Bock v Bock* 824 P 2d 723 (Alaska 1992); *McArthur v Santa Clara County Superior Court* 235 Cal App 3d 1287, 1 Cal Rptr 2d 296 (1991); *In re Mosier* 251 Kan 490, 836 P 2d 1158 (1992); *DeBoer v Schmidt* 442 Mich 648, 502 NW 2d 649 (1993); *Adams v Adams* 107 Nev 790, 820 P 2d 752 (1991).

53 UCCJA *supra* n 7 s14; Bodenheimer *CLR supra* n 3 983-984; Hersha *supra* n 17 1112-1113; *Lamon v Rewis* 592 So 2d 1223 (Fla Dist Ct App 1992).

54 Haralambie vol I *supra* n 16 24; *Tiscornia v Tiscornia* 154 Ariz 377, 742 P 2d 1362 (Ct App 1987). For a detailed discussion of initial and continuing jurisdiction see Haralambie *op cit* 22ff; Bodenheimer *FLQ supra* n 5 203; Crouch *supra* n 7 3-39.

55 S8(b).

56 S6 provides that where jurisdiction exists in more than one state the court that will hear the matter will be determined by the order of filing of the petition, the subsequent court yielding jurisdiction to the prior court. S7 permits the declinature of jurisdiction on the basis of *forum non conveniens* and s8 permits the declinature of jurisdiction on the basis that the petitioner has

-
- where there is litigation pending in another forum;⁵⁷
 - the petitioning party has unclean hands;⁵⁸ or
 - another state would be a more convenient forum.⁵⁹

A court may also decline jurisdiction where the child lives in another state with which he or she has more significant connections.⁶⁰ This is the *forum non conveniens* exception and in such cases the court should indicate the court in whose favour jurisdiction is declined.⁶¹

A court should also refuse to exercise jurisdiction if proceedings are pending elsewhere in another state that has jurisdiction in terms of the UCCJA.⁶²

The UCCJA actively encourages courts to communicate with each other and to share information.⁶³

unclean hands.

57 Haralambie vol I *supra* n 16 29-30 text and accompanying notes; Crouch *supra* n 7 17-19.

58 Haralambie vol I *idem* 30-31 and accompanying notes.

59 Haralambie vol I *idem* 28; Crouch *supra* n 7 19-26.

60 Haralambie vol I *idem* 25; *In re Cervetti* 497 NW 2d 897 (Iowa 1993).

61 Haralambie vol I *idem* 25, 31-33; *Waller v Richardson* 757 P 2d 1036 (Alaska 1988) in which no choice was indicated.

62 *Siegel v Siegel* 575 So 2d 1267 (Fla 1991).

63 Haralambie vol I *supra* n 16 33-34.

2.1.8. *Interstate Recognition and modification under the UCCJA*

The UCCJA also regulates enforcement jurisdiction.⁶⁴ It requires courts of one state to enforce orders of another state where the jurisdictional requirements of the two states are substantially the same.

2.1.9 *Sanctions for non-compliance with the UCCJA*

There are several sanctions for non-compliance with the provisions of the UCCJA. Sections seven and eight of the UCCJA, which permit a court to decline jurisdiction, contain provisions that permit a court declining jurisdiction to charge the petitioner with the travel and legal costs incurred by the other party or witnesses.⁶⁵ Such costs may also be ordered in instances where a petitioner's wrongful violation of a custody order has forced him or her to enforce the order in another state.⁶⁶

2.1.10 *Miscellaneous provisions of the UCCJA*

Section eighteen of the UCCJA enhances interstate co-operation in child-custody matters by making provision for the taking of testimony from the child, parties and witnesses by deposition or otherwise.

On a practical point it should be noted that the attorney-client privilege does not protect the current address of a client and child in a child custody case.⁶⁷ Failure by an attorney to disclose this information on request by the other parent could result in a finding of contempt of court against the attorney. The Act requires disclosure of this information

64 Ss23 and 15. See cases discussed under n 15 *supra*.

65 Ss7(g) and 8(c) respectively.

66 UCCJA s15(b). See further *infra*.

67 Haralambie vol I *supra* n 16 42-43.

in an affidavit attached to the pleadings.⁶⁸ The parties are required to keep this information up to date throughout the proceedings.⁶⁹

2.1.11. *Shortcomings of the UCCJA*

The UCCJA has been reasonably effective in instances where a parent snatches a child with the intention of applying for a more favourable custody determination elsewhere in the US. It is not effective, however, in instances where the snatcher has no intention of approaching the courts in an attempt to legitimise his or her custody.⁷⁰ The UCCJA has major shortcomings. For example, it creates an enormous potential for judicial discretion especially in relation to the jurisdictional requirements. Determination of whether or not a significant connection exists, whether or not a party has clean hands, or if there has been an infringement of a party's due process rights allows for discretionary abuse.⁷¹ A second and more important shortcoming is the lack of force behind the Act. The Act encourages but does not enforce cooperation between states. It allows for little more than a recovery of costs.⁷²

68 UCCJA s9(a).

69 UCCJA s9(c).

70 Morgenstern *supra* n 5 470; Crouch *supra* n 7 xiii-xiv; Katz *supra* n 4 31.

71 Katz *idem* 31-32.

72 Katz *idem* 32-33; Morgenstern *supra* n 5 470.

2.2 The Parental Kidnapping Prevention Act (PKPA)⁷³

As a result of the weaknesses inherent in the UCCJA the PKPA was enacted in 1980 with a view to promoting consistency in custody determinations in different jurisdictions and extending the authority of state officials outside their areas of jurisdiction. This Act implements the full faith and credit clause for those state custody decrees that meet the statute's jurisdictional standards. It requires states to enforce the custody and visitation orders of other states without modification. It also authorises federal assistance in the location of abducted children.⁷⁴ This Act makes the provisions of the Fugitive Felon Act⁷⁵ applicable to parental abductions across state lines to avoid felony charges of custodial interference.⁷⁶ Whether or not an abduction constitutes a felony depends upon the state laws of the state from which the child is taken. Often the crime is merely a misdemeanour and carries little weight. The approach to the crime of parental kidnapping at state level is not uniform. Most states now treat parental abduction as a

73 *Supra* n 32. For an overview of the PKPA see Hersha *supra* n 17 118ff; Hixson L "The Parental Kidnapping Prevention Act - Analysis and Impact on Uniform Child Custody Jurisdiction" 1981 27 *NY Law Sch LR* 553 (Hixson); Young *supra* n 14 348ff; Lockett WS Jr "The Parental Kidnaping(sic) Prevention Act of 1980: Death Knell for "The Rule of Seize and Run"" 1982 12 *Cumberland LR* 485 (Lockett); Abram MC "The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness" 1982 33 *Case Western Reserve LR* 89 (Abram); Pettenati JK "The Effect of the Parental Kidnaping(sic) Prevention Act of 1980 on Child Snatching" 1982 17 *New England LR* 499 (Pettenati). A comprehensive analysis of the federal legislation and the UCCJA are contained in Coombs RM "Interstate Child Custody: Jurisdiction, Recognition, and Enforcement" 1982 66 *Minn LR* 713 773 (1982) (Coombs "Interstate child custody"); McDonald *supra* n 14 294-295; Bodzin *supra* n 14 210-212; Erickson NS "The Parental Kidnapping Prevention Act: How Can Non-marital Children be Protected?" 1988 18 *Golden Gate LR* 529-537 (Erickson); Schuetze SM "*Thompson v Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act*" 1989 16 *Pepperdine LR* 409-430 (Schuetze); Wilson AT "Parental Kidnapping Prevention Act: Is There an Enforcement Role for the Federal Courts?" 1987 62 *Washington LR* 841-862 (Wilson); Viken LLM "Calling in the Feds: The Need for an Impartial Referee in Interstate Child Custody Disputes" 1994 39 *South Dakota LR* 469 (Viken); Cox *supra* n 14 427ff.

74 Haralambie vol I *supra* n 16 43-44; Haralambie vol II *supra* n 16 311, 319-320; Wilson *idem* 841. The PKPA amended the Social Security Act to make the Federal Parental Locator Service available in cases of child snatching involving interstate or international flights to avoid prosecution under applicable state felony statutes: 94 Stat 3573, amending 18 USCA s1073.

75 18 USC s1073.

76 PKPA s10. The application of this Act to child-snatching cases is discussed in Silverman *supra* n 4 1106-1111; Hersha *supra* n 17 1124ff.

crime but differentiate between concealing the child, a misdemeanour, and leaving the state with the child, a felony.⁷⁷

The PKPA was clearly designed to bolster the UCCJA.⁷⁸ To this end it makes enforcement of interstate custody decrees mandatory where the judgment of the rendering court was entered in substantial compliance with the PKPA jurisdictional requirements. The effect is to accord full faith and credit to custody decrees.⁷⁹ This mandatory enforcement applies even to foreign country judgments where the laws of the rendering forum are substantially similar to the provisions of the UCCJA.⁸⁰

The jurisdictional requirements of the PKPA⁸¹ require every state to enforce a custody determination of a court of another state provided that the rendering court had jurisdiction under the law of its state and that state was:

- The home state of the child at the time proceedings were begun; or
- the home state for six months prior to that date and the child is absent as a result of a removal or retention; or
- no other court has jurisdiction and the child's best interests require the forum to

77 See further "4. Kidnapping, re-stealing and extradition" *infra*.

78 DeMelis *supra* n 1 1330.

79 DeMelis *idem* 1335-1340. The UCCJA is used to determine initial jurisdiction and the PKPA is federal legislation that requires that interstate full faith and credit must be given to initial custody determinations rendered in accordance with the PKPA: Cox *supra* n 14 430. The Act does not confer jurisdiction but provides for the recognition of judgments covered by it: See *Siler v Storey* 587 F Supp 986 (N D Tex 1984); *Quenzer v Quenzer* 653 P 2d 295 (Wyo 1982). For a detailed account of the problems occasioned by the failure to accord full faith and credit to interstate child custody decrees see Hersha *supra* n 17 1105-1110.

80 *Schleiffer v Meyers* 644 F 2d 656 (7th Cir 1981); *Commonwealth ex rel Zaubi v Zaubi* 492 Pa 183, 423 A 2d 333 (1980); Haralambie vol I *supra* n 16 35.

81 S1739A. See Silverman *supra* n 4 1101ff for a discussion of the jurisdictional provisions of the PKPA.

exercise jurisdiction; or

- the child is present in the jurisdiction and has been abandoned there or an emergency exists.⁸²

The jurisdictional requirements of the PKPA were designed to force those states which had been slow to adopt the UCCJA to arrive at the same conclusions as those states that had adopted the UCCJA.⁸³

The primary difference between the PKPA and the UCCJA is that the former has a home-state preference embodied in its jurisdictional rules. Only orders issued consistently with the PKPA are entitled to full faith and credit.⁸⁴ In the light of the PKPA's home-state preference, any person desiring a custody order that will be afforded full faith and credit by all other US states should commence initial custody action in the courts of the home state or should obtain an order in which the home state declined jurisdiction before initial proceedings are commenced. Failure to follow these steps may result in the custody decree not being entitled to interstate enforcement without modification. If the rendering court acted in compliance with the PKPA and did not decline jurisdiction, the courts of other states must enforce its order without

82 28 USC s1738A makes provision for the recognition and enforcement of custody orders made in accordance with the provisions of the PKPA. The Act does not provide for original jurisdiction but protects, by full faith and credit, only certain custody decrees that are consistent with the jurisdiction in the Act in that the rendering court had jurisdiction under state law and met one of the requirements under the federal law. For a discussion of emergency jurisdiction under the PKPA, see DeMelis *supra* n 1 1349-1350. An emergency may be constituted by abuse or neglect of the child or use of addictive drugs by a parent: *Renno v Evans* 580 So 2d 945 950 (La Ct App 1991); *Cox v Cox* 536 NE 2d 521 524 (Ind Ct App 1989); *Swan v Swan* 796 P 2d 221 224 (Nev 1990).

83 Goldstein *supra* n 14 850.

84 Hersha *supra* n 17 1119-1120.

modifying it.⁸⁵ This remains so even if the custody decree is punitive.⁸⁶

The PKPA requires that all parties be given due notice of proceedings and a reasonable opportunity to be heard.⁸⁷

Only valid orders need be enforced.⁸⁸ Where the rendering court did not have jurisdiction under the UCCJA or PKPA, or due notice of proceedings was not given, enforcement is not mandatory.⁸⁹ A court enforcing a decree need not have modification jurisdiction and does not rule on the merits of the custody award.⁹⁰

Punitive decrees which modify custody in order to punish a custodial parent for misconduct such as wrongfully removing the child from the rendering state's jurisdiction are possibly not entitled to the same measure of enforcement as other decrees.⁹¹ However, neither the UCCJA nor the PKPA expressly refers to such an exception. Joint custody orders may also be problematic in that a person with joint custody may not be violating a criminal statute by removing the child who is the subject of such a custody order. For this reason such orders should include express restrictions upon the rights

85 PKPA s1738A(f); Haralambie vol I *supra* n 16 44-45; inter alia, *DeBoer v Schmidt* 442 Mich 648, 502 NW 2d 649 (1993).

86 *Belosky v Belosky* 97 NM 365, 640 P 2d 471 (1982).

87 S1738A(e) provides that the rendering court must give contestants the opportunity to be heard. This is a middle ground between the wide view of *Sampsell v Superior Court* 32 Cal 2d 763, 197 P 2d 739 (1948) and the constitutional limits of *May v Anderson* 345 US 528 (1953), resulting in the constitutionality of state court decrees rendered in accordance with the federal Act's provisions: Scoles and Hay *supra* n 3 544-545. S1738A(g) prohibits the exercise of custody jurisdiction during the pendency of proceedings in another state.

88 *Glanzner v Missouri* 835 SW 2d 386 (Mo Ct App 1992).

89 See, inter alia, *Wyatt v Falhsing* 396 So 2d 1069 (Ala Civ App 1981); *Fry v Ball* 190 Colo 128, 544 P 2d 402 (1975); *Fernandez v Rodriguez* 97 Misc 2d 353, 411 NYS 2d 134 (Sup Ct 1978).

90 *Wyatt v Falhsing* 396 So 2d 1069 (Ala Civ App 1981); *Butler v Morgan* 34 Or App 393, 578 P 2d 814 (1978); Haralambie vol I *supra* n 16 36.

91 Haralambie vol I *idem* 37-38.

of either parent to remove the child.⁹²

2.2.1 Modification jurisdiction under the PKPA

The PKPA provides that a state that obtained jurisdiction consistent with the provisions of the Act should continue to be vested with modification jurisdiction for as long as the child or one of the contestants remains resident in that state and the state has jurisdiction under its own laws.⁹³ This jurisdiction continues until it is declined, despite the fact that another state may now have become the home state.⁹⁴ Where the rendering court was not the home state and the home state had not declined jurisdiction the order is not protected by the PKPA. If the order is subject to PKPA protection then the attorney must establish whether or not the rendering court still has modification jurisdiction under its own laws.⁹⁵ The laws of some states, such as Tennessee and Texas, provide that jurisdiction is lost, for example where another state has become the home state.⁹⁶ This loss of jurisdiction is of course distinct from circumstances where the court has declined jurisdiction.

If the rendering court has continuing jurisdiction then it must be established whether the child or a contestant continues to reside in the state. If so, the rendering court has exclusive modification jurisdiction until it declines the same. Another court with which the parties now have a close connection may only exercise modification jurisdiction if the rendering court has declined jurisdiction.

92 Haralambie Vol I *idem* 39.

93 S1738A(d).

94 PKPA 28 USC s1738 A(c)(2)(D). Haralambie vol I *supra* n 16 45-46; Silverman *supra* n 4 1104-1106; see, inter alia, *DeBoer v Schmidt* 442 Mich 648, 502 NW 2d 649 (1993); *Hangsleben v Oliver* 502 NW 2d 838 (ND 1993); *Michalik v Michalik* 172 Wis 2d 640, 494 NW 2d 391 (1993).

95 S1738A(f)(2).

96 *Baumgartner v Baumgartner* 788 P 2d 38 (Alaska 1990); *Kemp v Sharp* 261 Ga 600, 409 SE 2d 204 (1991); Tenn Code Ann S36-6-203(a)(37)(repl vol 1991); Tex Fam Code Ann S11.53(d)(West 1993); Haralambie vol I *supra* n 16 47 n260.

Another significant difference between the PKPA and the UCCJA is that the PKPA does not recognise modification jurisdiction for temporary or permanent custody orders on the basis of emergency.⁹⁷ Hence only original orders made under the UCCJA on this basis will receive full faith and credit.

2.2.2. *The interrelationship between the UCCJA and the PKPA*

The UCCJA and PKPA are complementary and not mutually exclusive. Despite the common objectives of the UCCJA and PKPA to:

- Foster interstate co-operation in cases of child custody;
- promote recognition and enforcement of foreign custody orders; and
- deter child abductions,

there are significant differences between the UCCJA and the PKPA. These differences include, inter alia, that the UCCJA provides for continuing jurisdiction where one parent remains in the jurisdiction of the court and had contact with the child there,⁹⁸ and the PKPA as a federal Act only requires that the jurisdiction remains the residence of the child or one of the contestants. The role of the child in the latter instance is thus weaker. It should also be noted that the PKPA does not confer jurisdiction on federal courts but mandates full faith and credit to state court decisions.⁹⁹ In addition, the

97 Haralambie vol I *idem* 20. Since the PKPA was based upon the UCCJA Haralambie has regarded this as a deliberate omission: Haralambie *op cit* 48. The PKPA is federal legislation and binds all state authorities to accord with its terms. The UCCJA is state legislation and thus the state legislatures of each individual state were at liberty to accept it as part of their law, subject to such modifications as they chose to introduce: see n 15 *supra*.

98 *Heartfield v Heartfield* 749 F 2d 1138 (5th Cir 1985); *Kumar v Superior Court* 32 Cal 3d 689, 186 Cal Rptr 772, 652 P 2d 1003 (1982); *In re Chapman* 466 NE 2d 777 (Ind App 3 Dist 1984); *Barndt v Barndt* 397 Pa Super 321, 580 A 2d 320 (1990).

99 Scoles and Hay *supra* n 3 549.

PKPA¹⁰⁰ allows aggrieved parents to resort to federal and state-locator services to locate an abducted child and the snatcher,¹⁰¹ and expands the Fugitive Felon Act to include parental kidnapping in cases where inter-state or international flight was involved.¹⁰² The two Acts also relate to different types of custody hearings. The primary difference between the two Acts remains the home-state preference contained in the PKPA. The UCCJA permits the use of significant connection jurisdiction even where there is a home state, but the PKPA permits it only where there is no state that qualifies as a home state. Hence some awards may be in accordance with the jurisdictional requirements of the UCCJA but not the PKPA.¹⁰³ In *Thompson v Thompson*¹⁰⁴ the Supreme Court recognised that the PKPA was designed to incorporate the UCCJA hence the inclusion of the UCCJA provisions of a state's internal law in the jurisdictional provisions of the PKPA. The PKPA was intended to give effect to legitimate state awards and to remove the incentives for "forum shopping".¹⁰⁵

The PKPA has failed to fully resolve the issue of competing child custody decrees. In fact Goldstein is of the opinion that the PKPA has replicated the problems inherent in the UCCJA and increased the complexity of the law applicable to recognition and

100 *Supra* n 32 s9.

101 42 USC s663(17)(1982).

102 18 USC s1073 (1982). See Morgenstern *supra* n 5 471ff.

103 Cox *supra* n 14 440-441.

104 484 US 174 (1988) 181. For a detailed discussion of this case see Taylor DA Notes "Family Law - Federal Courts - No Federal Jurisdiction Under the Parental Kidnapping Prevention Act. *Thompson v Thompson* 1988 108 S Ct 513" 1988/89 11 *Uni Arkansas at Little Rock LJ* 97 (Taylor); Schuetze *supra* n 73 490.

105 *Wachter v Wachter* 439 So 2d 1260 1264-1265 (La Ct App 1983); *Bolger v Bolger* 678 SW 2d 194 (Tex Civ App 1984). For a discussion of the interrelationship between the two Acts see Crouch RE "Use Abuse and Misuse of the UCCJA and PKPA" 1992 6 *Am Jour Fam Law* 147 (Crouch "Use abuse and misuse"); Charlow *supra* n 19 308ff. One of the most publicised cases involving both the UCCJA and the PKPA was *In re Clausen* 442 Mich 648, 502 NW 2d 649 (1993), the so-called "baby Jessica case". For a discussion of this case see Luettgen WA Case Comments: Family Law: "State and Federal Child Custody Statutes Prohibit Modification of Home State's Child Custody Order - *In re Clausen* 442 Mich 648, 502 NW 2d 649 (1993)" 1994 28 *Suffolk Uni LR* 261 (Luettgen); Viken *supra* n 73 469.

enforcement of interstate custody decrees.¹⁰⁶ The PKPA, like the UCCJA, provides for continuing jurisdiction for as long as a child who is the subject of a custody decree remains resident within the jurisdiction of the rendering court, or that jurisdictional area remains the residence of any contestant.¹⁰⁷

*In re AEH*¹⁰⁸ explored the intricacies of the interrelationship between the UCCJA and the PKPA. In that case an interstate custody dispute arose between the courts of Wisconsin, the court of the temporary guardians of the children, and the Californian court, the court of the putative father of one of the two children. Both courts claimed jurisdiction under the UCCJA, resulting in conflicting custody decrees. The Supreme Court found that the proceedings fell within the ambit of the UCCJA and that the Wisconsin court had properly exercised significant connection jurisdiction under that Act as well as under the PKPA. California was the home state under the UCCJA but Wisconsin had concurrent jurisdiction. Section 6 of the UCCJA attempts to resolve the potential for conflict in such situations by indicating that no state may exercise its jurisdiction and institute action when a custody proceeding is pending in another state at the time of filing. The Wisconsin court alleged that the Californian court had declined jurisdiction and there was thus no action pending in a competent court at the time of initiation of the Wisconsin proceedings. The Wisconsin court then lost its jurisdiction when it recognised the Californian decree. Hence its jurisdiction in the final custody decree was manipulated. The court indicated that it was hearing a case for modification of the Californian decree, despite the fact that the Californian decree was only made after that determination. Murray argues that the shift in jurisdiction from California to Wisconsin, despite the fact that the parties had not moved may well have resulted from the need to have the matter decided by the court best placed to make the determination

106 *Supra* n 14 851.

