

# Parenting and Custody of Children

---

## 1 Introduction

**[1.1]** The law relating to the care and control of children has, in recent times, undergone considerable modification. In 1995, Pt VII of the Family Law Act 1975 (Cth) was completely re-written; spelling out in more detail the nature of parental responsibility towards children, and replacing the former orders of guardianship, custody and access with the more generic 'parenting order': s 61D. However, at least in relation to the rules of private international law affecting the care and control of children, these changes are largely cosmetic. A more fundamental change to the conflicts rules had already been made in 1987, with the implementation of the Hague Convention on the Civil Aspects of International Child Abduction 1980 by the Family Law (Child Abduction Convention) Regulations. The Convention applies whenever a child is habitually resident in a contracting state immediately before being brought to Australia in breach of rights of custody or access, and provides in general for the child to be returned to that territory and for any dispute about care and control to be determined there: art 4.

**[1.2]** Unless otherwise indicated, in this chapter references to section numbers are to those in the Family Law Act 1975 (Cth), and regulation numbers to those in the Family Law Regulations (Cth). The following abbreviations are used:

|     |   |
|-----|---|
| FLA | Family Law Act 1975 (Cth)   |
| HC  | Hague Convention on the Civil Aspects of International Child Abduction 1980 |
| HCR | Family Law (Child Abduction Convention) Regulations                         |
| WA  | Family Court Act 1975 (WA)  |

What is unclear is how Pt VII and the Hague Convention relate to each other. The rules of jurisdiction in Pt VII apply to any proceedings instituted under the FLA in relation to a child: s 69E. In its terms this probably includes legal proceedings brought under the Hague Convention as it ultimately takes its force from the regulation making power of s 111B of the FLA. Thereafter, nothing expressly indicates whether a case falling within the terms of the

Hague Convention can also be dealt with under Pt VII, either simultaneously or in the alternative. The Convention nevertheless states that, unless and until it is determined that a child is not to be returned to the place of habitual residence, the merits of the case are not to be decided: art 16. It therefore appears that any application made under the Hague Convention must be determined first, and the principles of Pt VII can only be applied later in the same case if, in accordance with the provisions of the Convention, the child is not to be returned to the place of habitual residence but the question of its care and control is to be determined in Australia: *Marriage of Barraclough* (1987) 11 Fam LR 773 at 779–80.

**[1.3]** Part VII of the FLA purports to deal with all children, whether born within wedlock or to unmarried parents. The Commonwealth Parliament only has an express grant of power to create jurisdiction over the children of a marriage, and it has only been possible to include the jurisdiction over children born outside marriage because there has been a referral of powers relating to ex-nuptial children to the Commonwealth Parliament from most of the states. However, there has been no referral of powers from Western Australia. Therefore, Pt VII as a whole applies in New South Wales, Queensland, South Australia, Tasmania, Victoria and the territories: ss 69ZE(1) and 96ZG. It is still open for the whole of Pt VII to apply in Western Australia if there is an appropriate referral of powers or the state parliament adopts the Part: s 69ZE(2). In the meantime, Pt VII has a more limited operation in Western Australia; its provisions being applicable in that state only to children of a marriage and parents who are parties to a marriage: s 69ZH. The rules relating to ex-nuptial children are set out in the Family Court Act 1975 (WA). Importantly, however, the provisions of Div 13 of Pt VII of FLA, which deal with the enforcement of foreign orders relating to children by registration, have an unlimited operation in Western Australia: s 69ZH(4). The Hague Convention also applies throughout the country, including Western Australia.

**[1.4]** In light of the above, the issues concerning multi-state parenting and custody cases are considered as follows:

- jurisdiction;
- the Hague Convention;
- Part VII of the FLA.

In this area as in matrimonial causes, the rules relating to the recognition of foreign orders are much more important than choice of law rules for determining multi-state cases. The choice of law rules will nevertheless be discussed briefly when considering Pt VII of the FLA: see **[4.2]**.

## 2 Jurisdiction

**[2.1]** Proceedings for a parenting order in relation to a child may only be brought by (a) either or both of the child's parents; (b) the child; or (c) any person concerned with the care, welfare or development of the child: s 65C. Other proceedings in relation to a child may, in addition, be brought by a

grandparent of the child: s 69C(2). Then, under s 69E(1) of the FLA proceedings may only be brought under the FLA in relation to a child if on the day proceedings are commenced:

- (a) the child is present in Australia;
- (b) the child is an Australian citizen or is ordinarily resident in Australia;
- (c) a parent of the child is an Australian citizen, is ordinarily resident in Australia or is present in Australia;
- (d) a party to the proceedings is an Australian citizen, is ordinarily resident in Australia or is present in Australia; or
- (e) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or common law rules of private international law, for the court to exercise jurisdiction in the proceedings.