107 Scoles and Hay *supra* n 3 548.

108 161 Wis 2d 277 288-292, 468 NW 2d 190 (1991) 194-196 . This case is discussed at length by Murray JC "One Child's Odyssey Through the Uniform Child Custody Jurisdiction and Parental Kidnapping Prevention Acts" 1993 *Wisconsin LR* 589 (Murray).

in the best interests of the child. Clear rules regulating when jurisdiction is declined may expedite matters.¹⁰⁹ Perhaps the UCCJA should adopt the PKPA's home-state preference or the PKPA's home-state preference should be repealed.¹¹⁰

The UCCJA was designed to serve the best interests of the child by awarding jurisdiction to the court with maximum contacts with the child.¹¹¹ To this end it gives custody jurisdiction to the courts of the home state or that with significant connections with the child.¹¹² In addition it provides for emergency jurisdiction.¹¹³ Only where there is no state to assume jurisdiction under any of these heads, or the court of such a state has declined jurisdiction, may another court exercise jurisdiction.¹¹⁴ As there may be a home state and a number of states with significant connections with a child concurrent jurisdictions may arise. In order to prevent multiple states from exercising concurrent jurisdiction the UCCJA provides that a court may not exercise jurisdiction in a matter where the matter is already pending before another court.¹¹⁵

The first court exercises initial jurisdiction and the right to modify the decree is reserved to that court unless it declines to exercise the jurisdiction or it loses jurisdiction by ceasing to be the home state or ceasing to have a significant connection with the child.¹¹⁶ A loophole exists, however, in that each state is empowered to independently determine the facts upon which it will base its decision to exercise jurisdiction and it is

109 Murray *idem* 600ff.

110 Murray *idem* 610ff.

111 Murray *idem* 591. His view is reflected in s1(a)(3) UCCJA. This view is also to be found in *Matter of Marriage of Settle* 25 Or App 579, 550 P 2d 445, 276 Or 759, 556 P 2d 962 (1976).

112 UCCJA s3(a).

113 UCCJA s3(a)(3).

114 UCCJA s3(a)(4).

115 UCCJA s6(a). See Goldstein *supra* n 14.

116 UCCJA s14(a).

not required to simply accept another state's claim to jurisdiction.¹¹⁷

2.2.3. Pre-emptive effect of the PKPA

As the PKPA is a federal Act it should pre-empt state law where the state and federal legislation is inconsistent.¹¹⁸ It is in the area of the failure of state courts to give pre-emptive effect to the PKPA that malpractice in the area of child custody often takes place.¹¹⁹

The Supreme Court, in *Thompson v Thompson*,¹²⁰ stated that federal courts may not determine which custody order is enforceable under the PKPA in instances of conflicting state custody decisions.¹²¹ Hence in instances of true jurisdictional deadlock the correct course of action would be to seek Supreme Court review of the federal

117 Murray *supra* n 108 593 n20. This loophole was explored by Foster H "Child Custody Jurisdiction: UCCJA and PKPA" 1981 27 *NYL Sch LR* 297 338-340 (Foster).

118 It is unclear whether federal pre-emption will operate under the supremacy clause here to ensure that the PKPA, as a piece of federal legislation, will control in instances where the Act clashes with state custody legislation. It has been argued that because domestic relations law traditionally belonged to the state law sphere, a federal statute that purports to regulate domestic relations will be precluded from having pre-emptive effect, unless such effect is expressly conferred upon it by Congress: DeMelis *supra* n 1 1340-1341. Haralambie vol I *supra* n 16 44 argues for the preemptive effect of the PKPA and indicates that failure to recognise the pre-emptive effect of the PKPA amounts to malpractice. She cites *Meade v Meade* 812 F 2d 1473 (4th Cir 1987); *Wallace v Alameda County Superior Court* 19 Cal Rptr 2d 157 (Cal Ct App 1993); *Archambault v Archambault* 407 Mass 559, 555 NE 2d 201 (1990); and *Glanzner v Missouri* 835 SW 2d 386 (Mo Ct App 1992) as authority for this view. See too *Mitchell v Mitchell* 437 So 2d 122 (Ala Civ App 1982); *Ex Parte Lee* 445 So 2d 287 (Ala Civ App 1983); *Garrett v Garrett* 292 Ark 584, 732 SW 2d 127 (1987); and *Atkins v Atkins* 308 Ark 1 5, 823 SW 2d 816 (1992). On the arguments for and against federal preemption see, Baron RM "Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes" 1993 45 *Ark LR* 885 (Baron "Federal preemption").

119 Haralambie vol I *ibid* 44.

120 484 US 174 (1988). Discussed in Wilson *supra* n 73 841-862.

121 This case was contrary to a line of previous findings in *Flood v Braaten* 727 F 2d 303 (3d Cir 1984) esp 312, discussed by Wilson *idem* 846; *McDougald v Jenson* 786 F 2d 1465 (11th Cir 1986), discussed by Wilson *op cit* 850-851; and *Heartfield v Heartfield* 749 F 2d 1138 1141 (5th Cir 1985).

question of the meaning of the full faith and credit clause.¹²²

In *Atkins v Atkins*¹²³ and *Adams v Adams*¹²⁴ modification jurisdiction was exercised under the PKPA and full faith and credit was refused to the decree of a court which held jurisdiction under the UCCJA on the basis of federal pre-emption. Cox argues against the pre-emptive power of the PKPA on the basis that the PKPA was devised to incorporate the UCCJA and to avoid inconsistent custody decrees.¹²⁵ Likewise Baron, and certain of the case authority, voice the opinion that because the PKPA is federal legislation applicable to an area that falls exclusively within the realm of state law it does not offer a federal solution.¹²⁶ Congressional enactments may only pre-empt state family law where there is an express statement to that effect contained in the congressional legislation or under the supremacy clause of the Constitution.¹²⁷ Because family matters are exclusively regulated by state laws a very strong test for pre-emption is imposed here.¹²⁸ The statement of the purpose and objectives of the PKPA indicates that it was enacted to establish national standards for the determination of custody disputes and the effect to be given in each jurisdiction to decisions of the courts of other jurisdictions.¹²⁹ The PKPA was however given pre-emptive effect in a number of

122 Wilson *idem* 861, calls for an extension of the PKPA to include a federal court remedy in cases of actual jurisdictional deadlock. See too DeMelis *supra* n 1 1353ff; Sharpless SM "The Parental Kidnapping Prevention Act: Jurisdictional Considerations Where There are Competing Child Custody Orders" 1992 13 *Jour Juv Law* 54 (Sharpless).

123 308 Ark 1, 823 SW 2d 816 (Ark 1992).

124 107 Nev 790, 820 P 2d 752 (Nev 1991).

125 *Supra* n 14 442ff.

126 Baron "Federal preemption" *supra* n 118 887; *Thompson v Thompson* 484 US 174 (1988); *California v Superior Court (Smolin)* 482 US 400, 107 S Ct 2433, 96 L Ed 2d 332 (1987)(Extradition case) discussed in Charlow *supra* n 19 301-302; LePori SY "The Conflict Between the Parental Kidnapping Act and the Extradition Act: Naming the Custodial Parent Both Legal Guardian and Fugitive" 1988 19 *St Mary's LJ* 1047 1064-1072 (Le Pori).

127 Art IV cl2.

128 *Rose v Rose* 481 US 619 (1987) 625; *Mansell v Mansell* 490 US 581 (1989) 587; *Hisquierdo v Hisquierdo* 439 US 572 (1979) 582.

129 Baron "Federal preemption" *supra* n 118 891.

recent cases.¹³⁰ Despite this some states still do not recognise this effect.¹³¹

In *Glanzner v Glanzner*¹³² the court held that the custody award of the Californian court in favour of a mother was not entitled to full faith and credit under the PKPA and was thus not enforceable in Missouri. The court found that the Californian court had properly exercised initial jurisdiction in accordance with the jurisdictional requirements of the Californian UCCJA. Likewise, Missouri had properly exercised initial jurisdiction while the action was pending in California in terms of the Missouri UCCJA. The court further determined that as Missouri was the home state, effect had to be given to the Missouri order. This was done by relying on the home-state preference in the PKPA rather than relying on the UCCJA. The court indicated further that had it focused on the UCCJA the finding would not have differed as the UCCJA is capable of being interpreted to include a home-state bias. This would mean that for as long as the home state was willing to act, jurisdiction could not be usurped by another court.¹³³ The Missouri court decision was thus given full faith and credit. In *Glanzner v Glanzner*¹³⁴ the court found that in instances where there are two competing custody awards the PKPA and not the UCCJA should be applied to determine which court should properly exercise jurisdiction.¹³⁵ The PKPA provides that full faith and credit is mandated where the initial court exercised jurisdiction in conformity with the UCCJA of that state and such jurisdiction was based

130 *State ex rel Valles v Brown* 639 P 2d 1181 (NM 1981); *Mitchell v Mitchell* 437 So 2d 122 (Ala Civ App 1982); *Ex Parte Lee* 445 So 2d 287 (Ala Civ App 1983); *Garrett v Garrett* 292 Ark 584, 732 SW 2d 127 (1987).

131 Baron "Federal preemption" *supra* n 118 892. In *Archambault v Archambault* 407 Mass 559, 555 NE 2d 201 204-208 (Mass 1990) no express wish was found in the PKPA that the federal Act was to pre-empt the Massachusetts UCCJA but the PKPA was given preemptive effect on the basis that to do otherwise in that instance would be to frustrate congressional intention in passing the federal Act. This case is discussed in Sharpless *supra* n 122 55ff.

132 835 SW 2d 386 (Mo Ct App 1992). See Cox *supra* n 14 444ff.

133 *Glanzner Idem* 392. This argument was relied upon in *Hattoum v Hattoum* 441 A 2d 403 (Pa 1982) 405; *Prickett v Prickett* 498 So 2d 1060 (Fla Dist Ct App 1986) 1061.

134 835 SW 2d 386 (Mo Ct App 1992). Discussed in full in Cox *supra* n 14 428ff.

135 *Glanzner idem* 393.

upon one of the grounds reflected in the PKPA.¹³⁶ If either requirement was not met a state would have modification jurisdiction in respect of the decree provided that it had jurisdiction in accordance with the provisions of the state's UCCJA.¹³⁷ This case is authority for the view that federal legislation will pre-empt state law where state and federal laws conflict in interstate custody matters. Cox contends that the reasoning behind the *Glanzner* decision¹³⁸ was flawed: The law was incorrectly applied and the underlying policies of the UCCJA and PKPA were thus frustrated.¹³⁹ This decision encouraged interstate kidnapping in hopes of a more favourable decree. The proper course of action for the court in *Glanzner*¹⁴⁰ was for the court to establish which of the two courts properly exercised initial jurisdiction. That finding would have indicated which court acted improperly. The judgment of the court that acted improperly would have been invalid and thus unenforceable. The Californian jurisdiction was valid on the basis of significant connection, as the Californian state law (UCCJA) did not contain any home-state preference and this could not be imported from the PKPA. Thus the Californian decree was valid although not enforceable under the second prong of the PKPA because California was not the home state at the date of commencement of the initial action. The Missouri decree did not meet the initial jurisdiction test of the PKPA because the Californian court was already validly exercising jurisdiction, as tested under Missouri law (UCCJA), at the date of the initiation of action in the Missouri court. The Missouri court should not have looked beyond its own UCCJA and the Californian court's initial jurisdiction. The focus of the enquiry should thus not have been on which of the two decrees was enforceable. Under the provisions of the Missouri UCCJA the Californian initial jurisdiction was valid because that court exercised jurisdiction under the significant connection clause prior to Missouri acting in the matter as the home

136 S1738A(c).

137 Cox *supra* n 14 431-432.

138 *Glanzner v Glanzner* 835 SW 2d 386 (Mo Ct App 1992).

139 Cox *supra* n 14 448ff.

140 *Glanzner v Glanzner* 835 SW 2d 386 (Mo Ct App 1992).

state.¹⁴¹ *Glanzner*¹⁴² hammered a square peg into a round hole. The Missouri UCCJA required Missouri courts to stay proceedings where a custody matter was already properly before another court. The court did not do this, instead it picked and chose between the provisions of the UCCJA in deciding which provisions to apply. The court should not have done this. It had the undesirable consequence of importing a non-existent home-state preference into the interpretation of the UCCJA of Missouri which resulted in federal pre-emption.¹⁴³

It has been suggested by Viken that federal courts should be legislatively empowered to determine the state court with jurisdiction consistent with the PKPA to hear the custody matter.¹⁴⁴ The federal court would thus act as a referee to determine the appropriate forum. This would expedite a final determination in the best interests of the child.

2.2.4 Problems encountered with the PKPA

One of the principal problems associated with the PKPA is the problem of interpretation. This is especially so in relation to the meaning of "home state".¹⁴⁵ The PKPA defines the home state as the state in which the child lived with his or her parents, a parent, or a person acting as a parent, for at least six consecutive months immediately preceding the abduction.¹⁴⁶ This definition is almost identical to that in the UCCJA. The objective of defining the home state in this manner is to retain the

141 Cox *supra* n 14 449.

142 *Glanzner v Glanzner* 835 SW 2d 386 (Mo Ct App 1992).

143 Cox *supra* n 14 451ff.

144 Viken *supra* n 73 475-6. This proposal also meets with the approval of Murray *supra* n 108 614ff.

145 Baron "Federal preemption" *supra* 118 893ff.

146 PKPA s1738(a)(4).

exclusive modification jurisdiction of the court of rendition.¹⁴⁷ This jurisdictional basis was included in the Act in the belief that the court of the home state would be the court that would have access to information and knowledge essential to the determination of what would be in the best interests of the child. Despite this some courts have interpreted "home state" as the state that issued the original decree or the state of the custodial parents' domicile.¹⁴⁸ This is further confused in situations where there has been a joint custody award.¹⁴⁹

Furthermore, the PKPA and UCCJA are extremely complex and are thus often misapplied and the underlying policies frustrated.

3 RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY CUSTODY DECREES

In the past the recognition and enforcement of foreign custody awards was not actively encouraged in American courts.¹⁵⁰ The policy of recognition of sister-state custody awards where possible was not extended to international awards. In the Restatement¹⁵¹ Beale indicated that sister-state and foreign judgments would be enforced where awarded by the court of the place of a child's domicile and would only be modified on

147 *Michalik v Michalik* 164 Wis 2d 544, 476 NW 2d 586 (1991); *Schute v Schute* 607 A 2d 890 (Vt 1992).

148 DeMelis *supra* n 1 1342-1343 and ns.

149 It should be noted too that the UCCJA and PKPA may also play a role in interstate adoption custody disputes. Although this falls outside of the ambit of this study the reader is referred to Crawford M Notes: "In the Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Disputes" 1994 19 *Vermont LR* 99 (Crawford).

150 Shirman BJ "International Treatment of Child Abduction and the 1980 Hague Convention" 1991 15 *Suffolk Transn'l LJ* 188 191-195; *Rzeszotarski v Rzeszotarski* 296 A 2d 431 (DC 1972).

151 Restatement, Law of Conflict of Laws 1934 American Law Institute s144, comment (a), ss145-147.(Restatement, 1st)

the basis of factors arising after the previous award.¹⁵²

The 1961 Hague Convention on the Protection of Minors, in force in a number of European countries but not in the US, adopted the criterion of the child's habitual residence both for initial and modification jurisdiction in custody matters.¹⁵³ This Convention did not address the kidnapping problem.¹⁵⁴ As this Convention is in force in a number of European countries,¹⁵⁵ American decrees are subject to modification in these Convention countries and states and many other civil law countries to the same extent as they are interstate, even though the basis upon which modification is sought may differ.

In the US foreign custody decrees are subject to modification on the grounds of lack of original jurisdiction of the rendering court or a subsequent change in circumstances, subject to the requirements of the Hague Convention.¹⁵⁶ Before the advent of the Hague Convention on the Civil Aspects of International Child Abduction¹⁵⁷ the Privy Council took the lead in child abduction cases in the matter of *McKee v McKee*,¹⁵⁸ an appeal from the Supreme Court of Canada.¹⁵⁹

An examination of the psychological impact of parental child snatching on aggrieved

152 See too Restatement, 2d *supra* n 10 ss92, 98; Ehrenzweig AA "Recognition of Custody Decrees Rendered Abroad - Law and Reason Versus the Restatement" 1953 II *AJCL* 167 (Ehrenzweig *AJCL*).

153 Scoles and Hay *supra* n 3 550. This Convention is currently in force in Austria, France, Germany, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey, Italy and Yugoslavia.

154 See Ehrenzweig AA and Jayme E *Private International Law* (Vol II) Special Part Sijthoff, Leiden (1973) 247ff (Ehrenzweig and Jayme).

155 See n 153 *supra*.

156 Ehrenzweig and Jayme *supra* n 154 251 n59; Scoles and Hay *supra* n 3 551.

157 The Hague Convention.

158 [1951] AC 352 (PC).

159 Discussed in Ehrenzweig *AJCL supra* n 152 234; McClean *supra* n 3 69ff.

parents clearly demonstrated the need for the implementation of the Hague Convention in the US.¹⁶⁰

The UCCJA, which addresses the problem of child abductions at an interstate level, also has an effect upon the international context.¹⁶¹ Section twenty three of that Act provides that the principles of the UCCJA shall also apply to foreign country judgments where sufficient notice and an opportunity to be heard were afforded all interested parties.¹⁶² However, the various alternative grounds of jurisdiction provided for in the UCCJA enable a court to uphold local jurisdiction for modification when this seems desirable.

After repeated calls for the implementation of the Hague Convention¹⁶³ it was implemented in the US in 1988 by the International Child Abduction Remedies Act

160 It should be noted that there are serious psychological implications for all persons involved with a child snatching, including the snatcher himself or herself. Often snatchers are on the run. They cannot obtain long-term employment and are often financially insecure because of the constant need to move on. This situation can cause the snatcher extreme frustration which may manifest itself in his or her attitude towards the child. Often the child is ill-treated or abused by the snatcher. The child cannot form normal relationships with peers and lives an unsettled life because of the need to remain hidden. The parent who is left behind by the snatcher and child suffers extreme anguish, not knowing where the child is and how the child is being treated. These psychological implications are discussed in detail in Abrahms S *Children in the Crossfire* Atheneum, New York (1983) especially chs 1, 2 & 3 (Abrahms).

161 UCCJA s23. This section has been accepted as part of the UCCJA of all the states of America except Missouri, New Mexico, Ohio, and South Dakota. See Haralambie vol I *supra* n 16 39 n207; Crouch *supra* n 7 40-41; Frank RJ "American International Responses to International Child Abductions" 1984 16 *NY Uni Jour Intn'l Law and Politics* 429-432 (Frank); Scoles and Hay *supra* n 3 551.

162 See in this regard Herring *supra* n 14 143ff; Stranko WA "International Child Abduction Remedies" 1993 July *Army Lawyer* 28 32-35 (Stranko).

163 Blynn *supra* n 14 esp 379ff; Helzick CS "Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction" 1987 5 *Boston Uni Int'l LJ* 119 (Helzick); Slotter LH "The Light at the End of the Tunnel: The Hague Convention on International Child Abduction has Reached Capitol Hill" 1986 9 *Hastings Int'l and Comp LR* 285 (Slotter).

(ICARA).¹⁶⁴ This Act gave concurrent original jurisdiction over Convention return cases to state and federal courts in order that a party making a claim in such a case could choose the applicable court system.¹⁶⁵ The Office of Citizens' Consular Services in the Bureau of Consular Affairs of the State Department is the Central Authority for the US.¹⁶⁶

The objectives of the Convention are:¹⁶⁷

- To compel the return of a child to its state of habitual residence so as to ensure the proper determination of custody;¹⁶⁸ and

164 42 USC s11601-11610 (1989). For a detailed discussion of the implementation of the Hague Convention in the US, see further McDonald *supra* n 14 295-312; Bodzin *supra* n 14 212-217; Silberman L "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" *FLQ* 9 14ff (Silberman *FLQ*); Silberman L "Hague International Child Abduction Convention: A Progress Report" 1994 57 *L&CP* 209 (Silberman *L&CP*); Hoff PM "An Overview of the North American Symposium on International Child Abduction 1994 28 *FLQ* 1 (Hoff Overview); Rivers DR Comment: "The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing the Doors to the Parent Abductor" 1989 2 *Transn'l Law* 589 630-633 (Rivers); Herring *supra* n 14 138-139 & n9; Dallmann PD "Hague Convention on Parental Child Abduction an Analysis of Emerging Trends in Enforcement by US Courts" 1994 5 *Intn'l & Comp LR* 171 173-174 (Dallmann); Pfund PH "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners" 1990 24 *FLQ* 35 38ff (Pfund) 42-44; Starr LA "Recent Developments: United States Implementation of the Hague Convention on the Civil Aspects of International Child Abduction" 1987 Fall *Stanford Jour Intn'l Law* 289 (Starr); Hilton WM "Handling a Hague Trial" 1992 6 *AJFL* 211 (Hilton "Handling a Hague Trial").

165 S4(a). See Haralambie vol I *supra* n 16 53; Haralambie vol II *supra* n 16 320ff; Stranko *supra* n 162 31-32; LeGette C "International Child Abduction and the Hague Convention: Emerging Practice and the Interpretation of the Discretionary Exception" 1990 25 *Texas Intn'l LJ* 287 (LeGette).

166 Rutherford JR "Removing the Tactical Advantages of International Parental Child Abduction Under the 1980 Hague Convention on the Civil Aspects of International Child Abductions" 1991 8 *Arizona Jour Intn'l & Comp Law* 149 153 (Rutherford). For a discussion of the US Central Authority see Starr *supra* n 164 303-305. Frank *supra* n 161, whose article was written before the implementation of the Hague Convention, explored the manner in which the American Central Authority might be designated at 470-471.

167 For a full discussion of the Hague Convention see ch 3 *supra*.

168 As to what constitutes "habitual residence" see further "3.1 Weaknesses in the Hague Convention (b)" *infra*. See too Herring *supra* n 14 152-156; Dallmann *supra* n 164 185-190; Haralambie vol I *supra* n 16 55.

- to ensure that custody and access rights under the laws of one contracting state are effectively respected in other contracting states.¹⁶⁹

The Convention is a procedural device and does not involve a substantive determination of custody.¹⁷⁰ The initial response to the Convention was very positive.¹⁷¹ A comparative analysis of the UCCJA and ICARA reveals that the scope of the Convention is limited. It seeks only the *status quo ante* and leaves the determination of custody to the state to which the child is returned.¹⁷²

3.1 Weaknesses in the Hague Convention

The Hague Convention is not without weaknesses:¹⁷³

- (a) It applies only between countries which are signatories.¹⁷⁴ For this reason the most serious limitation on the Convention is of course the fact that there are still many countries that are not members of the Hague Convention. Such non-

169 Dallmann *idem* 5 182ff; Daigle DC "Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exceptions" 1993 26 *Vanderbilt Jour Transn'l Law* 865 868-869 (Daigle).

170 Silberman *L&CP supra* n 164 212; Bodenheimer *FLQ supra* n 5 102-103.

171 Silberman *L&CP idem* 216ff. See too Dyer A "The Hague Child Abduction Convention - Past Present and Future" in *North American Symposium on International Child Abduction: How to Handle International Child Abduction Cases* 10 1993 (Dyer); LeGette *supra* n 165 288; Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction January 18-21 1993/1994 XXXIII *ILM* 225.

172 Rutherford *supra* n 166 151. Starr too is critical of the scope of the Convention: Starr *supra* n 164 296-7.

173 Silberman *L&CP supra* n 164 217ff; Morgenstern *supra* n 5 478ff.

174 Dallmann *supra* n 164 180; Haralambie vol I *supra* n 16 55; *In re Moshen* 715 F Supp 1063 (D Wyo 1989); Daigle *supra* n 169 870; Rutherford *supra* n 166 155; Frank *supra* n 161 449. On non-Convention cases see Levy RJ "Memoir of an Academic Lawyer: Hague Convention Theory Confronts Practice" 1995 29 *FLQ* 171-186 in which the author traces the progress of a case in which two children were abducted from South Africa to the US (Levy); Herring *supra* n 14 171-172. The practical implications of this are clearly set out in McKeon ML "International Parental Kidnapping: A New Law, A New Solution" 1996 30 *FLQ* 235 (McKeon) 235-236.

member states seriously limit the efficacy of the Convention by creating safe havens for abductors.¹⁷⁵

- (b) It does not adequately define either "custody rights" or "habitual residence".¹⁷⁶ The concept of "custody rights" is central to the determination of whether or not a removal or retention is wrongful, such being the case only where the removal or retention is in breach of existing custody rights. However, the two concepts are closely intertwined and of extreme importance in relation to the implementation of the Convention. It is only with reference to the place of habitual residence or by reason of a judicial or administrative decision that a meaning can be ascribed to "custody rights". The relevant custody rights are those existing in the place of habitual residence at the date of the wrongful removal or retention.

The determination of habitual residence is often straightforward,¹⁷⁷ but may be complicated on occasion.¹⁷⁸ In *Meredith v Meredith*¹⁷⁹ habitual residence was affected by the abduction and re-abduction of the child. This dual abduction

175 Harper T "The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-abduction" 1995 9 *Emory Intn'l LR* 257 264 (Harper); Herring *supra* n 14 180-181.

176 See Silberman *FLQ supra* n 164 16-20; *David S v Zamira* 574 NYS 2d 429 (NY Fam Ct). *In re Schnier* 17 Fam L Rep (BNA) 1237 (NY App Div 1993); *Navarro v Bullock* 15 Fam L Rep (BNA) 1576 (Cal Super Ct Sept 1 1989) cited in Silberman *L&CP supra* n 164 219; *Viragh v Foldes* 612 NE 2d 241 (Mass 1993); Dallmann *supra* n 164 190-194; Kelly MM "Taking Liberties: The Third Circuit Defines "Habitual Residence" Under The Hague Convention on International Child Abduction" 1996 41 *Villanova LR* 1069 (Kelly) 1072ff; Bailey M "Rights of Custody" Under the Hague Convention" 1997 11 *BYU Jour of Public Law* 33 (Bailey).

177 *Tyszka v Tyszka* 200 Mich App 231, 503 NW 2d 726 (1991) discussed by Silberman *L&CP supra* n 164 225.

178 See *Meredith v Meredith* 759 F Supp 1432 (D Ariz 1991) cited in Silberman *L&CP idem* 225-226; Dorosin M Note: "You Must Go Home Again: *Friedrich v Friedrich*, the Hague Convention and the International Child Abduction Remedies Act" 1993 18 *NCJ Intn'l L & Com Reg* 743 753-4 (Dorosin).

179 759 F Supp 1432 (D Ariz 1991).

situation also arose in *Tahan v Duquette*¹⁸⁰ where the court indicated that habitual residence "is established by someone being awarded custody or by somebody being entitled to custody even without there being an order for custody".¹⁸¹ The Court in that case found that as the custody order was issued by a Canadian court that Canada was the place of habitual residence. This in fact was incorrect, New Jersey should have been regarded as the place of habitual residence.¹⁸² Other cases in which the issue of habitual residence arose include *In re Collopy*¹⁸³ and *Friedrich v Friedrich*.¹⁸⁴ In the latter case, the court was careful to point out that habitual residence was not the same as domicile.¹⁸⁵ In *Levesque v Levesque*¹⁸⁶ the court regarded habitual residence as a fluid concept with a basis in fact. It required a continuity of living in a particular place to create an impression of settlement, an impression negated, according to the *Ponath* case,¹⁸⁷ by coercion. This view of the effect of coercion on habitual residence was not adopted in the *Prevot* case.¹⁸⁸ Another factor which may complicate the determination of the place of habitual residence of the child occurs where one party has agreed to relinquish custody to the other parent for some time and then demands the child's return.¹⁸⁹

180 259 NJ Super 328, 613 A 2d 486 (App Div 1992), 600 A 2d 472 (NJ Super Ct App Div 1991).

181 *Idem* at 476.

182 See Dorosin *supra* n 178 753.

183 No 90 DR 1138 (Col Dist Ct Div B Adams Cty May 8 1991) cited in Silberman *L&CP supra* n 164 226-227.

184 983 F2d 1396 (6th Cir 1993).

185 *Idem* at 1402. For a full discussion of this case, the first federal case to reach appellate level, see Dorosin *supra* n 178; Daigle *supra* n 169 872-874.

186 816 F Supp 662 (D Kan 1993).

187 *In re Ponath* 829 F Supp 363 (D Utah 1993) 367.

188 *In re Prevot* 855 F Supp 915 (WD Tenn 1994).

189 *Slagenweit v Slagenweit* 841 F Supp 264 (ND Iowa 1993) see esp 270; *Feder v Evans-Feder* 866 F Supp 860 (ED Pa 1994), discussed in Kelly *supra* n 176 1073ff. See also Silberman *FLQ supra* n 164 20-24.

- (c) Article thirty-five of the Hague Convention limits its application to wrongful removals and retentions which take place after the implementation of the Convention in a particular country.¹⁹⁰
- (d) The clauses of the Convention in which exceptions are created and in terms of which return of the child is not mandated are worded in such a manner as to enable a court to invoke an exception as a pretext to mask a decision with a basis in cultural beliefs or national or religious bias.¹⁹¹

The discretionary exceptions¹⁹² include article 13(b) which allows the judge a discretion to refuse to order the child's return in circumstances where there is a grave risk of harm to the child. "Grave risk" is not defined in the section and is thus open to judicial manipulation.¹⁹³ The threshold level of harm is also not quantified. The US has thus interpreted the provisions of article 13(b) to be relevant only where there is internal strife and unrest in the place of habitual residence and the circumstances in that place would place the child at risk.¹⁹⁴ This will not necessarily be the interpretation placed upon the article by other nations. This article also allows the court to refuse return of the child in situations where the child will be placed in an intolerable situation. Such a situation seems to include societal circumstances as well as familial circumstances. Again the judge has a very wide discretion in determining what constitutes an intolerable

190 Silberman *L&CP supra* n 164 232; *Kilgour v Kilgour* 1987 Sess Cas 55 (Ct Sess Outer House Dec 24 1986)(Scot); *Gollogly v Owen* 13 Fam LR 622 (Austl Fam Ct Townsville Oct 5 1989).

191 Harper *supra* n 175 259; Silberman *L&CP idem* 233ff; Herring *supra* n 14 163ff; Silberman *FLQ supra* n 164 25ff; Daigle *supra* n 169 874ff; Frank *supra* n 161 451-456.

192 Discussed fully in ch 3 *supra*.

193 See *Sheikh v Cahill* 145 Misc 2d 171, 546 NYS 2d 517 (Sup Ct 1989) discussed in Rutherford *supra* n 166 156-158; Starr *supra* n 164 298-300.

194 Snyder ES "Convention Aids Returns in Abduction Cases" 1993 Nov *NJLJ* 11 (Snyder); Dallmann *supra* n 164 196-199; LeGette *supra* n 165 289-290, 297ff.

situation.¹⁹⁵ This section creates an ideal pretext for non-Western countries to refuse to order the return of American children to America.

The limits of the defence which have been restrictively interpreted in the US and some other Convention countries are set out in a string of cases in which the defendant failed to provide "clear and convincing proof of the grave risk of harm which would arise in the event that the child/children were returned".¹⁹⁶ This defence was given further parameters in *Tahan v Duquette*¹⁹⁷ in which case the hearing limited its investigation, for purposes of the article 13(b) enquiry, to a determination of whether the place of habitual residence was subject to such "internal strife or unrest as to place the child at risk".¹⁹⁸ This view was rejected on appeal as being both too narrow and too mechanical. The court of appeal did however agree with the lower court's finding that psychological profiles and an examination of the fitness of parties to act as parents was also not a suitable avenue to be followed in such cases.¹⁹⁹ The appeal court thus sought to establish the presence of a realistic concern for the well-being of the child within the context of the environment to which the child was to be returned and the basic qualities of the persons present within that environment. Such grave risk was not established and the lower court's order for the return of the children was upheld. This narrow approach of the court is mirrored in other Convention countries such

195 Harper *supra* n 175 260-261. In the case of *PF v MF* 1992 Ir SC 390 the Irish Supreme Court refused to return a child abducted from the US (Massachusetts) on the basis that the father's inability to manage the finances of the family responsibly would place the child in an intolerable situation.

196 *Renovales v Roosa* No FA 91-0392232-S, 1991 WL 204483 (Conn Super Ct Sept 27 1991); *Navarro v Bullock* 15 Fam L Rep (BNA) 1576 (Cal Super Ct 1989) esp 1577; *In re Prevot* 855 F Supp 915 (WD Tenn 1994). These cases are discussed in Silberman *L&CP supra* n 164 236-237.

197 613 A 2d 486 (NJ Super Ct App Div 1992). For a detailed discussion of this case, see Lurvey I "Not Just Law But Wisdom" 1993 15 *Fam Adv* 8 (Lurvey); Daigle *supra* n 169 875-877.

198 *Tahan v Duquette idem* 489.

199 *Ibid.*

as England.²⁰⁰

This exception was successfully relied upon in circumstances where the parent to whom the child was to be returned had been guilty of a previous abduction.²⁰¹

The consent exception, also contained in article 13, allows the judge to refuse return in instances where the child objects to his or her return in circumstances where the court should take notice of the child's wishes. The judge has a discretion to determine the maturity of the child in question.²⁰² The wishes of a child are malleable and the parent with whom the child is currently resident may brainwash him or her.²⁰³ In the US the question has arisen: Does the child have a constitutional right to remain in the US if he or she expresses a desire to do so?²⁰⁴ In *Bergstrom v Bergstrom*²⁰⁵ the court refused to adjudicate upon the constitutional issue stating that custody is a factual issue best dealt with at state court level.²⁰⁶ The third circuit court of appeals did, however, indicate in *Acosta v Gaffney*²⁰⁷ that a child does not have a fundamental right to remain in the US

200 See ch 5 "2.5.1 The Hague Convention at English Law *supra*.

201 *d'Assignies v Escalante* No BD 051876 (Cal Supr Ct Dec 9 1991) discussed in Silberman *L&CP supra* n 164 242-243.

202 See Harper *supra* n 175 262-263; Dallmann *supra* n 164 200-201; Nanos R "The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Convention" 1996 22 *Brooklyn Jour Intn'l Law* 437 (Nanos) 443ff. See *Wanninger v Wanninger* 850 F Supp 78 (D Mass 1994); *Currier v Currier* 845 F Supp 918 (D NH 1994) with regards to what constitutes acquiescence. This defence has only been used occasionally: *Bickerton v Bickerton* No 91 06694 (Cal Super Ct *Contra Costa* Cty July 17 1991); *Matter of McIntyre & Hammon* (Kan Civ Ct Johnson Cty July 15 1990) cited and discussed in Silberman *L&CP idem* 245 and n 176. The grave risk exception contained in art 13(b) has been used extensively: Silberman *L&CP op cit* 235; LeGette *supra* n 165 287 esp at 298-304.

203 See *Sheikh v Cahill* 145 Misc 2d 171, 546 NYS 2d 517 (Sup Ct 1989).

204 Daigle *supra* n 169 887.

205 623 F 2d 517 (8th Cir 1980).

206 *Bergstrom v Bergstrom idem* 519; Daigle *supra* n 169 888.

207 558 F 2d 1153 (3d Cir 1977).

if he or she was born there and his or her parents were deported. Similarly, in custody cases such as *Tischendorf v Tischendorf*,²⁰⁸ the Minnesota Supreme court found that a child did not have an independent constitutional right to remain in the US where a custody decree judicially determined that the best interests of the child would best be served by the child living with a parent elsewhere. The right of the child only becomes effective when a sufficient degree of maturity has been reached for the child to exercise it circumspectly and responsibly.²⁰⁹

Article 20 allows yet another discretionary exception in instances where return would be inconsistent with fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.²¹⁰ This exception focuses on harm arising from returns to a particular country. It has not yet been relied upon successfully.²¹¹ This particular exception has a basis in public policy. The public policy exception created by article 20 is not, however, an unlimited type of exception and does not offer the requested state unrestricted scope. Article 20 may only be invoked in instances where the principles of human rights have been accepted into the law of the requested state. The drafters suggested that to reasonably limit the application of this article it should be restricted to instances where the return of the child would violate the internal law of the requested state and not simply be incompatible with the policies or culture of that state. The policy exclusion should not be invoked any more frequently than it would be invoked in ordinary domestic judicial proceedings.²¹² The US courts

208 321 NW 2d 405 (Minn 1982).

209 *Tischendorf v Tischendorf* 321 NW 2d 405 (Minn 1982) 410. On the limitation of the rights of children as opposed to those of adults see *Schleiffer v Meyers* 644 F 2d 656 (7th Cir 1981), decided before the implementation of the Hague Convention in the US.

210 Starr *supra* n 164 298-300.

211 Silberman *L&CP supra* n 164 242. See too Explanatory Report by official Convention Reporter Elisa Perez-Vera, published in Acts and Documents of the Fourteenth Session Book III (1980) 433-434 ("Perez-Vera report"); Dallmann *supra* n 164 199-192; Daigle *supra* n 169 877-879.

212 Daigle *supra* n 169 878-879; Eekelaar J "International Child Abduction by Parents" 1982 32 *U Toronto LJ* 281 314 (Eekelaar).

look to ICARA for internal law in implementing Article 20 of the Hague Convention.²¹³

The UCCJA and PKPA, which afford the due process rights to notice and an opportunity to be heard in child-custody cases, are also relevant to the application of article 20.²¹⁴ In defined circumstances the UCCJA gives the court an opportunity to make a custody determination,²¹⁵ whereas the Hague Convention only allows the court to determine whether or not there has been a wrongful removal and thus does not guarantee that the custody hearing meets with due process requirements. In *Horlander v Horlander*²¹⁶ the court stated that the UCCJA required the recognition of a foreign custody decree only where all interested parties received reasonable notice and an opportunity to be heard.²¹⁷ The appeal court refused to consider whether or not the trial court's custody finding violated Hague Convention policy.²¹⁸ The *Horlander* opinion indicates that if the French court had not given the father due notice of the proceedings and an opportunity to be heard then the court would not have returned the child under the Hague Convention. This potential conflict between the Hague Convention and the UCCJA might well be an appropriate place for the application of an article 20 exception.

- (e) Under the Convention an aggrieved parent has only one year from the date of the abduction within which to institute action before the judicial or administrative authority of the contracting state where the child is to be found. If he or she fails

213 *Klam v Klam* 797 F Supp 202 (ED NY 1992).

214 *Klam idem* 205; Daigle *supra* n 169 880ff.

215 S4.

216 579 NE 2d 91 (Ind Ct App 1991).

217 *Idem* at 96. See too Katz *supra* n 4 28-29.

218 *Horlander v Horlander* 579 NE 2d 91 (Ind Ct App 1991) 98-99.

to do so the court has a discretion to determine whether or not the child is settled in his or her new environment. This discretion also allows for extensive judicial discretion which is open to many subjective criteria.²¹⁹ This provision may cause undue problems in instances where the aggrieved parent has been unable to locate the child and the action has not been instituted for reasons other than the delinquency of the parent. Action cannot be instituted under the Hague Convention until the child's location is known. This clause was included for the laudable purposes of:

- Protecting the child from the actions of an ambivalent parent who hesitated before initiating proceedings; and
- taking note of the speed with which children adapt to new surroundings. However, it may prove to be a double-edged sword, since one of the most important difficulties experienced with the application of the Hague Convention centres on the location of kidnapped children. This difficulty is compounded by the inadequacy of legal-aid resources to assist parents where the child has been recovered.²²⁰

(f) The Convention applies only in respect of children under the age of 16. This is a factual limitation that does not permit any discretion. Despite this it may occasion some difficulty in that it requires that the Convention cease to apply to a child who is the subject of Convention proceedings and who attains the age of sixteen at any time during the proceedings. This is so despite any physical or

219 Frank *supra* n 161 450-451; Harper *supra* n 175 263; Dallmann *supra* n 164 201-203; Starr *supra* n 164 297-298.

220 LeGette *supra* n 165 288. For a note on steps to be taken in locating an abducted child, see *inter alia* Marks ER "Fighting Back - The Attorney's Role in a Parental Kidnapping Case" 1990 64 *Florida Bar Jour* 23-26 (Marks).

mental dependency of the child.²²¹ Delaying tactics by the abductor before and during the proceedings could thus have a very serious impact upon the process.²²²

- (g) The Convention is not retroactive and will thus not assist in resolving outstanding abduction cases.
- (h) The deterrent effect of the Convention applies only to contracting states.²²³ In the absence of the Hague Convention the domestic laws of the receiving state apply and the best interests of the child will be considered. The problem here is that the conception of what is in the best interests of the child is not reflected uniformly among countries.²²⁴ In instances where a child is removed to a non-contracting state, or one of the discretionary exceptions is invoked, re-abduction may be a last resort available to the aggrieved parent.²²⁵ In the event of a re-abduction the question arises, could the initial abductor invoke the Convention and force the return of the child to him or her? It seems that the answer to this question lies in the determination of the child's habitual residence. If the child was abducted, the abduction cannot result in a change of habitual residence because the move was not sanctioned by the custodial parent. The US remains the place of habitual residence. Therefore the Convention could not be relied upon as it is only available in instances where the abduction is from the place of

221 Art 4 of the Convention, see Silberman *L&CP supra* n 164 244; Dallmann *supra* n 164 194-195; Shirman *supra* n 150 241.

222 Silberman *L&CP idem* 246-247.

223 See 3.1(a) above: Harper *supra* n 175 265; Pinkleman J "Child Custody Unit Helps Parents Keep Track" 1991 Jan 12 *US Dep't of State Dispatch* 49 (Pinkleman); Mackie S "Procedural Problems in the Adjudication of International Parental Child Abduction Cases" 1996 10 *Temple Intn'l & Comp LJ* 445 (Mackie).