It is likely that the personal connections with Australia required by s 69E(1) are defined in the same way as they are at common law. The ordinary residence of a child would therefore be the place of its parents' matrimonial home if they live together, or its custodial parent's home if they live apart: see [2.2]. For proceedings commenced in Western Australia, these provisions only apply if the child is a child of a marriage and the parents were parties to the marriage: s 69ZH(2). Proceedings relating to a child in that state who was born outside marriage may only be brought by:

- (a) either parent;
  - (aa) the child or a person acting on behalf of the child;
- (b) any guardian, whether appointed under the provisions of this Act or by will or otherwise;
- (c) any person having custody or care and control of the child;
- (d) any person acting in a fiduciary capacity who is, under any will, gift, or settlement, or otherwise by law, possessed of any fund for the maintenance or education of the child, or any fund a portion of which may by law be applied for the maintenance or education of the child; or
- (e) any other person, who on the hearing of the application can establish to the satisfaction of the court that his or her paramount interest in the matter is the welfare of the child: WA, s 36.

Jurisdiction to make an order for the care or control of an ex-nuptial child exists when the child is present in the state and either of the parties is resident in the state: WA, s 27(5). It has already been seen that the rules of jurisdiction in s 69E(1) probably apply to actions brought under the Hague Convention. However, where these cases involve a child who has been removed to Australia the child will, in accordance with s 69E(1)(a), inevitably be present in the country at the time proceedings are commenced. This provision does not apply where an ex-nuptial child is removed to Western Australia, but the regulations probably still provide an independent ground for an application to be made in that state: see HCR, r 14. Of course, where these cases involve a removal of a child from Australia some other connection referred to in s 69E(1) must be relied on. It is quite possible that such a case might qualify as one in which jurisdiction could be exercised in accord-

ance with an arrangement in force between Australia and an overseas jurisdiction, in the terms of s 69E(1)(e). For any proceedings relating to a child commenced in a territory court, jurisdiction only exists to determine the case if one of the parties is ordinarily resident in the territory: s 69K

**[2.2]** The common law rules of jurisdiction are preserved under s 69R(1)(e) of FLA, but are only likely to be helpful to an applicant if they are broader than the statutory grounds of jurisdiction. This is most unlikely. Indeed, the common law rules of jurisdiction parallel the statutory rules in many respects. These originate in the court of Chancery's equitable jurisdiction over infants in the kingdom, and as a result the mere physical presence of the child in the territory became a sufficient basis of jurisdiction: *Re D, an Infant* [1943] Ch 568; *A v B* [1979] NSWLR 57. The common law might also recognise the child's citizenship in the territory as a ground on which jurisdiction can be exercised: *Re Willoughby, an Infant* (1885) 30 ChD 324; *Kelly v Panayiotou* [1980] 1 NSWLR 15; *Moses v Stephenson* (1981) 10 NTR 32. However, more recently serious doubts have been expressed about this: *A v B* [1979] NSWLR 57; *McM v C* (1980) 5 Fam LR 650; *Ex parte TMW* [1981] Qd R 436. The availability of citizenship as a ground of jurisdiction in s 69E(1)(b) of the FLA makes it unnecessary to resolve the point. Probably the most accepted ground of jurisdiction at common law is the ordinary residence of the child in the territory: *Re P (GE), an infant* [1965] Ch 568; *McM v C* (1980) 5 Fam LR 650; *Corin v Corin* (1971) 7 SR (WA) 124. For cases involving children this has developed a more specific meaning; ie where the parents live together it is the place where they have the matrimonial home: *Holden v Holden* [1969] VR 334. If the parents live apart, the ordinary residence of the child is the place where the custodial parent is resident: *Glasson v Scott* (1973) 1 ALR 370.