224 Harper *idem* 267-268.

225 Harper *idem* 268ff; Gaw M "When Uncle Sam Needs to Come to the Rescue" 1987 9 *Fam Adv* 24 25 (Gaw). More about re-abduction *infra*.

habitual residence.²²⁶

- (i) One of the stated objectives of the Hague Convention is to ensure the prompt return of the child.²²⁷ Despite this there are sometimes lengthy delays between the institution of proceedings under the Convention and the return of the child.²²⁸ Ordinarily time starts running from the date of the wrongful removal. A request for the return of the child would then be filed with the Central Authority in the requesting state which would transmit the request to the requested state which would take steps to locate the child and commence steps for return of the child with the appropriate authorities. Delays may be caused by difficulties in locating the child and identifying the appropriate state for return proceedings. In other instances judicial delays may take place. Such delays include those caused by the civil procedure rules of the requested authority regarding such matters as: giving notice of a hearing, setting return dates, requesting adjournments for various reasons, obtaining social work reports, etc.²²⁹ Hilton questions whether or not an abductor parent should be allowed to benefit from such delays by claiming that the child has been settled with him or her for such a substantial period that to return him or her now would constitute a grave risk under article 13 (b) of the Convention.²³⁰ Intuitively, the answer is "no" but, unfortunately the matter is not that simple. The underlying policy of the Convention is that the interests of the child are paramount. ICARA²³¹ states that the Convention's policy is not to benefit a wrongdoer by his own actions, but to facilitate the prompt

226 *Meredith v Meredith* 759 F Supp 1432 (D Ariz 1991).

227 Art 1 (a).

228 Hilton WM "The Effect of Judicial Delay in Proceedings Under the Convention on the Civil Aspects of International Child Abduction" 1995 9 *Am J FL* 155 (Hilton "Judicial delay").

229 Hilton "Judicial delay" *idem* 155 where the author mentions the case of *Barlow v Barlow* (Switzerland 1993) in which proceedings were held up for a year and a half due to judicial delays.

230 *Idem* 156.

231 *Supra* n 164 s11401.

return of the child. To allow the wrongdoer here to rely on an article 13 exception would frustrate the purpose of the Convention.²³²

Perhaps the situation under the UCCJA may be used as a guide. The objectives of the UCCJA are parallel to those of the Convention.²³³ In UCCJA cases in which there has been a substantial judicial delay, the courts have stated that the judicial delay is not taken into account and that the determination is made in accordance with the *status quo* existing at the date of commencement of the proceedings.²³⁴ In conclusion, therefore, the principal objective of the Convention is to secure the prompt return of the child to the place of habitual residence as it was at the date of the abduction. The court may only look at the facts that prevailed at the time of commencement of the proceedings and may not base its decision upon facts and events that occurred subsequently.²³⁵

3.2 The Hague Convention within the context of the wider custody laws of the US²³⁶

The Hague Convention specifies that it will not preclude direct application by an aggrieved parent of an abducted child to any administrative or judicial authority of a

232 Hilton "Judicial delay" *supra* n 228 156; "Perez-Vera report" *supra* n 211 34 where the author calls for a restrictive interpretation to be placed upon the exceptions.

233 Hilton "Judicial delay" *idem* 157.

234 Hilton "Judicial delay" *idem* 157-158; *Curtis v Curtis* 574 So 2d 24 (Miss 1990) 29-30; *Rexford v Rexford* 631 P 2d 475 (Alaska 1980) 478; *Plas v Superior Court* 155 Cal App 3d 1008 1015, 202 Cal Rptr 490 (1984) 494; *Hegler v Hegler* 383 So 2d 1134 (Fla Dist Ct App 1981) 1137; *Bull v Bull* 311 NW 2d 768 (Mich Ct App 1981) 774; *Com ex rel Octaviano v Dombrowski* 434 A 2d 774 (Pa Super Ct 1981) 777; *Boyd v Boyd* 653 SW 2d 732 (Tenn Ct App 1983) 738; *Irving v Irving* 682 SW 2d 718 (Tex Ct App 1985) 721.

235 Hilton "Judicial delay" *idem* 159.

236 Haralambie Vol I *supra* n 16 58 and Stranko *supra* n 162 32ff neatly and briefly explain how the Hague Convention procedures are implemented.

contracting state otherwise than in terms of the Convention.²³⁷ In the US legal action outside of the Convention is permissible in terms of ICARA. This Act states that the remedies available in terms of that Act are in addition to and not in lieu of the provisions of the Convention.²³⁸ Furthermore, the UCCJA²³⁹ extends the principles of that Act to international cases in which the jurisdictional requirements of that Act have been met.²⁴⁰ It may be more advantageous to rely on the Hague Convention which is available even where there is no existing custody decree.²⁴¹ Hilton suggests that in appropriate circumstances it is always prudent to file an action under both section 23 of the UCCJA and the Hague Convention in the alternative.²⁴² The UCCJA confers modification responsibility on the state that made the original order. An aggrieved parent may thus have a remedy under either the Convention or the UCCJA. The latter may include an order directing an abductor to return the child to the custodial parent in the original state, but will not ensure that the return takes place.²⁴³

Could a re-abducting parent be subject to a remedy arising under the UCCJA? American courts have interpreted the Act as not giving any remedy outside of the Convention.²⁴⁴ Thus it would seem that neither ICARA nor the Convention may be used by a first abductor in the event of a true re-abduction. The first abductor's only possible remedy is in terms of section 23 of the UCCJA which states that the general policies of the Act extend into the international arena. This Act includes the provision that a foreign court order will be recognised and enforced if reasonable notice was given and

237 Art 29.

238 *Supra* n 164 s11601(b).

239 *Supra* n 7 s23.

240 Silberman *L&CP supra* n 164 249-250.

241 Dallmann *supra* n 164 184.

242 Hilton "Handling a Hague trial" *supra* n 164 214.

243 Silberman *L&CP supra* n 164 250.

244 *Moshen v Moshen* 715 F Supp 1063 1065 (DC Wyo 1989); Harper *supra* n 175 272-273.

all affected parties were given an opportunity to be heard.²⁴⁵ Section 23 was not adopted by Missouri, New Mexico, Ohio and South Dakota. For this reason a re-abductor in one of those states need not be concerned that the courts will recognise and enforce any custody decree issued by the foreign court in favour of the first abductor. In the other forty-six states however, this provision of the UCCJA could found a basis for the return of the child to the abductor.²⁴⁶ Of course the re-abductor must have had reasonable notice of, and an opportunity to be heard at, the proceedings at which the first abductor obtained a custody award in his or her favour.²⁴⁷ It seems likely that the American courts would refuse jurisdiction to hear a custody application filed by the abductor parent. This would accord with the objectives of the UCCJA.²⁴⁸

4 KIDNAPPING, RE-STEALING AND EXTRADITION

Both the international and interstate position on the recognition and enforcement of foreign custody orders could benefit from a review of federal kidnapping laws. Kidnapping laws are designed to protect both the rights of the parents and the liberty of the child against infringement by third parties. Parental status has historically been successfully used as a defence to kidnapping charges.²⁴⁹ This situation has been further aggravated by the incongruity of approaches in different states.²⁵⁰ Abducting parents are often afforded new custody hearings in the receiving state despite the

245 S23.

246 Harper *supra* n 175 273.

247 Harper *idem* 273ff; *Schmidt v Schmidt* 548 A 2d 195 (NJ Super AD 1988) 198. On the attitude of the courts toward s23 see *Middleton v Middleton* 227 Va 82 (1984) 95-96.

248 Harper *idem* 275.

249 Agopian MW *Parental Child-Stealing* Lexington Books Lexington, Massachusetts, Toronto (1981) 30 (Agopian).

250 *Idem* 30-31.

contempt of an existing order.²⁵¹ This practice has led to endless changes in the original decree. Court infighting has also led to inconsistencies in the policies applied in cases of parental child-stealing. Bodenheimer indicates three bases upon which a new custody hearing may be granted in a particular jurisdiction:

- The second judge may disagree with, or mistrust the existing decree;
- the second court may be more receptive to a "local" parent; or
- all persons concerned, including the judge, may become embroiled in the emotionalism surrounding the issue.²⁵²

It has thus become impossible to treat both parents equally.

Initially, the Federal Kidnapping Act was only applicable to interstate kidnapping for ransom, reward, or other unlawful purposes. It was not applicable to parental child-snatching. The reason for this exclusion was to prevent the legislation from leading to the prosecution of parents who took children across state lines in contravention of a custody decree or to avoid jurisdiction.²⁵³ The Fugitive Felon Act, which made it a felony for anyone to travel interstate to avoid prosecution for an offence which is a felony in terms of state laws, was ineffective in that it could only be invoked if a further felony had been committed or the physical or moral welfare of the child was impaired. In America today parental kidnapping is both a criminal offence and a civil matter.²⁵⁴ The civil matter relates to the custody, welfare, and well-being of the child, while the criminal

251 Agopian *idem* 31; Ehrenzweig A "Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings" 1965 64 *Michigan LR* 1-12 (Ehrenzweig *Mich LR*); Ratner *supra* n 12 183-205.

252 Agopian *idem* 31; Bodenheimer *FLQ supra* n 5 83-100.

253 The Federal Kidnapping Act; Agopian *supra* n 249 29-30.

254 Fugitive Felon Act 18 USC; Prietsch JR "Interpol its Role in International Parental Kidnapping" 1995 Oct *Police Chief* 69 (Prietsch).

aspect addresses the criminal behaviour, that is the kidnap and the flight of the abductor with the child or children.²⁵⁵ An abductor parent may be charged with interference with a court order or parental kidnapping. The offences range from misdemeanours to felonies, depending upon the state law applicable in the place from which the child is abducted. Because of the increasing incidence of international parental child abduction both federal and state legislatures in the US have responded to the need to review existing legislation and to enact new legislation to deal with the issues. One such innovation in the legislative sphere was the introduction of the International Parental Kidnapping Act of 1993.²⁵⁶ This legislation makes international parental kidnapping a federal offence, subject to extradition and federal criminal penalties.

As was stated above, the PKPA extends the federal locator services to cases of parental child-snatching. This is sound, but in effect such services can be difficult to obtain because each state must enter into an agreement with the Office of Child Support Enforcement in order to have access to the Federal Parental Locator Services (FPLS) for parental kidnapping and custody cases. Hence it is at the discretion of each state whether or not to enter into such an agreement.²⁵⁷ Even if such an agreement has been concluded the reporting methods of the FPLS may hamper recovery as their databases are far from current. Many kidnapers change their names and social security numbers and disappear underground.²⁵⁸ Once a felon is traced, the FPLS cannot arrest him; police intervention is required. If the perpetrator is found outside the home state then extradition will be needed if the abductor parent is to be returned to the home state. If the law in his or her current location merely regards the child-snatching as a misdemeanour extradition will not take place.

255 *Ibid.*

256 18 USC s1204 (1993), discussed by McKeon *supra* n 174 239-241.

257 Abrahms *supra* n 160 102; Hershman *supra* n 17 1122-1123.

258 Abrahms *idem* 102-103.

The PKPA²⁵⁹ also makes the Fugitive Felon Act²⁶⁰ applicable in cases of interstate and international child-snatching. This Act makes it a felony to travel outside the state or country to escape prosecution for a felony, and allows the FBI to locate and apprehend such fugitives at the state prosecutor's request. The Justice Department has balked at these provisions and says it will only intervene where evidence of a third party shows the child to be neglected or abused in its current surroundings. Furthermore, the home state must have a felony statute for child-snatching and be willing to extradite. The parent whose custody rights have been infringed must show that the abductor has crossed state lines and must then obtain a felony warrant.²⁶¹

Individual states may adopt legislation making child-snatching a federal offence. In states where law enforcement agencies possess a discretion to file either misdemeanour or felony charges such a discretion permits a sensitivity to the circumstances of each individual case. State legislation could thus be used to close the loophole whereby an abductor may circumvent the system by moving to a "safe state". Interstate extradition laws could be enhanced. Such action could conceivably result in a diminution in the number of re-stealings.

Custodial vigilantes whose specialty is re-stealing kidnapped children are to be found in increasing numbers in the US. Re-abduction may be a criminal offence in the place where it is attempted and the first abducting parent may have obtained legal custody in that place. Hence the re-abduction may well breach an existing custody order. Even if the re-abduction is successful the abducting parent may be prevented from travelling to that place ever again.²⁶² An aggrieved parent may avoid the risk of arrest by

259 S10. The FBI will investigate even if the child is not in danger or in a position of abuse or neglect: 31 US Atty Bull 8 (Apr 29 1983). The criminal application of the PKPA requires an interstate flight and a state felony prosecution for custodial interference to apply: Haralambie vol II *supra* n 16 329.

260 *Supra* n 254.

261 Agopian *supra* n 249 103.

262 See Agopian *ibid*; Harper *supra* n 175 269.

remaining outside of the area of jurisdiction in which the child is located and making use of the services of a "mercenary" to carry out the re-abduction.²⁶³ As was mentioned above, complications arise where re-abductions take place from Hague Convention member states. Another difficulty that may arise in cases of re-abduction is the problem of extradition. The re-abduction often breaches a foreign custody decree or a law of the foreign country. In instances where there is an extradition treaty between the US and the foreign country from which the child was re-abducted, and both countries regard parental kidnapping as a criminal offence, extradition is a real possibility.

Prior to promulgation of the PKPA the US did not extradite or seek extradition in cases of parental kidnapping. However, today the US will honour an extradition treaty. The dual criminality requirement is the re-abductor's only hope.²⁶⁴ The International Parental Kidnapping Crime Act of 1993²⁶⁵ does not regard re-abduction in circumstances where the child was first abducted without the consent of the custodial parent to be a crime. This means that where A is in lawful custody of the child (C) in terms of a valid custody order, and B kidnaps C, A can kidnap C back. The Act permits A to rely upon the existence of a valid custody order in his or her favour, enforceable in terms of the UCCJA, as a defence. A would be innocent of any federal offence in the US. This is an affirmative defence and cannot be relied upon by an aggrieved parent whose child was abducted before the issue of a valid custody decree. For this reason a parent planning a re-abduction would be well advised to first obtain a valid American custody decree before embarking upon the re-abduction. In this way he or she will avoid any prospect of extradition.²⁶⁶ Even if an extradition request is honoured there is no provision for the return of the child.

263 For examples of re-abductions see Harper *idem* 270.

264 Harper *idem* 275-276.

265 107 Stat 1998 of 1993 S1204.

266 Harper *supra* n 175 276.

5 OTHER REMEDIES IN CASES OF PARENTAL CHILD SNATCHING

5.1 *Habeas corpus*

When custodial interference has taken place, the parent in possession of a valid custody order may apply for a writ of *habeas corpus*. In this case a writ is served calling for the immediate production of the child before the court.²⁶⁷ Other remedies and sanctions have included a change of custody or a restriction of visitation.²⁶⁸ In instances where there are firm grounds to believe that the child will be removed from the country the custodial parent may obtain a passport for the child and keep it in a safety deposit box. The court may make an order regarding the issue or surrender of a passport or, in the event of dual nationality, passports.²⁶⁹

5.2 Tort Remedies

Civil damages, either for tortious interference with custody or intentional infliction of emotional distress, offer a remedy in some instances.²⁷⁰ Most states recognise some tort for custodial interference.²⁷¹ Some states have created a statutory cause of action while

267 Haralambie Vol II *supra* n 16 323; Katz *supra* n 4 102-108.

268 Haralambie vol II *idem* 323-326 & ns.

269 *Idem* 326-327.

270 Bentch ST "Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal" 1986 18 *St Mary's LJ* 361 380-385 (Bentch). On tort suits see *Lloyd v Loeffler* 539 F Supp 998 (ED Wis), 694 F 2d 489 (7th Cir 1982) discussed in Hemming RB "Parental Kidnapping, Child Stealing, and the Parental Kidnapping Prevention Act" 1983 7 *Jour Juv Law* 246 246-249 (Hemming); *Wasserman v Wasserman* 671 F 2d 832 (4th Cir 1982). On damages actions under civil rights legislation see *Hooks v Hooks* 771 F 2d 935 (6th Cir 1985) (domestic relations exception to federal jurisdiction does not bar an action under 24 USCA s1983 for damages for deprivation of child custody without due process); *Stem v Ahearn* 908 F 2d 1 (5th Cir 1990); *Norton v Cobb* 744 F Supp 798 (N D Ohio 1990).

271 Haralambie vol II *supra* n 16 333 n134; Hoff PM "Child Snatching: Getting Legal Relief Through New Tort Remedies" 1982 5 *Fam Adv* 38 (Hoff "Child snatching"); Taylor ML "Tortious Interference With Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching" 1982-1983 68 *Iowa LR* 495 (Taylor "Tortious interference"). The elements of such a tort are set out in the Restatement, Second, of torts (1977) s 700.

others recognise a tort in the absence of a statutory cause of action.²⁷² In *Larson v Dunn*²⁷³ the Minnesota Supreme Court rejected John Larson's claim for delictual damages arising from the kidnapping of his daughter by her mother and her maternal grandparents.

Oberdorfer points out that the tortious interference with custodial rights flows from the English common law action for trespass by a father deprived of his child.²⁷⁴ In America today the tort is there to protect the relationship between parents and children. The Restatement, Second, of Torts²⁷⁵ codifies the tort of custodial interference and requires only that a parent have lost the society of his or her child for redress. This tort will not exist if the child is being rescued from an abusive situation or is taken by a joint custodian.²⁷⁶ The tort has received judicial approval in many cases.²⁷⁷

6 WHAT MORE CAN BE DONE?

As indicated above, the efficacy of the Hague Convention may be enhanced by encouraging more countries to become signatories to it. In both the international and

272 Haralambie vol II *supra* n 16 334ff & ns.

273 460 NW 2d 39 (Minn 1990) 41. See Oberdorfer D Comment: "*Larson v Dunn*: Toward a Reasoned Response to Parental Kidnapping" 1991 75 *Minnesota LR* 1701 (Oberdorfer).

274 *Idem* 1712. See, *Pickle v Page* 252 NY 474, 476, 169 NE 650 (1930) 651.

275 S700.

276 Oberdorfer *supra* n 273 1713-1714; Katz *supra* n 4 98-102.

277 *Inter alia* *Lloyd v Loeffler* 694 F 2d 489 (7th Cir 1982) 495-497; *Kunz v Deitch* 660 F Supp 679 (ND Ill 1987) 683. See too Oberdorfer *idem* 1714 n 93; Comment: "Torts - Punitive Damages - Escalating Punitive Damages in Cases of Child Abduction - *Lloyd v Loeffler*" 1983 *Ariz St LJ* 191 204 (Comment: "Torts"); Comment: "In the Best Interest of the Child? Minnesota's Refusal to Recognize the Tort of Parental Kidnapping: *Larson v Dunn*" 1991 14 *Hamline LR* 257 274-275 (Comment: *Hamline LR*); Campbell E "The Tort of Custodial Interference - Towards a More Complete Remedy to Parental Kidnappings" 1983 *U Ill LR* 229 260 (Campbell "Tort of custodial interference"); Silverman *supra* n 4 1113-1116. The court in *Larson* felt that to allow the tortious claim between the parents where the child was returned would be to the detriment of the child. For this reason Oberdorfer proposed at 1724ff that the tort of interference with custodial rights should apply in respect of third parties to the matter who may be aware of the whereabouts of a missing child and who refuse to co-operate in the location of the child.

interstate context the focus should be on preventative measures rather than the return of the child. Such measures are effective in relation to all children and, in the international context, not simply to abducted children taken to member states of the Hague Convention. Such preventative measures should include:

- The early identification of high-risk marriages.²⁷⁸
- The introduction of a requirement that in cases of high-risk marriages non-custodial parents must post a bond before exercising rights of visitation.²⁷⁹
- The training of customs officials to identify high-risk situations and the improvement of the availability of technology to such officials to increase their effectiveness.
- The introduction of a national registry.²⁸⁰
- The education of law enforcement officers.²⁸¹ The impact of a law enforcement

278 Agopian *supra* n 249 conducted research in the hopes of identifying situations that increase the possibility that a parental child kidnapping will take place. He sought to determine important relationships between certain attributes and variables. He studied ninety-one cases reported to the District Attorney's office during the initial year of California's new law prohibiting such activities.

279 Harper *supra* n 175 277-278; Bales K "Breaking Up: Beware" *Intn'l Herald Tribune* Oct 17 1992 at Money Report (Bales) cited in Harper *op cit* 267; Agopian *idem* 103.

280 Harper *idem* 278-279. The Federal Missing Children Act 28 USC s534 of 1982 allows law enforcement officers to enter descriptions of missing children into the National Crime Information Centre (NCIC) computer, even if there are no criminal charges: Haralambie Vol II *supra* n 16 311. The Missing Children's Assistance Act of 1984 42 USC s5771 requires the Department of Justice to: (i) Establish and operate a national toll-free hotline to receive reports of missing children and to help facilitate their return to their families; (ii) operate a national clearing house to administer information pertaining to missing and exploited children; and (iii) assist parents in locating their children. As a result of this a private organisation, the National Centre for Missing and Exploited Children, was established and merged with the Adam Walsh Child Resource Centre in 1990: Haralambie Vol II *op cit* 311-312.

281 In the past law enforcement officers have been reluctant to act in what was regarded as an essentially domestic dispute: Agopian *supra* n 249 7; Janvier RF, McCormick K and Donaldson MS "Parental Kidnapping: A survey of Left-Behind Parents" 1990 41 *Juv & Fam Ct Jour* 1 6

officer on the matter cannot be overemphasised.²⁸²

- The retraining of judges to be creative in finding appropriate alternatives to the conventional approaches to child custody awards.²⁸³
- The introduction of court sponsored custody mediation as a cost-effective preventative measure in parental kidnapping.²⁸⁴
- The introduction of compulsory post-divorce counselling as a stipulation of a custody decree.²⁸⁵
- The imposition of sentences that convey the seriousness of the offence while not

(Janvier *et al*).

282 The degree to which the matter will be pursued may be influenced by the individual biases and prejudices of the law enforcer involved: Agopian *ibid*; Janvier *et al ibid*; Girdner LK "Obstacles to the Recovery and Return of Parentally Abducted Children" 1992 13 *Children's Legal Rights Jour* 2 4-6 (Girdner). In interstate cases the district attorney has the discretion to classify child-stealing offences as either felony or misdemeanour child-stealing offences. This classification may be important in relation to the location of a child and the decision whether or not to extradite: Girdner *op cit* 8.

283 Judges should promote the discussion of custody between the parents before an award is made. This could considerably reduce the number of cases in which the non-custodial parent feels aggrieved by the decision of the court. An interdisciplinary approach leads to a more informed, less biased, less gender-oriented approach to child custody awards: Agopian *supra* n 249 104; Beaudoin R "Towards a More Positive and Prospective Approach to Determining the Best Interests of the Children" 1993 8 *Maine Bar Jour* 110 110-112 (Beaudoin).

284 It is envisaged that such mediation would diffuse hostility between parents and encourage a true consideration of the best interests of the child: Bentch *supra* n 270 388. Mediation as an alternative to protracted adversarial proceedings is also supported by Coombs RM "Non Court-Connected Mediation and Counselling in Child-Custody Disputes" 1984 17 *FLQ* 469 (Coombs "Mediation"); Pearson J and Thoennes N "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" 1983 17 *FLQ* 497 (Pearson and Thoennes); Bahr SJ "Mediation is the Answer - Why Couples are so Positive about this Route to Divorce" 1981 Spring *Fam Adv* 32 (Bahr). Coombs, Bahr, Pearson and Thoennes do not call for the mediation to be court sponsored or connected in any other way to the court. Nor do they consider parental child snatching.

285 Agopian *supra* n 249 105.

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- exceeding what is necessary to deter future kidnapping.²⁸⁶
- The education of the community at large about the existence, purpose and workings of the Hague Convention.²⁸⁷
 - The promotion of information exchange and co-operation between law enforcers, social services and schools.²⁸⁸
 - The development of collaborative processes for the sharing of information and the training of staff of all agencies in the applicable policies and procedures.²⁸⁹
 - The development of joint policies and procedures by law enforcement and social services agencies to ensure maximum co-operation between them.²⁹⁰
 - The introduction of the requirement that the judge must consider the possibility of future custodial interference at the date of drafting the custody agreement and that the agreement be detailed, specific and unambiguous.
 - The early education of children regarding their personal details.²⁹¹

286 Agopian *idem* 54; Janvier *et al supra* n 281.

287 Herring *supra* n 14 172-173.

288 Bass D Special Report: "Enlisting the Help of Social Service Agencies and the Schools in the Search for Missing Children" 1993 14 *CLRJ* 2 (Bass).

289 Where access to information is excluded by law to protect privacy, the enforcement agency may seek alternative means of allowing the school or social services to disclose information, eg, the enforcement agency might obtain the permission of the aggrieved parent for disclosure of school records: Bass *idem* 9.

290 An example of one such policy might be that police will not reveal the location of an abducted child to an aggrieved parent where the woman fled after being beaten by her husband.

291 Children should be taught their names, addresses, parents' names and addresses, telephone numbers including codes; how to call upon emergency services, etc.

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- The provision of copies of custody and visitation orders to schools and other interested parties.
 - The retention by parents of current photos of their children and, in high-risk cases, even fingerprints could be taken and kept on record.
 - The retention of current, detailed information sheets on both parents by the court and each parent.
 - The introduction of uniform national legislation relating to the relocation of children subject to custody or visitation orders.²⁹²
 - The clarification of definitions and, where appropriate, the development of new definitions.
 - The amendment of the PKPA to include federal action where there are conflicting custody decrees.
 - The allocation of increased resources for the location and return of abducted

292 This would further the ends of the UCCJA and the PKPA. Currently each state has the ability to determine its own laws with regard to the relocation position: Baron RM "Refining Relocation Laws - The Next Step in Attacking the Problem of Parental Kidnapping" 1993 25 *Texas Tech LR* 119 127 (Baron *Texas Tech LR*). Baron has suggested the amendment of state relocation laws to impose three conditions:

- The parent wishing to relocate should notify all interested parties and the appropriate court;
- the relocating parent must obtain the consent of other interested parties or the appropriate court; and
- the relocating parent must acknowledge the jurisdiction, initial or continuing, as the case may be, for at least six months or for so long as it remains the "home state", whichever is longer: Baron *idem* 129. Goldstein *supra* n 14 942 makes a similar suggestion. He calls for a centralisation of decision making, limitation of free movement of parents and children and a review of the best interests standard. He proposes the exclusive initial and continuing modification jurisdiction of the home state for a period not exceeding five years from the date of the decree unless it remains the child's home state.

children.²⁹³

- The implementation of federal anti-parental kidnapping legislation.²⁹⁴

7 CONCLUSION

No law, document or agreement can prevent criminal conduct in all cases.²⁹⁵ All the law can do is act as a general deterrent.

In summary, the US has the following existing solutions to cases of parental child kidnapping: The UCCJA; the PKPA; the Hague Convention; the Missing Children Act 1982; the National Child Search Assistance Act of 1990; state criminal laws; and clearing houses under the Missing Children's Assistance Act. Problems which continue to plague the US in relation to such cases include: Difficulties in the location and return of children; lack of knowledge and experience on the part of all persons involved in such cases; non-compliance with laws by enforcement agencies; non-uniform state and federal laws; and a lack of financial resources on the part of the so-called "left-behind" or "aggrieved parent".²⁹⁶

The Inter-American Convention on the International Return of Children, signed on 31 January 1990 by Bolivia, Brazil, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay and Venezuela, was drafted by the Inter-American Judicial Committee.²⁹⁷ This Convention was to apply between Organisation of American States members that are

293 Girdner *supra* n 282 2-6. On the dire consequences of the US art 27 reservation relating to costs see Mackie *supra* n 223 451-459.

294 Janvier *et al supra* n 281 7.

295 See Wright KL "Kidnapping by Family Members" 1993 65 *NY St Bar Jour* 12-14 (Wright); *People v Richard R Morel* 566 NYS 2d 653 (AD 2 Dept 1991).

296 Janvier *et al supra* n 281 5.

297 CIDIP -IV/doc. 4/88 add.1.

not members of the 1980 Hague Convention. It addresses the civil aspects of wrongful removal and retention. The word "abduction" does not appear in the title as it does not apply in respect of criminal matters.²⁹⁸ This Convention applies to interference with custody or visitation rights and its provisions are substantially similar to those of the Hague Convention.

The United Nations Convention on the Rights of the Child adopted on November 20th 1989²⁹⁹ re-establishes the best interests of the child test.³⁰⁰ Article 10 includes the right of the child to have and develop a relationship with both parents even if the parents live in different states. Article 11 states that parties to the United Nations will actively discourage the illicit transfer or non-return of children abroad and, to this end, encourages the conclusion of bilateral and multilateral treaties. Article 18 indicates that states that are parties to the Convention will recognise the principle that both parents have a responsibility in the upbringing of the child.

All of the measures listed above are insufficient to solve the problem. Uniform guidelines are necessary to achieve the objectives of the UCCJA and PKPA and to reduce custody litigation and child snatching. Interpretative discretion in relation to the PKPA needs to be eliminated and a child-based jurisdiction introduced. Neither the UCCJA nor the PKPA require personal jurisdiction over a parent or other interested party in order to exercise custody jurisdiction.³⁰¹ However, neither Act states this expressly or provides for a mechanism to ensure due process in the absence of such jurisdiction.

298 Inter-American Convention on the International Return of Children 1989 29 *ILM* 63 63-64. A copy of the provisions of the Convention appear in *ILM* 66ff.

299 Reproduced in *ILM* Vol XXVIII Number 6 November 1989 1448.

300 *Idem* art 3.

301 Murray *supra* n 108 593; Atwood B "Child Custody Jurisdiction and Territoriality" 1991 52 *Ohio St LJ* 369 370-371 (Atwood).

International treaties specifically addressing parental child-stealing and child-custody awards are essential. Perhaps courts should sacrifice flexibility in favour of certainty and a codification of the laws with regard to child custody and interstate and international child kidnapping be created. Alternatively, flexibility may be achieved through the discarding of all attempts at uniform legislation and the return to courts searching for justice in each individual case. Behnke has called for the US to issue federal legislation to require courts to give effect to the best interests of the child in every case.³⁰² This call constitutes a call for a uniform approach to interstate custody matters - the application of the welfare principle.

All that is certain at this time is that in cases of international child kidnapping from the US to a country that is not a member of the Hague Convention the position as regards the recovery of the child remains as hopeless as ever.

302 Behnke *supra* n 14 738-740.

CHAPTER EIGHT

A SUMMARY OF THE CURRENT POSITION IN SOUTH AFRICA, THE UK, AUSTRALIA AND THE US REGARDING RECOGNITION AND ENFORCEMENT OF FOREIGN CUSTODY ORDERS AND THE ASSOCIATED PROBLEM OF INTERNATIONAL CHILD KIDNAPPING

1 INTRODUCTION

Mankind has been plagued by custody disputes for a very long time. In Biblical times Solomon was called upon to apply all his great wisdom to resolving such a dispute between two prostitutes who each laid claim to a baby. This incident revealed that custody disputes require more than a simple juridical resolution but also emotional understanding and judicial wisdom. Divorce will always create a winner and a loser and often hostility emerges at its worst in the determination of child custody. Should a disgruntled parent snatch a child, the trauma to the child is awful and the pain and chaos in the life of the parent who is left behind is devastating. All the parties to cases of child abduction may be drained of both their financial and emotional resources. Clearly, therefore, a judge faced with the resolution of a contested custody or child abduction dispute is faced with one of the most difficult situations that he or she may be called upon to adjudicate. This is especially so where the dispute crosses international boundaries. The difficulties of obtaining the return of a child kidnapped by a parent are exacerbated where the child is removed to another country. In such cases the costs and the stresses of the situation are dramatically increased by the need to deal with a foreign, and quite dissimilar legal system, often in a foreign language. The foreign authorities are often ineffectual in rendering meaningful assistance.

Despite:

- The allocation of vast resources to deal with child abduction;

- the growing interest in, and publicity surrounding child abduction;
- continuing attempts to find alternative means of determining custody which are designed to encourage the continued involvement of both parents in the upbringing of children of a failed marriage; and
- the introduction of legislation and international treaties and conventions,

the prevention of international child kidnapping remains an elusive goal. In fact cases of this nature appear to be increasing.¹ Child snatching by deprived parents has by and large been a result of a failure to develop effective international mechanisms to address such matters. The Hague Conference on Private International Law, inspired by the determination of Canada to address the issue, resulted in the Hague Convention on the Civil Aspects of International Child Abduction² which was ratified and implemented in the United States (US), the United Kingdom (UK) and Australia.³ South Africa has acceded to this Convention which was implemented here in October 1997.⁴ The implementation of the Hague Convention in South Africa will dispel the image of South Africa as a safe haven for international child snatchers. This said, however, the Hague Convention will not resolve all the problems associated with recognition and enforcement of foreign custody orders and the associated problem of international parental kidnapping.

1 Dallmann PD "The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by US Courts" 1994 5 *Intn'l LR* 171 172 & n 24 (Dallmann) indicates that the US State Department received about 4000 reports of international parental abductions for the period 1973-1991 and estimates that the true numbers may be as high as 10000. Agopian indicates that by 1981 between 25 000 and 100 000 children were being abducted by their parents in America each year, and that if wrongful retention figures are added to this the numbers could be as high as 400 000 per annum: Agopian M W *Parental Child-Stealing* Lexington Books, Lexington (1981) 23 (Agopian).

2 1980 (Hague Convention).

3 See ch 5 "2.4 Foreign custody orders; ch 6 "8.3 The Hague Convention"; ch 7 "3 Recognition and enforcement of foreign country custody decrees" *supra*.

4 Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 implemented by the Regulations published as GNR 1282 GG 18322 10Oct 1997. See ch 4 *supra*.

2 THE CURRENT POSITION IN SOUTH AFRICA, AUSTRALIA, THE UK AND THE US SUMMARISED

The recognition and enforcement of foreign judgments is a complex area of private international law. A comparative examination of the various legal systems discussed in this thesis revealed that all of them share the principle of territorial sovereignty. This means that none of these legal systems regards foreign judgments as having direct effect within its borders. Recognition and enforcement will not be afforded such judgments unless they:

- were issued by a court with international competence;
- were final and conclusive;
- will not offend against the public policy of the forum; and
- comply with any statutory requirements.

The position as regards the recognition and enforcement of foreign custody orders is especially complex because these judgments are not final and conclusive, but remain modifiable in the best interests of the child.⁵

2.1 Recognition and enforcement of custody orders issued by one state, province, territory or independent legal system of a country by the courts of another state, province, territory or independent legal system of the same country, and abductions that do not cross international borders

The custody order of one of the High Courts of South Africa will not be recalled, overruled or amended by another High Court of South Africa. Jurisdiction to vary a custody order issued in consequence of a matrimonial proceeding is retained by the

⁵ South Africa: Ch 4 "2 Custody orders issued by the South African courts" *supra*; UK: Ch 5 "2.4 Foreign custody orders" *supra*; Australia: Ch 6 "6 Custody of children" *supra*; US: Ch 7 "2 Child custody in general" *supra*.

court of the matrimonial cause even if the parties have subsequently changed their residence.⁶ The court of the place of the child's residence may however exercise jurisdiction as the upper guardian of all minor children within the court's jurisdiction. A judgment issued in consequence of the exercise of such jurisdiction is regarded as a new order and not a modification of the previous order.⁷ Custody orders issued by one division of the High Court will only be enforced by another where an authenticated copy of the judgment or order, and proof that it remains unsatisfied, is lodged with the Registrar.⁸ Failure to afford automatic recognition and enforcement to foreign custody orders, that is orders issued by the courts of another province, may result in an aggrieved parent stealing the child away to another province in hopes that the courts there will be more sympathetic towards him or her. The policy of the High Court of South Africa to retain the modification jurisdiction in the court of the matrimonial cause seems to be effective in rendering such behaviour on the part of a parent ineffectual in circumstances where the abducting parent approaches another High Court of South Africa for a new custody decree. The current position is however inadequate to deal with situations in which a child is snatched from a custodial parent and secreted elsewhere in South Africa without the abductor attempting to legitimate his or her custody by approaching the courts for a new order. Further steps may be possible to deter this type of behaviour.⁹

The English law regarding custody of children was radically altered by the Children Act of 1989. The concepts of "custody, care and control" were replaced by "parental responsibility" and "parental authority". Parental responsibility includes the right to custody. "Custody orders" are no longer made, but have been replaced by section 8

6 Spiro E "Variation and Enforcement of Custody Orders" 1957 *Butterworths SA LR* 56 58-59 (Spiro *Butterworths*); *Watson v Cox* 1917 WLD 151; *Crow v Cuthbert and Cuthbert* 1948 1 PH B20 T. See ch 4 *supra*.

7 Spiro *Butterworths idem* 59.

8 Spiro *Butterworths idem* 51-61.

9 See suggestions in ch 9 *infra*.

orders relating to residence, contact and prohibited steps. For purposes of convenience section 8 orders will be referred to as custody orders. The Family Law Act regulates recognition and enforcement of section 8 orders made elsewhere in the UK.¹⁰ Where such orders are in respect of a child under 16 years of age orders made elsewhere in the UK will be treated as if they were orders of the English court, provided that they are registered with the High Court and remain enforceable within the jurisdiction of the issuing court.

In Australia the Family Court of Australia has jurisdiction in custody matters.¹¹ Like South Africa, the common law approach in Australia also allows modification of foreign custody orders on the basis of the best interests of the child. Although the welfare principle retains paramountcy in terms of the Family Law Act of 1975, where a child is abducted within the Commonwealth of Australia the aggrieved parent may obtain a warrant for the return of the child which is then handed over to the police to be acted upon. The Family Law Act establishes mechanisms to assist parents who are "left behind" or aggrieved to obtain information relating to the current whereabouts of an abducted child.¹² It also provides for an injunction to prevent the removal of a child who is at risk.¹³ Persons who wrongfully interfere with the custodial rights of others may be fined or sentenced to a short period of imprisonment. However, powers of arrest in relation to the abduction of children only operate where the abduction is of an international nature.

The US possibly offers the most sophisticated approach to the handling of sister-state custody judgments and interstate parental child kidnapping. As was apparent from my

10 Part I.

11 See ch 6 "6.1 Jurisdiction" *supra*.

12 S 64.

13 S 114(3).

discussion of the American situation,¹⁴ the more sophisticated and complex the system introduced the more complex the difficulties that it occasions. Each of the states of the US may be used as a laboratory in which social experiments, codified by law, may be conducted for the benefit of the entire country. This ability to use one state as a testing ground for new ideas, thus saving other states from the penalties of implementing ideas that don't work, has been extremely advantageous to the US but, just as federalisation has produced advantages it has also produced disadvantages. One such disadvantage is clearly illustrated by the history of interstate custody disputes and child snatching. The full faith and credit clause of the US Constitution¹⁵ does not require each state to recognise and enforce the custody judgments of the courts of other states. This is because custody judgments differ from other civil judgments in that they are capable of modification. Thus a parent could leave the jurisdiction of the rendering court and approach another court, uninformed about the history of the first decree, which would exercise modification jurisdiction based upon the presence of the child and the abducting parent within its jurisdiction. The new court would hear the matter anew and might possibly modify the order in favour of the abductor. This situation resulted in uncertainty in the law pertaining to child custody.

The Uniform Child Custody Jurisdiction Act (UCCJA) was introduced into US law in 1968 in a legislative attempt to unify the jurisdictional rules of states in custody matters and thus ensure that a single state had jurisdiction.¹⁶ This Act has been adopted in all the states. It was hoped that its provisions would reduce the incidence of interstate child abductions after a decree had been issued. The purpose of the jurisdictional rules was to avoid interstate jurisdiction disputes by putting the matter before the court in the best position to receive the relevant evidence. It was hoped that by doing this, stability for the child would be promoted and continuing custody disputes would be discouraged.

14 Ch 7 *supra*.

15 28 USCA art IV.

16 See Ch 7 "2.1 The UCCJA".

The Act sets rules for the determination of the proper court to exercise original or modification jurisdiction in any custody matter. It also provides the mechanisms whereby any court possessed of information pertinent to a custody matter may make that information available to the court hearing the matter. The Act provided for a variety of jurisdictions: home state,¹⁷ significant connection¹⁸ and emergency jurisdiction.¹⁹ And the matter may be heard by the state in which the action is brought if no state qualifies as the home state, the state of significant connection, or the state that is appropriate because of maltreatment.²⁰ Such jurisdiction will only be exercised in instances where it would be in the best interests of the child and there was no other court with jurisdiction. Modification jurisdiction is retained in the court of initial jurisdiction until such time as that court relinquishes jurisdiction. This continuing jurisdiction is exclusive.

One of the difficulties encountered in the application of this Act is that it is often difficult to determine at what point a court has declined to exercise jurisdiction. Another difficulty is that the legislature failed to include a home-state preference in the jurisdictional rules provided in the UCCJA which has created the potential for concurrent jurisdiction to arise where one court claims home state jurisdiction and another claims significant connection jurisdiction. Even in instances where the UCCJA has been interpreted to contain an implied home-state preference difficulties associated with concurrent jurisdiction may be encountered where a child has moved around frequently and has not stayed in one place for six months, in such instances no home state has been created.

17 S 3(a)(1). This is the place where the child has lived with his parents, a parent, or a person acting in the capacity of a parent, for a period of six consecutive months immediately before the hearing: S 2(5).

18 S 3(a)(2). A significant connection exists where a state has a significant connection with both the child and at least one of the parents (or custodial contestants) and important evidence relating to the custody dispute is available in that state.

19 S 3(a)(3). If the child is present in another state and has been abandoned, mistreated, abused or neglected or threatened with such treatment.

20 S 3(a)(4).

The UCCJA further provides for enforcement of sister-state custody orders where the initial court's jurisdictional requirements are substantially the same as those of the enforcing state.

Provision for a court to decline jurisdiction under certain circumstances and to order the petitioner to pay all the travel and legal costs of all the persons involved, even the witnesses, is also made in the Act.²¹ Despite the fact that ordinarily all information imparted to an attorney by his or her client is privileged and the attorney cannot be forced to disclose this information to the court or other parties to a case, the Act encourages co-operation between the parties by denying protection under the attorney and client privilege to the current address of a client and child in a custody case. Parties are required to supply these addresses in an affidavit attached to the pleadings.²² As was the case with South African law, the UCCJA is effective in cases where an abductor parent approaches the courts to legitimise his or her custody but does not help where the parent and child simply drop out of sight. Furthermore, the Act permits the court a wide discretion in relation to the determination of the jurisdictional ground of significant connection, the determination of clean hands and the determination of whether or not the due process requirements have been met.

While there is an increasing readiness on the part of prosecutors to enforce child-snatching statutes there appears to be a reluctance to prosecute.²³ The Act often has the effect of eliciting sympathy towards the kidnapper rather than concern for either the child or the custodial parent. The police tend to view interstate parental child abduction as a civil matter and thus parental kidnappers are not as vigorously pursued by law enforcers as other kidnappers.²⁴

21 Ss 7-8.

22 S 9.

23 Black JC and Cantor DJ *Child Custody* Columbia University Press, New York (1989) 56 (Black and Cantor).

24 *Ibid.*

A "hometown" judge can circumnavigate the UCCJA provided that a petitioner makes the necessary jurisdictional claims,²⁵ and many petitioners may be without the strength or the financial resources to appeal, even where a court rules in a manner that is clearly contrary to the UCCJA.²⁶

In addition to the UCCJA and various criminal statutes, another piece of legislation introduced with a view to eliminating parental child kidnapping was the Parental Kidnapping Prevention Act (PKPA) of 1980. This Act was introduced to address some of the inherent weaknesses to be found in the UCCJA.²⁷ It was also required to address the fact that interstate child kidnapping was increasing, state courts were inconsistent in their decision making, and the existing federal system contributed to child abduction and excessive relitigation of custody cases without due recognition being afforded to the decisions of other jurisdictions.²⁸

The PKPA is federal legislation and made the full faith and credit clause of the US Constitution applicable to child custody matters in which the jurisdictional requirements of the PKPA were met. This Act contains a home-state preference. This preference causes problems in instances where concurrent jurisdiction arises. In such cases the court must decide whether or not the provisions of the PKPA must be applied on the basis that as federal legislation the provisions of this Act pre-empt the provisions of state legislation. Opinions differ on the issue of whether or not the PKPA voices the federal policy of pre-emption and is thus entitled, under the Supremacy Clause of the US Constitution, to be treated as superior to the UCCJA in areas where the two Acts differ.²⁹

25 *Ibid.*

26 *Idem* 57.

27 See ch 7 "2.2 The Parental Kidnapping Prevention Act (PKPA)" *supra*.

28 Black and Cantor *supra* n 23 57.

29 See ch 7 "2.2.3 Pre-emptive effect of the PKPA" *supra*.

The PKPA sets national standards for the exercise of jurisdiction. Under this Act a court will only qualify to modify the custody order of another state if it has jurisdiction in terms of its own law and the prior ordering state has either lost jurisdiction in terms of its own law or has declined to exercise jurisdiction. This has given rise to situations in which a chosen state has jurisdiction under the UCCJA³⁰ but not under the PKPA.³¹

The PKPA assists aggrieved parents by permitting the Federal Parental Locator Service (FPLS) to be utilised in cases of interstate or international abduction.³² It also makes the Federal Fugitive Felon Act³³ applicable to interstate abductions and interstate and international flight aimed at avoiding prosecution under applicable state felony statutes.³⁴ This Act thus permits the Federal Bureau of Investigation (FBI) to become involved in the search for abducted children in cases where the abductor has committed a felony offence in the place from which the child was taken.

The complexity of the UCCJA and the PKPA has led to their often being misapplied or misinterpreted.³⁵ The result has been the frustration of the underlying policy of the legislation.

30 S 3(a)(2).

31 *RB William v B Cynthia*, 108 Misc 2d 920, 439 NYS 2d 265 (Fam Ct 1981); *Mebert v Mebert* 111 Misc 2d 500, 444 NYS 2d 834 (Fam Ct 1981); Black & Cantor *supra* n 23 58.

32 *Ibid.*

33 18 USC s1073.

34 As was indicated in ch7 "2.2 The Parental Kidnapping Prevention Act (PKPA)" *supra*, whether a parental abduction constitutes a felony or not is entirely dependent upon legislation covering parental abduction in the state from which the child was taken.

35 See ch 7 "2.2.2 The interrelationship between the UCCJA and the PKPA" *supra* for a discussion of the relationship between the two Acts.

2.2 Recognition and enforcement of custody orders issued by the courts of a foreign country and international abductions

At common law foreign country custody judgments are not recognised and enforced in South Africa. They remain variable and the South African court retains the right to independently assess the best interests of the child.³⁶ This is because such judgments are not *res judicata* and thus fail the finality requirement for recognition and enforcement.

A consequence of the failure of legal systems to automatically recognise and enforce foreign custody orders is that parents who feel aggrieved by a custody determination of the courts of one country may remove the child to another country hoping to obtain a more favourable determination there. Until 1996 South Africa was viewed as a safe haven for international parental abductors, but in 1996 South Africa acceded to the Hague Convention on the Civil Aspects of International Child Abduction. This should change South Africa's image. The inequities of the pre-1996 South African approach are patent in the case of *Märtens v Märtens*³⁷ in which the father's repeated kidnapping of his children in the face of a German court order did not make him unsuitable to act as the custodial parent of the children. Should such a case arise after implementation of the Hague Convention the decision would be different. In accordance with the provisions of the Hague Convention the children would be returned to Germany and the German court would make a custody determination on the merits.

South Africa, the UK and Australia shared the same common law approach to foreign country custody orders and until the inurement of the Child Abduction and Custody Act³⁸ foreign country custody orders were neither final nor conclusive in the UK. The courts of the UK applied the principles of the child's best interests to make a determination of

36 See ch 4 *supra* text to ns 24-40.

37 1991 4 SA 287 T.

38 1985.

their own. The Child Abduction and Custody Act³⁹ gave effect to the Hague Convention on the Civil Aspects of International Child Abduction of 1980 and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children of 1980 in the UK. The determinations of non-Convention countries will be treated as individual cases although the trend, as we have seen, is to apply Convention principles in all cases. The Hague Convention is not dependent on an existing custody order, but a disruption of custody rights that are being exercised. The Council of Europe Convention applies to a smaller geographical area and is used to recognise and enforce foreign custody orders.

In the UK an abductor may be held in contempt of court.⁴⁰ Since *Regina v D*⁴¹ a parent may be convicted of the common law offence of kidnapping in respect of his or her own child. The Offences Against the Person Act⁴² also provides for the offence of removing a child under the age of 18 years from the UK without the consent of the other parent.⁴³ A person can only be convicted of this offence in cases of international abduction, not domestic abduction. Sequestration may also be used to obtain the return of the child by forcing the abductor parent to return to the UK. A port alert can be obtained to prevent the removal of a child from the country.

The Australian position as regards foreign country custody judgments and international child abduction is regulated by the Family Law Act⁴⁴ and the Hague Convention. As was the case with South Africa, the common law position in Australia afforded foreign custody orders no direct effect within Australia. The foreign order and the abduction

39 *Ibid.*

40 See ch 5 "4 Criminal repercussions" *supra*.

41 [1984] 1 AC 778.

42 1861.

43 This offence is punishable by imprisonment for a period not exceeding 7 years: S 4(1)(b).

44 Family Law Act 1975 (Cth) s 68.

were merely matters to be considered by the Australian court in making an independent judgment.

The Family Law Act reiterates the paramountcy of the welfare principle in relation to child-custody determinations and provides that it applies to determinations of whether or not to return the child who has been abducted to, or is wrongfully being retained in, Australia.⁴⁵ Where the action is instituted shortly after the abduction or retention the court will find summary return of the child to be in his or her best interests. Subsequent to Australia's accession to the Hague Convention the principles of that Convention requiring the prompt return of the child are applied in such cases arising before the court.⁴⁶ Generally the principles of this Convention are also applied in cases of abductions from non-Convention countries. Section 68 of the Act allows for registration of foreign custody orders of certain prescribed countries in an Australian court having jurisdiction under the Act. The effect of such registration is to make that order of the same force and effect as an order of the registering court. Division 8(c) of the Reform Act⁴⁷ also provides for location orders, Commonwealth information orders and recovery orders, all of which are aimed at assisting a parent who has been left behind. South Africa and the UK have similar provisions relating to judgments of courts of other jurisdictions within the country but do not supplement the provisions of the Hague Convention in this way.⁴⁸

Expenses incurred in recovering an abducted child may be recovered in terms of the Family Law Act⁴⁹ and the Commonwealth Government's Overseas Custody (Child Removal) Scheme offers financial assistance. Although the Family Law (Child

45 S 64 (1)(a).

46 The Hague Convention was implemented on 1 January 1987.

47 1995 (Cth).

48 See SA:Ch 4 "2 Custody orders issued by the South African courts; UK:Ch 5 "2.3 Orders of other courts in the United Kingdom" and Ch 8 2.1 *supra*.

49 S 117.

Abduction Convention) Regulations require the petitioner to lodge security for costs incurred in pursuance of the Convention the court that makes an award in respect of the child that was wrongfully removed or retained may order the abductor to pay all costs.⁵⁰

Australian law also makes provision for the criminal liability of abducting parents under certain limited circumstances, and, as in the UK, contravention of an existing order constitutes contempt of court.⁵¹ It is however section 63 of the Family Law Act that is most often invoked. This section creates the offences of interference with custodial rights and removing the child from a person legally entitled to custody in both domestic and international cases. Extradition also offers a limited solution.⁵²

The states of the US are not bound by the full faith and credit clause of the US Constitution to give effect to foreign judgments, nor is the policy of recognition of sister-state judgments extended to the international arena.⁵³ Foreign judgments may, however, be given effect to for reasons of comity. Comity normally only operates in circumstances where the court is convinced that it is not contrary to public policy. Comity is not extended to foreign judgments only on the basis of the issues raised before a foreign court, but also on the basis of the procedures applied by that court in determining the issues. Thus comity will not be extended if due process requirements were not met. These requirements are not met where proper notice of proceedings is not given or the parties are not afforded a fair hearing.⁵⁴

In addition to providing for interstate child-custody jurisdiction, the UCCJA created a

50 Regs 21-22.

51 S 70A of the Family Law Act allows for aggravated contempt charges where the child is removed from Australia altogether.

52 See ch 6 "9 Criminal liability and extradition orders" *supra*.

53 See ch 7 "3 Recognition and enforcement of foreign country custody decrees".

54 Black and Cantor *supra* n 23 58.

basis for the recognition and enforcement of foreign nation decrees that went beyond comity and extends the principles of the UCCJA to international situations.⁵⁵ Following section 23 of that Act the courts have enforced decisions of the courts of England⁵⁶ and Australia.⁵⁷ The UCCJA will not, however, pay deference to the decrees of the large number of judicial systems, not in the common law tradition, that operate on principles unacceptable to the American courts.⁵⁸ Section 23 of the UCCJA makes the principles of that Act applicable only in instances involving a foreign custody order where all interested parties were given sufficient notice of proceedings and were afforded a reasonable opportunity to be heard. In addition to section 23 of the UCCJA the Hague Convention was implemented in the US in 1988 by the International Child Abduction Remedies Act (ICARA).⁵⁹ In terms of that Act State and Federal Courts were awarded concurrent jurisdiction to hear Convention return-cases. Thus in cases of abductions involving the US, where there is a custody award, action may be taken in terms of either section 23 of the UCCJA or the Hague Convention.

A vast number of countries remain non-Convention countries. In abduction cases involving abductions to non-Convention countries the custody determination will be subject to the requested state's interpretation of the best interests of the child. The development of a worldwide re-abduction industry has exacerbated the difficulties associated with determining what will be in the best interests of the child in such cases. This failure of many countries to accede to the Hague Convention is possibly the biggest stumbling block to the Convention realising its full potential. In addition the courts and jurists of the US, like those of the UK and Australia, have identified the following weaknesses in the Hague Convention itself:

55 S 23.

56 *Woodhouse v District Court* 196 Colo 558, 587 p 2d 1199 (Colorado 1978).

57 *Miller v Superior Court* 22 Cal 3d 923, 151 Cal Rptr 6, 587 P 2d 723 (1978).

58 Black and Cantor *supra* n 23 58.

59 42 USC S 11601 - 11610 (1989).

- The lack of an adequate definition of terms such as "custody rights" and "habitual residence", the latter is especially problematical in cases where there has been abduction and re-abduction of the child;
- the non-retrospective nature of the application of the Convention which will not apply in any instance where the wrongful removal or retention took place before the implementation date;
- the discretionary exceptions contained in articles 13 and 20 of the Convention permit courts to mask a cultural bias under the pretext of one of the exceptions. "Section 13 exceptions" in particular, permit too wide a discretion by failing to define such terms as "grave risk" and "acquiescence";
- the one year time limit. This can be problematical in cases where difficulty is encountered in the location of the child; and
- the Convention does not apply in respect of a person who reaches the age of 16 during the proceedings.⁶⁰

In the US parental kidnapping is both a criminal offence and a basis for a civil action (tort/delict).⁶¹ Civil damages for custodial interference or deliberate infliction of emotional distress are recoverable. The criminal offences range from interference with a court order to child kidnapping. Although a few of the offences are misdemeanours, most are felonies.⁶² Unfortunately the criminal offences are so diverse that the discretion of the prosecuting authority may seriously impact upon the seriousness with which the offence is viewed.

The International Criminal Police Organisation (Interpol) may well have a role to play where a parental abduction has taken place in any one of its one hundred and seventy

60 See further ch 7 "3.1 Weaknesses in the Hague Convention" *supra*.

61 Ch 7 "5 Other remedies in cases of parental child stealing" *supra*.

62 See the International Parental Kidnapping Act 1993 18 USC S1204.

six member states, which include the US.⁶³ This organisation routinely receives requests from judicial authorities and local law enforcement agencies within its member states, to assist in international parental kidnapping cases. Each member state has a National Central Bureau (NCB) which acts to facilitate the investigation of international criminal cases within the scope of that country's own laws, policies and accords. In the US the NCB has an Alien Fugitive Enforcement Division to which international parental abductions are referred. Interpol is not an international police force with agents who pursue criminals across international borders. It is not vested with any powers of arrest or seizure. Its agents compile information, analyse investigative leads, and disseminate vital data on an international basis to law enforcement authorities of member states.

In instances of domestic parental kidnapping within the US, the abductor parent is usually charged under state law and his or her name is entered into the National Crime Information Centre computer system as a wanted person. The child is listed as a missing person. These entries assist US law-enforcement authorities who notify the US NCB when it is feared that the abductor parent has fled the country. This body in turn disseminates the information to the international community. The NCB only reacts to requests from law-enforcement authorities and not requests from victims, their attorneys or representatives. Once a valid request for help has been received by the NCB the US NCB opens a case and assigns coordinative responsibility to the Alien Fugitive Enforcement Division. Databases are searched for any records that may facilitate the investigation of the case. Once all available databases have been investigated the case information is transmitted to other NCBs. The circumstances of each case will determine which NCBs must be notified. If no clues exist as to the possible destination of the abductor a diffuse message is sent to any one of nine different geographical regions worldwide. This alerts all NCBs in these zones of the circumstances of the case. The US NCB has no control over the response of these NCBs to the request. Once the US NCB has located the abductor, the appropriate US

63 See Prietsch JR "Interpol: Its Role in International Kidnapping" 1995 62 *Police Chief* 69 (Prietsch).

law enforcement agency is notified and the local prosecuting attorney communicates any arrest or extradition request to the Justice Department's trial attorneys. Extraditions in parental abduction cases are rare because such offences are often not specified in the treaties to which the US is a party.

The PKPA makes the Fugitive Felon Act applicable to interstate and international child abductions in circumstances where the state from which the child was abducted treats the abduction as a felony. Many states do not.⁶⁴ The FBI may not become involved in

64 Delaware - Delaware code Title 11 S 785: Class A misdemeanour; Maryland - Maryland Anno Code S 9-307: Misdemeanour where child is abducted by a relative or person assisting a relative. In such cases it is a valid defence if the abductor proves the child was in danger and institutes a modification of custody action in court within ninety-six hours. If the child is kept for more than thirty days the offence becomes a felony; Massachusetts Gen Laws Ann Ch 265 S 26 A: Misdemeanour where the child is abducted by a relative. If the child is put in danger or taken out of the state then the abduction becomes a felony; Nebraska - Nebraska Revised Statutes S28-316: Misdemeanour unless a court order regulating custody is violated, then it is a felony; Nevada - Nevada Revised statutes S 200.359: Misdemeanour; New Jersey -New Jersey Statutes Ann S 2C: 13-4: Custodial interference by parent is a misdemeanour - custodial interference otherwise constitutes a felony. It is a valid defence that the child was taken for his or her protection, or if the child is 14 or older and he or she left consensually and without the purpose to commit a criminal offence with or against the child; New York - New York Penal Law SS 135.45, 135.50: Misdemeanour unless the child is removed from the state with the intent to permanently remove the child, and the child is actually removed, or if the child is exposed to a risk that endangered his or her safety or materially impaired his or her health; South Dakota - South Dakota Compiled Laws Ann S 22-19-9: Misdemeanour for first offence; Virginia - Virginia Code S 18.2-47: Misdemeanour if child is abducted by a parent, otherwise it is a felony; and West Virginia - West Virginia Code S 61-2-14: Parents are exempt from prosecution for the kidnapping of their own child, but S61-2-14d states that concealment or removal of a minor child from his or her custodian or a person entitled to visitation constitutes a misdemeanour. If the concealment or removal is outside of the state then the action constitutes a felony. Other states determine a time-frame within which abduction charges may be avoided or mitigated if a child is returned within that time: Arizona - Arizona Rev Statutes S 13-1302: Felony offence unless the child is returned without physical injury prior to the abductor's arrest. If the child is so returned then the offence is only a misdemeanour offence; Illinois - Illinois Ann Statutes Ch 38 S10-5: Felony offence. Return within 24 hours constitutes a defence; Kentucky - Kentucky Revised Statutes S 509.070: Removal of the child from the state is a Class E felony. It is a Class D felony if the child is not voluntarily returned; Minnesota - Minnesota statutes Ann S 609.26: Felony offence. If the child was first taken for his or her protection this will constitute a valid defence. The charges will be dismissed if the child is returned within fourteen days; Montana - Montana Revised Codes Ann S 45 - 5- 304: Felony. There is no criminal offence if the child was not removed from the state and he or she was returned prior to arraignment. Where the child has been removed from the state he or she must be returned before the abductor is arrested if felony charges are to be avoided; Pennsylvania 18 Penn Cons Statutes Ann S 2904: Felony offence unless the abductor acted with good cause and the child was removed or retained for less than twenty-four hours. In such cases the removal or retention is a misdemeanour offence only; and Texas - Texas Penal Code S 25.03: Felony offence. If child is returned within seven days this will be a valid defence to the charges.

abduction cases in such states either at all or only after time delays which weaken the effect of the PKPA.

CHAPTER 9

A MODEL FOR SOUTH AFRICA

It is neither desirable nor appropriate for South Africa to simply emulate the approach taken to recognition and enforcement of foreign custody awards and the related problem of parental child abduction by the three legal systems reviewed in this thesis. Each approach has met with some difficulties. Some of the difficulties encountered in the application of the United States (US) approach are occasioned, to a large extent, by the bifurcated nature and complexity of the American legal structure with its distinction between state and federal laws. South Africa needs to devise a strategy that is uniquely her own. In doing this jurists should draw upon that which is good from foreign legal systems, whilst guarding against the importation of the less effective and more problematic aspects of foreign approaches to the issue. The approach which is ultimately introduced must be founded upon principles of justice and equity and should further the best interests of the child at all times. In addition, the rules that are introduced should:

- Be simple and efficient;
- result in fairness and justice between the parties; and
- offer solutions that accord with the principles and beliefs of the community.

In devising a comprehensive South African strategy to deal with foreign custody awards and the problem of parental abduction the jurist must consider three areas:

- Inter-provincial custody judgments and inter-provincial parental abductions.
- South Africa as a part of the Southern African sub-continent.
- Foreign country custody orders and international child abduction.

1 INTERPROVINCIAL CUSTODY ORDERS AND INTER-PROVINCIAL PARENTAL ABDUCTIONS

The first question which should be addressed in devising a model for South Africa is: How should the courts of one province within South Africa deal with custody orders issued by another? Clearly the present position in terms of which modification jurisdiction is retained in the court of matrimonial cause¹ resolves many of the problems that could arise where a parent wrongfully removes the child from the custodian, and takes him or her to another province in search of a new custody order. This situation could be enhanced by placing all custody awards on a national register, a copy of which should be available to all the courts of the Republic of South Africa which have custody jurisdiction. This would enable a court to ascertain whether or not there is a custody order in existence and to identify the issuing court. In addition it is proposed that exclusive modification jurisdiction should be reserved to the court of matrimonial cause until that court declines, in writing, to exercise that jurisdiction as a consequence of the severance of all ties between the child and the area of the court's jurisdiction. Any court that is approached to modify a decree should therefore be legally required to insist upon such written declination of jurisdiction before entertaining proceedings. For example, where a parent abducts a child and attempts to obtain a modification order from another court within South Africa the court approached should decline to make a determination upon the merits of the case and should order the immediate return of the child to the parent from whom he or she was abducted. In cases where there is concern for the physical or emotional safety of the child the court should order the immediate delivery of the child to a place of safety pending a determination of the merits by the appropriate court. The abductor should be required to pay all travel and legal costs.

"Abduction" should be defined as the removal by any person, including a parent, of a child from the care and control of any other person, including a parent, who is lawfully

1 See ch 4 "2 Custody orders issued by the South African Courts" *supra*.

exercising such care and control, whether in accordance with a custody decree or at common law. It should include any failure by any person, including a parent of a child, to return the child promptly to the care and control of any other person, including a parent, who is lawfully entitled to such care and control whether in accordance with a custody decree or at common law.²

In cases where there is no custody decree the High Court should reserve the right to initial custody jurisdiction to the province in which a child was resident with one or both parents for the twelve-month period preceding the institution of custody proceedings. In the cases where the child has not been so resident in any province, initial jurisdiction should be vested in the courts of the province with which the child has the most significant connection. "Significant connection" will be determined on the basis of the duration of the child's residence in the province, where he or she goes to school, where the child's extended family is to be found, and with regard to the court which is best placed to access information necessary for determining what order would be in the best interests of the child. No court should exercise initial jurisdiction until the child has been restored to the appropriate authorities in the place from which he or she was abducted.³

Consideration must be given to those cases where custody rights are breached in circumstances where there is no custody decree or where an aggrieved parent abducts a child to another province in contravention of an existing order but does not approach the courts of that province to legitimise his or her custody. The potential exists in South Africa for a child to be hidden within the country and moved around with impunity. A good example of the efficiency with which a person could hide a child within the country is the abduction of Michaela Hunter.⁴ Furthermore, large areas of South Africa are

2 This definition would accord with the definition of "wrongful removal" found in art 3 of the Hague Convention on the Civil Aspects of International Child Abduction (The Hague Convention) art 3 discussed in "2.4 Wrongful removal or retention" *supra*.

3 Significant connection jurisdiction is used in the Uniform Child Custody Jurisdiction Act 9 ULA 115 (UCCJA) s 3(a)(2) of the US as an alternative to home-state jurisdiction. See ch 7 "2.1.2 Significant Connection Jurisdiction" *supra*.

4 Maggs A and Patta D *Baby Michaela* Zebra Press, Johannesburg (1996) (Maggs and Patta).

remote and inaccessible with little or no infrastructure. This lack of accessibility would seriously hamper any attempt to locate and return a missing child. Recovery of children in instances where the abductor does not betray his or her whereabouts by approaching the courts can thus be extremely costly and difficult.

Clearly legislation is needed to assist the so-called "left-behind" or aggrieved parent to locate and recover a stolen child. A special task force of the Child Protection Unit of the South African Police Services should be established to assist in the location of missing children.⁵ Legislation must also address the thorny issue of the costs involved in locating and returning the child. These costs should be paid by the abductor. To this end the assets of a parental abductor which are located within the Republic should be attached. The abductor should be called upon to show reason why these assets should not be liquidated and the proceeds used to defray the travel and legal costs involved in the location and return of the child.⁶ If the whereabouts of the abductor are unknown the aggrieved parent should be required to advertise the proceedings in two national newspapers for a period of fourteen days preceding the hearing and should be required to satisfy the court that all reasonable steps have been taken to find the abductor and serve him or her with notice. These proceedings may cause the abductor to return to the jurisdiction of the court and thus facilitate the location of the child. If good cause is not shown the court will then liquidate the assets and make the proceeds available for the purposes of locating and securing the return of the child.

Criminal sanctions should also be imposed upon an abductor parent. These sanctions should be of such a nature as to deter other parents from considering similar action. Prison sentences should be meted out in appropriate circumstances and substantial fines should be imposed. A minimum period of imprisonment should be mandatory in cases where there was physical violence involved in the abduction, or where the child has suffered physical or emotional abuse at the hands of the abductor. The parent of

5 See more about this task force under 3 *infra*.

6 Ordering an abductor to pay costs in relation to an international abduction is not a satisfactory solution for reasons which appear under 3 *infra*.

an abducted child should also face serious criminal charges where, for example, he conspires with any other person to abduct the child on his behalf. By imposing criminal penalties for such behaviour it may be possible to avoid the growth of a South African "re-stealing industry".⁷

Preventative measures should also be instituted. More use could be made of mediation in matrimonial proceedings involving the custody of children. Mandatory mediation may be problematic in cases where parents cannot afford mediation. For this reason the Family Advocate's office offers a free service in certain cases and legal aid could possibly be extended to cover the costs of an accredited mediator where appropriate. Such accredited mediators could be approached to work for a nominal fee in such cases. In other cases parties should be required to share the costs of the mediator in proportions to be determined according to their means. Mediation will not prevent a kidnapping where a parent has set his or her mind on taking the child but it should help the parties to arrive at a custody arrangement that is less likely to result in frustration to either party than a court order that is imposed upon them.

Another possible preventative measure which could be introduced is to require all parties to South African matrimonial proceedings in which a custody award is made to register an authenticated copy of the order with each High Court of South Africa or on a national register, as suggested above. No court other than the court which made the order should be permitted to consider modification proceedings relating to the order unless the court of matrimonial cause provides clear and unambiguous written notice that it declines modification jurisdiction.

2 SOUTH AFRICA AS A PART OF THE SOUTHERN AFRICAN SUB-CONTINENT

The second area that needs to be addressed in the development of a South African

⁷ For a discussion on "re-stealing" see ch 7 "4 Kidnapping, re-stealing and extradition" *supra*.

strategy is South Africa's position as a leader on the Southern African sub-continent. South Africa is clearly awakening to the demands of her position as a member of the international community. It is patent from the South African accession to the Hague Convention on international child abduction that these demands are being taken seriously.⁸ While accession to the Convention is to be welcomed, South Africa is in danger of ignoring the pitfalls that have befallen the other legal systems reviewed in this thesis. The Hague Convention was not designed to address the problem of recognition and enforcement of foreign custody orders but simply to address the issue of parental abduction.⁹ South Africa needs to develop a three-prong approach in her dealings with her neighbouring African states. The three prongs should deal with:

- The recognition and enforcement of custody awards;
- prevention of international child abductions between these states; and
- deterrence of parental child abduction.

South Africa has close ties with her neighbouring Southern African countries. The relationship is similar to that between the United Kingdom (UK) and her European neighbours across the channel. For this reason it may well be advantageous for South Africa to consider initiating negotiations to arrive at a local Southern African convention similar to the Council of Europe Convention. This Convention would be of limited geographical scope. In terms of this convention South Africa could agree to a uniform procedure for the recognition and enforcement of custody orders between South Africa, Namibia, Mozambique, Lesotho, Botswana, Swaziland and Zimbabwe. Such a convention could incorporate a provision for the peremptory return of any child wrongfully removed from one member state to any other, whether or not a valid custody decree had been issued by a court of law. This convention would take precedence in cases where both it and the Hague Convention are applicable. In addition, a multilateral extradition treaty could be concluded in terms of which the person guilty of the wrongful

8 Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

9 For a discussion of the difficulties associated with the application of the Hague Convention see 3 *infra*.

removal of the child from one member state to another could be extradited to the state from which the child was removed. In this way a uniform practice could be achieved with regard to recognition and enforcement of custody orders and international child abduction.¹⁰

South Africa should actively encourage those of her neighbours that have not yet acceded to the Hague Convention to do so. In this way international abductions to Southern African convention countries from non-member countries, or vice versa, will be regulated in the same way as they are regulated in South Africa.¹¹

In drafting a Southern African convention care should be taken to ensure that there is no ambiguity as regards the meaning of terminology.

As a deterrent to child abduction each country should introduce criminal penalties which clearly reflect the seriousness with which the behaviour is viewed.¹²

3 FOREIGN COUNTRY CUSTODY ORDERS AND INTERNATIONAL CHILD ABDUCTION

The UK has modified its approach to the recognition and enforcement of foreign country custody orders by acceding to the Council of Europe Convention which requires that the custody orders of member states will be recognised and enforced in any other member state.¹³ In addition, the common law continues to regulate the position regarding recognition and enforcement of foreign custody judgments of non-member

10 European Convention on the Recognition and Enforcement of Decisions Concerning Children and the Restoration of Custody of Children (Council of Europe Convention) discussed in ch 3 "3 The Council of Europe Convention" *supra*.

11 The discussion *infra* would then also apply to South Africa's relations with her neighbouring states.

12 See "1 Interprovincial custody orders and inter-provincial parental abductions" *supra*.

13 Child Abduction and Custody Act of 1985.

states and any other custody orders which do not fall within the ambit of the Convention. None of the other countries examined in this thesis has acceded to the Council of Europe Convention. Consequently, there is some uncertainty about how a court will react when faced with a request to modify a foreign country custody order. The Hague Convention deals with circumstances where a child is wrongfully removed or retained, not with instances where recognition or enforcement of a foreign custody order is sought. The Hague Convention does not create any choice of law rule in relation to the determination of the merits of the custody dispute.¹⁴ If countries uniformly agreed to the recognition and enforcement of foreign custody orders and put a procedure in place for the enforcement of such judgments many of the problems associated with non-recognition, especially international parental abduction, could be avoided. This is an unrealistic goal. Each country has its own conceptions of what is in the best interests of the child and thus it is unlikely that the courts of any country would willingly enforce the custody determination of another without any enquiry into the merits. This statement is especially true in instances where the country from which the child is abducted is culturally different from that to which the child is taken, for example a child abducted from the US and taken to Iran.

South Africa's accession to the Hague Convention is an important step towards a policy regulating the problem of international parental kidnapping.¹⁵ However, as we have seen above, the Convention is fraught with difficulties. The most important difficulty encountered in applying the Convention is that there are still a great number of countries that have refused to accede to the Convention. For this reason the Convention offers assistance in many, but not all, cases of parental abduction. Those cases which are not governed by the Hague Convention are governed by the common law. The common law can give rise to unsatisfactory results as we saw in *Märtens v*

14 Schuz R "The Hague Child Abduction Convention: Family Law and Private International Law" 1995 44 *ICLQ* 771 796 (Schuz).

15 Note that although there are no reliable statistics in South Africa since the implementation of the Hague Convention in October 1997 three cases of international abductions abroad have been dealt with: Caelers D "Tug-of-Love Kids Tossed a Lifeline" 1998 Jan 27 *Cape Argus* 1 (Caelers).

Märtens.¹⁶ In addition to cases arising in non-Convention countries there are many abductions to or from Convention countries which occurred before the implementation date of the Convention. These abductions are also not covered by the Convention and are regulated by the common law. Clearly therefore, the Hague Convention fails to govern a great many abduction cases. South Africa must thus take steps to implement the Convention in the most effective way possible and, at the same time to supplement the Convention with legislation which will regulate non-Convention cases.

3.1 The Hague Convention

The comparative analysis of certain foreign legal systems that have made use of the Hague Convention has revealed defects in the Convention which South Africa should take urgent steps to remedy when implementing it.

One of the most important requirements of the Convention is that a Central Authority be established in each member state.¹⁷ In South Africa it is envisaged that the Family Advocate will act as the Central Authority. This choice of the Family Advocate seems appropriate when cognisance is taken of the fact that the Family Advocate is already deeply involved in custody matters. However, the human resources of this office are already stretched to the limit in dealing with the matters currently before it. It would appear that the strict budget imposed on the office at present does not allow for the extension of the Family Advocate's responsibilities. The Family Advocate's office should indeed be involved in child abduction cases, but a dedicated personnel, with an independent budget, should be appointed to handle these cases. This group of persons would form a Parental Abduction Task Force and should comprise of an attorney or advocate, a social worker, and a detective who could act in tracing missing children. This task force would also be responsible for the drafting of the forms necessary for making an application to the South African Central Authority as well as those to be

16 1991 4 SA 287 T, discussed in ch 4 *supra*.

17 Art 6.

used throughout the process. These forms will require careful consideration to ensure that all relevant information is disclosed to the appropriate authorities immediately it becomes available. These forms will require revision as new anti-abduction measures are introduced into the South African legal system. The task force would also be responsible to liaise with foreign Central Authorities, parents and their legal representatives, the Missing Children Task Force of the Child Protection Unit, schools, revenue services, and any other person or body who might come into possession of information pertaining to the location of a child who has been parentally abducted. Certainly, without an effective and dedicated Central Authority the Hague Convention will not be effective in South Africa. The implementation of a dedicated task force would not require the allocation of vast financial resources as the small number of parental abduction cases which arise in South Africa each year would only require a small personnel. The Missing Children Task Force of the Child Protection Unit would also not require vast resources but would be of immense value. It would ensure that a police officer is trained and available to search for missing children only and will not be required to deal with these cases as well as cases of child abuse, child rape, negligence and molestation as is the case at present.¹⁸

South Africa should exercise the right under article 26 of the Convention to exclude state liability to cover the costs of Convention proceedings where the child has been abducted from South Africa. In circumstances where a child has been abducted to South Africa the abductor is a *peregrinus* and unlikely to have assets in the country, the recovery of costs in such cases may be problematic. In circumstances where a child has been abducted from South Africa the abductor is unlikely to return to South Africa to settle any outstanding legal costs and thus the recovery of costs in such cases may also be problematic. Thus in instances of abduction any assets of an abductor which are located in South Africa should be attached by the courts immediately the kidnapping is reported and the goods should be liquidated and the proceeds used to locate and arrange for the return of the child and to defray any legal costs awarded

18 Maggs and Patta *supra* n 4 95-107.

against the abductor by any court awarding custody back to the aggrieved parent.¹⁹ In the event that the "abductor" proves to the satisfaction of the South African courts that his or her action was not wrongful, the petitioner in the abduction case shall be required to repay to the "abductor" any sum used for the purpose of locating or returning the child.

In cases where the child is abducted to South Africa the South African authorities should confirm with the foreign country from which the child was abducted that the foreign country will cover any costs incurred by the South African authorities in recovering and returning the child in accordance with Convention provisions. In instances where the foreign state has also provided that it will not bear the costs of Convention proceedings South Africa should obtain a commitment from that country to recognise and enforce any South African award made in terms of the Convention and any costs award arising from Convention proceedings and made by a competent South African authority. It is submitted that this could be done by way of multilateral or bilateral treaty provisions.

The Convention's choice of law rule enjoins that the wrongfulness of a child's removal or retention is determined by the law of the place of habitual residence of the child immediately before the removal or retention. This is surprising if one considers that the concept of habitual residence is inherently ambiguous. This concept may not reflect a close connection between the child and the forum. The forum may not be best placed to evaluate the rights of the child. Hence the application of this choice of law rule may potentially conflict with the justice principle that underlies the conflict of laws in general.²⁰ As in all situations there are cases that are atypical. A solution which would result in a just and equitable result in the majority of cases would result in an injustice in such cases. It has been proposed that two exceptions be incorporated into the

19 As in cases of interprovincial abductions, procedures should be put in place to ensure that the rules of natural justice are obeyed in liquidating such assets. See "1 "Inter-provincial custody orders and interprovincial parental abductions" *supra*. This practice is akin to sequestration at English law. See ch 5 "4 Criminal repercussions" *supra*.

20 Schuz *supra* n 14 798-799.

Convention to deal with these cases:

- Where it can be shown that the laws of a country other than the place of habitual residence are more closely connected to the custody determination, then that law will be applied to determine whether or not the removal is wrongful; and
- where it can be shown that the place to which the child has been removed is the most appropriate to determine the future best interest of the child it should be permitted to determine the matter despite a Hague Convention application having been made.²¹

I submit that these suggestions should not be acted upon. The introduction of further exceptions which offer judicial discretion into this area of law will simply muddy the waters. There are really only two possible approaches if international consistency is to be achieved: Either the rules applied in Convention cases must be rigid and the atypical case take its chances; or there should be no fixed rules whatsoever and mere guiding principles established to help judges in the exercise of their discretion. There is no doubt that trends are towards the imposition of uniform rules and thus it appears reasonably safe to assume that the contemplation of each individual case on the merits is a thing of the past, a return to which is not desirable.

The Convention makes use of a number of important concepts that, despite initial impressions, are not clearly defined. These concepts have resulted in inconsistencies in the outcome of Convention proceedings in the countries examined in this thesis. For this reason the South African implementing legislation should be amended to incorporate clear definitions of the concepts fundamental to the Convention. A clear definition of "wrongful removal" within the context of the South African law is needed.²² Whether or not a removal is wrongful is determined by the law of the place of habitual

21 *Ibid.*

22 "Wrongful removal" is defined in art 3 of the Convention in a manner that makes it dependent on the meaning of "habitual residence" and "custody rights".

residence. The concept of habitual residence must be clearly and unambiguously defined within the South African legal context. The meaning of "custody rights" at South African law must also be defined to include any right to care and control awarded to any person by law, judicial or administrative action, or legal agreement. These rights would include access and visitation rights. The legislation should also set out clearly the circumstances under which South African law will regard a person as "exercising" his or her custody rights and whether this conflicts category will accord with the domestic law category or will be broader. It is proposed that while domestic law appears to treat "access" and "visitation" as distinct from "custody" they should fall within "custody rights" for purposes of conflict of laws.²³

The Convention exceptions contained in articles 12, 13 and 20 may also prove a source of confusion.²⁴ Implementation legislation should include definite parameters to determine the point at which a child has become settled in his or her new environment and the factors to be taken into consideration in making such a determination. These factors should be strictly interpreted. Thus a child who has been in a country for eleven months, has learnt the language, and made friends there, but who has not attended school should not be regarded as settled. It would be preferable to make the return of the child to the applicant state peremptory pending a determination on the merits. Article 13 exceptions are capable of discretionary abuse. For this reason "consent" should be clearly defined, as should the meaning of "grave physical or psychological harm" and the circumstances to be considered in deciding whether or not a risk of such harm exists. Discretion should be minimised in the interests of certainty.

Definite parameters should be set for the determination of the age at which the child is sufficiently mature to have cognisance taken of his or her preference as regards his or her return. Consideration of the child's preference should in fact be left for evaluation by the court making the final determination on the merits.

23 See, Silberman L "Hague International Child Abduction Convention: A Progress Report" 1994 57 *L&CP* 209 224 (Silberman *L&CP*).

24 See ch 3 "2.7 Defences" *supra*.

Article 20 contains a public policy exception. This exception too is open to discretionary abuse. However, public policy considerations are fundamental to any community's system of justice and equity and it would be unacceptable to discard this provision.

The Convention makes provision for a twelve-month period within which Convention proceedings must be instituted, failing which the court has a discretion to refuse to return the child on the basis that he or she is settled in his or her new environment.²⁵ The one year time limit from the date of the abduction is too short. Experience shows that often children cannot be located despite the best efforts of the aggrieved parent. Thus it is possible for an abductor to hide the child for a year or more and then prevail upon the court to exercise its discretion to refuse return on the basis that the child is now settled. The aggrieved parent should be allowed a period of one year from the date upon which the child was located to institute action under the Convention. This should be subject to the proviso that steps were taken to locate the child within 3 months of the child's abduction. Judicial delays should not be permitted to benefit the abductor in any way. For this reason the circumstances in Convention cases should be regarded as they were at the institution of proceedings and not as they are at the date of completion of the custody hearing.

The sixteen year age limit should be reviewed.²⁶ In cases where the child is under the age of sixteen when Convention proceedings are initiated the Convention should continue to apply despite the child attaining the age of sixteen before completion of the proceedings. This too would prevent an abductor from benefiting from judicial delays. In cases where a child of sixteen years or older is mentally or physically dependent on his or her custodian the Convention should continue to apply for as long as the courts of the place of the child's habitual residence prior to the abduction, regard that person as dependent.

25 See art 12 of the Convention.

26 See art 4 of the Convention.

One major drawback of the Convention is that only the return of the child is required. The return of the parent should also be required so that he or she may settle any legal costs and face any possible criminal charges arising from the abduction. A parent who refuses to return should be seen to be placing his or her welfare ahead of that of the child.²⁷

3.2 Non-Convention cases

South Africa needs to introduce certainty into the position regarding cases of parental child abduction which do not fall within the scope of the Hague Convention. The rules that are applied should not distinguish between cases of abduction to or from Convention countries before the implementation date of the Convention and those to or from non-Convention countries. The first step to be taken is to encourage all non-Convention countries to accede to the Convention. Such an increase in Convention membership would result in the greater efficacy of the Convention. Global membership of the Convention is an ideal; but it is unrealistic ideal bearing in mind the diversity of cultural and legal heritages among the member states of the United Nations (UN).

South African Courts could adopt any one of three approaches when dealing with non-Convention cases:

- They could implement a peremptory-return approach. In terms of this approach any person petitioning the court for a custody award in a case where the child has been abducted should be relieved of the child immediately. The justice department of the country from which the child was removed should be asked to nominate a local welfare authority to which the child should be handed pending a custody determination by the courts of the country from which the child was abducted. For example, A abducts B from the custody of C in country X and takes B to country Y. A applies to the courts of country Y for a custody

²⁷ Silberman *L&CP* 238 *supra* n 23 238.

order in his or her favour. The courts of country Y will immediately contact the justice department of country X which will indicate to which welfare agency in country X the child should be delivered. The courts of country X will then make a custody order based upon the merits of the case. The abductor is thus deprived of physical custody of the child without any determination being made on the merits of the case. The court system of the country from which the child was abducted is left to determine the custody arrangements that best accord with the child's welfare. Costs of the return of the child should be borne by the abductor parent;

- they could simply deal with each case on the merits. This would perpetuate South Africa's image as a safe haven for abductors. This is an image that the legislature has taken steps to dispel by acceding to the Hague Convention; or
- they could be bound by legislation to apply Convention principles in non-Convention cases. Currently, South African courts have a discretion to apply these principles which creates uncertainty and permits discretionary abuse. Any discretion should be eliminated. The Central Authority and the mechanisms of the Convention would not be available in such cases but the policy to return the child to the place from which he or she was abducted will apply.

The first and third approaches would give rise to certainty in non-Convention cases. The last approach appears to be the most practical.

It should be noted that in all cases, whether they are Convention or non-Convention cases, it is proposed that the child should be placed in the safety of the care agencies of the country or province from which he or she was abducted pending the determination of the custody issue by the appropriate court. This would ensure that the child is safe throughout the proceedings and that neither party has an opportunity to unduly influence the child with regards to his or her preference.

A major difficulty that may arise in relation to a non-Convention case of abduction to South Africa is the uncertainty about what can be done to assist an aggrieved parent in cases where the abductor does not approach the courts. The relevant authority in the foreign country should be given access, through designated channels, to any information that is available in South Africa which might assist the aggrieved parent in his or her search for the child. Practical measures could be implemented to create a framework to facilitate such searches for missing children.²⁸

3.3 General measures which could be applied to all cases of parental child abduction

The following measure could be introduced quickly, and at a relatively low cost, to help in the location of children abducted to or from South Africa:

- Children entering or leaving South Africa for a visit should be required to produce the written consent of both parents. Such children should be fingerprinted and the fingerprints kept in a computerised central record. This would assist in the determination of whether or not the child has entered or left the country.
- Airport personnel and customs officials should be fully informed of means of identifying "at risk children" and should have easy access to adequate technology to run random checks on children entering or leaving the country. They should be trained to note factors such as persons entering or leaving the country for a short period with an excessive amount of luggage, persons entering the country for a lengthy stay with little or no luggage, a child who is clearly sedated, or an accompanying adult who seems nervous or upset.

28 See 3.3 "General measures which could be applied to all cases of parental child abduction" *infra*. The SABC has started a new television programme, "Missing". The purpose of this programme is to assist people in the search for missing persons. It is estimated that of the 3 569 persons currently listed at the National Bureau for Missing Persons, 671 are children under the age of 18: "SABC Highlight" 1988 April *You* 71.

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- Schools should be alert to the admission of children with no transfer records or who have changed schools frequently.²⁹ The South African Central Authority should put in place the mechanisms necessary for schools to report such cases and should have the manpower available to conduct appropriate follow-up investigations.
 - Where a foreign child has been hidden in South Africa the special task force of the Child Protection Unit of the Police, called for above, should be assigned to assist the aggrieved parent in locating the child and ensuring that the child is returned.
 - Mechanisms should be devised to ensure that South African parents whose custodial rights have been infringed by the abduction of a child to a non-Convention country are given as much assistance and co-operation from the Central Authority in facilitating their search as possible.
 - All assets of an abducting parent should be attached and the parent who is left behind should be entitled to have these assets liquidated and the proceeds used to defray the costs incurred in searching for and securing the return of the child.
 - South African embassies and consulates should assist where possible in smoothing the way for aggrieved parents to make use of the foreign authorities such as foreign police services in their search for an abducted child. They should actively involve themselves as go-betweens to improve communications and to expedite the matter where possible.
 - Interpol has certain resources which may be effectively exploited by South Africa

29 The need for abductors to remain hidden often causes them to move about frequently and to place the child in new schools. Although there may be valid reasons for a custodial parent and his or her child to move frequently the schools have the potential to identify children whose school record might suggest that further enquiry is warranted, especially if the child arrives at his or her new school with no transfer papers from his or her previous school.

in its battle against parental child abductions.

Often it is not the inadequacies of the legal provisions that impede the recovery of abducted children, but rather the absence of a suitable infrastructure to lend practical assistance to an aggrieved parent. For this reason a national registry of missing children should be created and a special task force of the Child Protection Unit should be established to offer assistance in such matters.³⁰

3.4 Criminal sanctions and delictual damages

Measures should be introduced making the act of parental kidnapping, whether the child is taken by the parent or at the behest of the parent, an offence subject to severe penalties such as a substantial fine or a period of imprisonment, or both. It is proposed that the amount of the fine or the period of imprisonment imposed should be determined according to the following factors:

- Whether or not there was violence associated with the abduction;
- the period during which the child was missing;
- whether or not the abductor notified the other parent that the child was safe;
- whether or not the child was removed from the country;
- whether or not there was a custody decree at the time of the abduction;
- whether or not the child was well taken care of while he or she was with the abductor; and
- whether or not the abductor voluntarily returned the child.

It is not suggested that delictual damages should be payable by a parental child abductor to the aggrieved parent, however the abductor should be liable for all costs

30 Martin C "Abduction of Children - Some National and International Aspects" 1986 1 *AJFL* 125 150-151 (Martin) called for a specialised police force and national registries to be established in Australia. As was indicated in n 28 *supra*, there is a National Bureau for Missing Persons, however, this Bureau does not identify which of the missing persons has been abducted. A dedicated register of abducted children should be established.

reasonably incurred by the parent in locating and obtaining the return of the child. The abductor should also be liable to pay for the costs of a period of counselling for both the child and the aggrieved parent where a court finds that such counselling is necessary. The court shall determine the period for which the abductor will be liable to pay for such counselling. The court should also be empowered to order that the abductor undergo counselling himself or herself.

3.5 Preventative measures

The emphasis should fall upon the prevention of child abduction rather than the return of abducted children. Preventative measures are needed to reduce the risk of child abduction internationally.³¹ These measures should be aggressively pursued in order to reduce the incidence of such cases.

Education will be central to any campaign to institute effective preventative measures. All persons, whether they are social workers, police or customs officials, teachers, lawyers or judges, must be educated in the nature, causes and procedural steps available in cases of child abduction. In addition it is imperative that the public too is educated. The perception of parental abduction as a domestic quarrel must be dispelled and the public encouraged to become involved in the protection of children within the community by reporting any suspicious circumstance involving a child.

Technology must be exploited to ensure that central records recording the child's details and any information identifying a child as a high-risk case are readily available. All custody awards made in South Africa should be recorded on a central register and the records should be updated regularly. South Africa should follow the American example of creating a national register of missing children. All information on record should be available to the relevant authorities involved in assisting in a child-abduction matter.

31 See Harper T "The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-abduction" 1995 9 *Emory Intn'l LR* 277 (Harper).

It is vital that a comprehensive South African strategy be designed to safeguard the physical and emotional safety of the child. Such a strategy should attempt to minimise the disruption of the child's life. Custody arrangements should allow for maximum contact between the child and both parents that is consistent with the child's safety and stability. The courts should be accessible to parents seeking temporary custody and should act promptly in such cases. Pre-divorce parenting patterns should be considered in making any custody award. In addition, as with interprovincial child abductions, mandatory mediation in all cases of matrimonial proceedings where there are children of the marriage might possibly also help to reduce the incidence of international abductions.³² The resources of the Family Advocate's office are overburdened, both human and financial resources are stretched so thin that any method that might be introduced to alleviate the pressure upon this institution should be given serious consideration. Certainly, court-sponsored mediation is out of the question. Private, accredited mediators could support the efforts of the mediation services offered by the Family Advocate in instances where the parties are able to pay for the service. Financial assistance could be made available in appropriate cases through a system similar to legal aid, or a reserve fund could be created by making provision that half of all fines paid by persons convicted of parental child abduction be paid into a national fund for the provision of mandatory mediation in child custody cases where there is financial need. The other half of such fines could be allocated to

32 On mediation see: Abram MC "How to Prevent or Undo a Child Snatching" 1984 70 *American Bar Association Jour* 52 55 (Abram); Roberts S "Mediation in Family Disputes" 1983 46 *MLR* 553-557 (Roberts); McCrory JP "Confidentiality in Mediation of Matrimonial Disputes" 1988 51 *MLR* 442 (McCrory); Davis G, MacLeod A and Murch M "Undefended Divorce: Should Section 41 of the Matrimonial Causes Act 1973 be Repealed?" 1983 46 *MLR* 121 (Davis *et al*); Blades J *Family Mediation Cooperative Divorce Settlement* Prentice-Hall Inc, New Jersey (1985) 29-30 (Blades); Burrett JF *Child Access and Modern Family Law* The Law Book Company Ltd, Sydney (1988) 4 (Burrett). Fisher T "Family Mediators Go Comprehensive" 1994 24 *Fam Law* 697 (Fisher) discusses mediation as it has been implemented in the US under the National Family Mediation Project (NFM). NFM research findings revealed that children were not as central a focus in matrimonial disputes as had previously been supposed. While the jury is still out on whether or not mediation has meaningfully contributed to decisions of parents to abide by custody decrees it cannot do any harm to encourage open and honest communication between divorcing parents and the children of their marriage. See too Ingleby R "Court Sponsored Mediation: The Case Against Mandatory Participation" 1993 56 *MLR* 441 (Ingleby "Mediation") in which Ingleby declares himself in favour of mediation as a recognised form of alternate dispute resolution but against its being made mandatory.

the Child Protection Unit Abduction of Children Task Force.³³

Mandatory mediation in matrimonial proceedings where custody is an issue would have twofold advantages. First, the children's interests would be given careful consideration outside of a hostile adversarial context. This would serve to ensure that the parents attention is focused on the fact that the demise of their marital relationship does not also signal the demise of their parenting responsibilities and, secondly, it prevents the use of the child as a pawn in arriving at a financial settlement. Custody awards should not be so demeaning to the non-custodial parent as to goad him or her into illegal action. Mediation is directed at clearing channels of communication. If the parents of the child are able to clearly and openly communicate their feelings regarding custodial arrangements to each other they are more likely to arrive at a compromise regarding custody that is acceptable to both. In addition, perhaps a greater involvement of children in divorce proceedings may ensure that their wishes are also considered.³⁴

Schools and other interested institutions should be furnished with a copy of any custody order awarded in matrimonial proceedings. Parents should advise schools where they believe that the child may be at risk. Identity cards for school-going children should be issued by the educational authorities and the data therein recorded. This would force any person entering a child into the South African school system to place the details of the child on computer.

The Central Authority, the Child Protection Unit of the South African Police Services, social workers, the Family Advocate, schools and the South African Revenue Service should confer and arrive at co-operation agreements to ensure that the relevant authorities have access to as much information as possible which might assist in the

33 There are no reliable South African statistics at this time. Based upon the number of Convention cases dealt with since the accession of South Africa to the Hague Convention noted in n 15 *supra* the numbers are numerically small. This means therefore that the state may be able to render assistance without the allocation of vast financial and human resources.

34 Crosby-Currie "Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals" 1996 20 *Law and Human Behaviour* 289 (Crosby-Currie).

location of missing children, including those who have been abducted.

Members of the legal fraternity, social workers, teachers and law-enforcement agencies should be trained in the identification of high-risk cases. In matrimonial proceedings where no mediated custody agreement could be arrived at, or where the child appears to fall into the category of high risk because of dual nationality, a foreign parent, etc, the court should require that a bond be posted each time visitation rights are exercised. In the event of parental abduction the bond could then be used towards the costs of locating and returning the child.

The manner in which child custody awards are made should be thoroughly reviewed and judges encouraged to find innovative solutions to assist families in arriving at an arrangement that is acceptable to all. The possibility of non-compliance with the terms of the custody award should be considered when the award is made. Custody orders should set out visitation rights clearly and unambiguously to ensure that misunderstandings occasioning frustration are minimised. Relocation of children subject to a custody order should be strictly regulated.

The passports of children listed on the national register of children "at risk" should be held by the court and should only be handed to a parent for travel purposes when the parent applies in writing for the release of the passport. Such an application must be accompanied by a signed, witnessed, consent from both parents that the child may be removed from the country. The parent removing the child should be required to post a bond until such time as the child is safely returned to the custodial parent or other custodian and the court should record the child's fingerprints.³⁵

Many of the abovementioned suggestions can be implemented at very little cost. Some of the suggestions will however require the allocation of more resources to the recovery

35 The child's fingerprints are a more useful form of identification than a photograph. The physical appearance of the child may easily be altered and after a time the child may change substantially.

and return of children. The number of children that are parentally abducted worldwide appear to be numerically small but this has not prevented Australia, the UK, the US and South Africa from taking the problem seriously. South Africa, like these other countries, has indicated a commitment to the resolution of this problem by acceding to the Hague Convention. South Africa should not now ignore the need for the allocation of financial resources to ensure the attainment of the objectives of the Convention. If parents cannot locate their abducted children the Convention is without value to them.

4 CONCLUSION

Clearly, recognition and enforcement of foreign custody orders and the associated problem of international parental child abduction gives rise to complex and challenging problems. The opportunity for innovative solutions to a vexing dilemma offers itself now. South African jurists must rise to the occasion and protect the children of South Africa.

It must be remembered that "One of the most complex forms of criminal behaviour is that which concerns offences involving family members. They are especially difficult to understand because of the intimate relationship between the parties, the private environment in which they are perpetrated, and the vast array of motivations which induce them. Crimes such as wife-beating and child abuse depict the distinctive nature of violence and suffering inflicted by family members. These more visible types of domestic crime generally cease with divorce. But a repercussion of the divorce process has been the increase in parental abduction. Children of divorce now face an increasing risk of being abducted by a parent who loses custody following the breakup of a marriage."³⁶

The ultimate victims of divorce are the children who are often treated as possessions by their emotional and often hostile parents. As a result of the increasing number of matrimonial cases in which child custody is an issue, child abduction may also

36 Agopian *Parental Child-Stealing* Lexington Books, Lexington (1981) Preface xvii (Agopian).

increase. In cases where a parent feels an imminent threat of losing custody of his or her child an abduction may precede the divorce, or it may occur after the divorce when the loss of custody has become a reality. It should also be borne in mind that custodial parents have also been known to abduct their children in order to deprive the non-custodial parent of visitation rights which, for most purposes, are regarded as limited custody rights. Parents are seldom deprived of these fundamental rights to contact with their children, save in the most extreme circumstances. Interference with these rights to contact should not be tolerated by the South African legal system.³⁷

The establishment of a coherent body of information surrounding parental child abductions in South Africa should be given priority. This information may be useful in identifying any patterns which could be used by authorities in devising a cohesive plan for the eradication of this behaviour. Such information should include the sex of the abductor and the abducted child, the age group to which the parents belong, the age of the child or the children abducted, the economic position of the parents, when, where and how the child was abducted, whether the abduction took place before, during or after a divorce, the place to which the child was taken, the period for which the child was retained before he or she was recovered, whether or not the child was recovered, the number of children the parents have, whether any siblings were also abducted, the time of day when the abduction took place, whether or not the abduction followed upon a period of visitation, whether or not the abduction occurred during a school holiday, whether or not there was any violence associated with the abduction, whether or not the parent who was left behind reported the matter to the police, the extent and nature of any police involvement in the recovery of the child and the expenses that were incurred, whether or not the abductor was prosecuted and convicted of any offence, and if so, the nature of the offence, and the penalty that was imposed, if any.

In cases of publicised child kidnappings the public often feels an emotional bond with both the deprived parent and the snatcher. Persons involved at an official level must

37 Visitation rights have not been discussed here as they were specifically excluded from the scope of this thesis.

be careful not to emotionally identify with a parent. They must be sure to objectively evaluate the whole situation without bias against either parent. Parents are often equally loving and the motivation for the abduction may vary enormously from one case to another.

The complexity of the problem of parental child snatching demands a holistic approach to its resolution. It will not suffice to improve the law enforcement response to such complaints unless the position of the courts is reviewed. The situation of the child in the home and the relationship between the child and divorced parents must be re-evaluated and the legal position restructured to stabilise the situation and reduce the resentment of the non-custodial parent.

Custody orders are not final and conclusive³⁸ but they are of such grave importance to the fabric of our society that they should be placed in a special position and treated *sui generis*. The High Court of South Africa is the upper guardian of all minor children within the country. It has thus been entrusted with the daunting task of ensuring that their best interests are considered of paramount importance when making any decision in their regard.³⁹ It is imperative that the court be possessed of a body of law which creates a definite framework within which it may operate. In the absence of such a framework the South African courts run the risk of their decisions being inconsistent and reflecting cultural bias or personal prejudice.

The Hague Convention certainly puts in place an important part of the framework, but it does not go far enough. The South African legislature must take steps to supplement the Convention and make South Africa a bastion for the protection of children. Kidnapping of children by, or on behalf of, their parents is emotionally traumatic to all concerned, especially the child. In many instances the emotional trauma is

38 See ch 2 "4.2 Finality" *supra*.

39 Robinson JA (man ed) *Children and Young Persons in South Africa* Butterworths, Durban (1997) 227 (Robinson).

accompanied by physical trauma.⁴⁰ Children who have been abducted often feel betrayed by the abductor, are emotionally tortured by their fear that the aggrieved parent does not want them and is not searching for them, have their names changed and are forbidden to make friends lest they reveal their true identity, constantly move from school to school, are kept locked up, beaten or verbally abused by the abductor who is unhappy and dissatisfied with life on the run, and in extreme cases may even die at the hands of the abductor.⁴¹ Preventative measures are imperative. Criminal sanctions should exist to punish an abductor, and even more strict penalties should apply in cases of re-abduction. Situations of abduction and re-abduction have been labelled "tug-of-love" situations but in fact the child does not feel loved. The child is confused and frightened and the trust that exists between him or her and his or her parents is destroyed.

The US has taken sophisticated steps to combat the child abduction problem but their steps are too complicated. South Africa must ensure that whatever steps are implemented they are clear and concise. Here is an opportunity for South Africa to seize the initiative and show other countries the way forward. South Africa, as a regional Southern African leader, has an ideal opportunity to exercise her leadership and initiate regional negotiations for the implementation of a regional convention between the countries on the sub-continent.

The most damaging aspect of custody battles is often not manifest until after the divorce. "Parents of missing children, wounded and desperate, are easy marks for aggressive detectives and lawyers.....Like a disease, there is no way to prevent it and no way to predict whom it may strike. Child stealing may occur after lots of warnings or

40 For a discussion of the trauma to abducted children see Plass PS, Finkelhor D, Hotelling GT "Family Abduction Outcomes: Factors Associated with Duration and Emotional Trauma to Children" 1996 28 *Youth and Society* 109 (Plass *et al*); Agopian *supra* n 36; Abrahms S *Children in the Crossfire* Atheneum, New York (1983) 1-8 (Abrahms).

41 Abrahms *ibid*.

with none at all. No one is immune."⁴² "Ironically, it is the legal system itself that has spawned child stealing, because it encourages, rather than discourages, this behaviour. Abducting parents who break the law are rarely caught or punished, while mothers and fathers who play by the book frequently lose out."⁴³

Police co-operation with the public in cases of interference with custody rights can be improved. Education of all concerned will help, as will the aggrieved party's commitment to prosecute in instances where a criminal offence has occurred. When parents withdraw charges it enrages beleaguered law-enforcement agents who have spent valuable time and may have even risked their lives in locating the abductor and the child.⁴⁴

Children cannot be guarded at all times and thus a snatch is always a possibility. Indeed, where a parent is determined to kidnap his or her child he or she will invariably succeed.⁴⁵ Of course, where a child is at risk all preventative measures should be taken. But in the end fair and precise custody and visitation agreements are probably the best insurance against child snatching. Where parents are happy with the custody arrangements they rarely steal.

42 Abrahms *supra* n 40 xviii.

43 *Idem* 88.

44 This is the case in the US, *idem* 96.

45 Grief GL and Hegar RL *When Parents Kidnap: The Families Behind the Headlines* The Free Press, New York (1993) (Grief and Hegar).

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Texas Penal Code

Tenn Code Ann

Tex Fam Code Ann

LIST OF ABBREVIATIONS

ABA Jour	American Bar Association Journal
AJFL	Australian Journal of Family Law
ALJ	Australian Law Journal
Am J CL	American Journal of Comparative Law
Am J FL	American Journal of Family Law
Arizona Jour I & CL	Arizona Journal of International and Comparative Law
Boston Uni Intn'l LJ	Boston University International Law Journal
Butterworths SA LR	Butterworths South African Law Review
CILSA	Comparative International Law Journal of South Africa
CLD	Current Law Digest
CLRJ	Children's Legal Rights Journal
CLR	California Law Review
CLY	Current Law Yearbook
Cth Law Bulletin	Commonwealth Law Bulletin
Col LR	Columbia Law Review
Emory Intn'l LR	Emory International Law Review
Fam Adv	Family Advocate
Fam Law	Family Law
Fam Rel	Family Relations
Fed LR	Federal Law Review
FLQ	Family Law Quarterly
Hastings LJ	Hastings Law Journal
Hastings Intn'l and Comp LR	Hastings International and Comparative Law Review
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
JCL	Journal of Child Law
Jour of Comp Fam Studies	Journal of Comparative Family Studies

Jour Juv Law	Journal of Juvenile Law
Juv & Fam Cr't J	Juvenile and Family Court Journal
L&CP	Law and Contemporary Problems
Loyola LA Intn'l & Com LJ	Loyola of Los Angeles International and Comparative Law Journal
LIJ	Law Institute Journal
LQR	Law Quarterly Review
MLR	Modern Law Review
Netherlands Intn'l LR	Netherlands International Law Review
NILQ	Northern Ireland Law Quarterly
NLJ	New Law Journal
NCJ Intn'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
NYL Sch LR	New York Law School Law Review
NY St Bar Jour	New York State Bar Journal
NYU Jour Intn'l L & P	New York University Journal of International Law and Politics
QLD Uni of Tech LJ	Queensland University of Technology Law Journal
Rabel Z	Rabel Zeitschrift
SALJ	South African Law Journal
SCLR	Southern California Law Review
SLT	Scots Law Times
Sol Jour	Solicitor's Journal
Stanford Jour Intn'l Law	Stanford Journal of International Law
Suffolk Transn'l LJ	Suffolk Transnational Law Journal
Suffolk Uni LR	Suffolk University Law Review
St Mary's LJ	St Mary's Law Journal
Sydney LR	Sydney Law Review
Texas Intn'l law	Texas International Law
The Juridical Rev	The juridical Review

THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg
Uni Arkansas at Little Rock LJ	University of Arkansas at Little Rock Law Journal
Temple Intn'l & Comp LJ	Temple International and Comparative Law Journal
Uni Cal Davis LR	University of California Davis Law Review
Uni Miami Inter-Am LR	University of Miami Inter-American Law Review
Uni Louisville Jour of Fam L	University of Louisville Journal of Family Law
Uni Toronto LJ	University of Toronto Law Journal
Vanderbilt Jour Transn'l Law	Vanderbilt Journal of Transnational Law
Yale LJ	Yale Law Journal