**[2.3]** The superior courts which may exercise jurisdiction under Pt VII are the Family Court of Australia, the Family Court of Western Australia and the Supreme Court of the Northern Territory: s 69H. The state and territory courts of summary jurisdiction — Local and Magistrates Courts — may also exercise jurisdiction in most matters arising under Pt VII: s 69J. However, if there are contested proceedings relating to a parenting order a court of summary jurisdiction must transfer them to a superior court unless all parties consent to the inferior court's determining the case: s 69N. The same courts — superior and inferior — have jurisdiction in applications brought under the Hague Convention: HCR, rr 2(1) and 14. However, there is no provision for transfer from one to the other. Therefore, proceedings brought in any state except Western Australia must be commenced in the Family Court of Australia. In the Australian Capital Territory, proceedings are brought in the Family Court or, if one of the parties is ordinarily resident in the territory, the Magistrates Court: s 69K. In the Northern Territory, proceedings may be commenced in the Family Court or, if one of the parties is ordinarily resident in the territory, the Supreme Court or the Magistrates Court: s 69K. Naturally, in Western Australia proceedings must be brought in the state Family Court or, for proceedings under Pt VII or the Hague Convention, the

Magistrates Court. Proceedings relating to an ex-nuptial child in Western Australia must be brought in the state Family Court: WA, s 36. These proceedings can be instituted in a Magistrates Court but, if the merits and suitability of the jurisdiction of the court are contested, they must be transferred to the state Family Court: WA, s 75.

**[2.4]** Under the cross-vesting scheme the jurisdiction exercisable by the Family Court under Pt VII or the Hague Convention is invested in the Supreme Court of any state or territory. The legislation provided also that the jurisdiction of the Family Court of Western Australia in state matters was invested in the Federal Court, Family Court and state and territory Supreme Courts: see **Chapter 2** at **[2.3.13]**. However, since *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 these state matters cannot be heard in or transferred to any of the federal courts: see **Chapter 2** at **[2.13.12]–[2.3.13]**.

**[2.5]** The paramount consideration a court must take into account in making a parenting order in relation to a child is the best interests of the child: s 65E. In general, this means a court is only able to refuse to decide the ultimate question of the care and control of the child if a refusal to do so is in the child's best interests. The only cases to which this principle does not apply are those arising under the Hague Convention, in which the return of the child to the place of habitual residence is regarded as a more important consideration: *Marriage of van Rensburg and Paquay* (1993) 16 Fam LR 680 at 683. Nevertheless, the general principle was stated recently by the High Court in *ZP v PS* (1994) 122 ALR 1.

In *ZP v PS* (1994) 122 ALR 1 the child was born in Greece in 1987, but registered as an Australian citizen the following year. His mother was an Australian citizen of Greek origin, as was probably his father. They separated in 1989. A temporary custody order in relation to the child was registered in a Greek court, under which the mother was given custody and the father access to the child. The child was brought up in Greece until 1993, when the mother took him to Australia. In September that year the Family Court granted interim custody to the mother but a Greek court granted it to the father. The father, however, opposed the wife's being granted permanent custody by the Family Court, and applied for orders to have the child returned to Greece. These were granted by Mushin J at first instance, on the ground that an Australian court was a *forum non conveniens*. This was confirmed on appeal to the Full Court, where Nicholson CJ also thought the correct principle to apply was that of *forum non conveniens*. Kay and Graham JJ thought that Mushin J's decision was correct whether it was one applying the doctrine of *forum non conveniens* or, as the paramount consideration, the best interests of the child.

The majority in the High Court allowed an appeal from the Full Court. The justices unanimously agreed, however, that the one factor to consider in exercising jurisdiction over a child was its best interests. The doctrine of

*forum non conveniens*, which looks to the litigants' interest instead, was therefore irrelevant. However, there were cases where the child's best interests were served by having the question of custody determined in a foreign court. This was especially so when the child is normally resident in the foreign territory: *ZP v PS* at 6, 17–18 and 22–4. Brennan and Dawson JJ emphasised (at 18) that, in such a case, the court was not declining its jurisdiction. It was exercising its jurisdiction in the interests of the child by ordering its return to a foreign territory. The majority comprising Brennan, Dawson, Deane and Gaudron JJ held that, by applying the wrong principle and failing to consider whether the mother would return to Greece if the child were ordered to do so, the Full Court had erred. *ZP v PS* was not a case to which the Hague Convention could apply. Deane and Gaudron JJ nevertheless thought (at 22–3) that, in determining the best interests of the child, a court could take into account as a matter of *prima facie* importance, the policy of discouraging international child abduction. For Brennan and Dawson JJ (at 19–20) this could only be relevant if other considerations relating to the child's welfare were evenly balanced, and theirs would appear to be the more orthodox position. In other cases the courts have not been prepared to decide the merits of the case where the child was neither present nor resident in Australia: *Szintay v Szintay* (1954) 73 WN (NSW) 330. However, in *Marriage of Taylor* (1988) 12 Fam LR 423 the Full Court of the Family Court held that this should only be in cases where there would be no possibility of enforcing an order made in Australia in the foreign territory and the court of the foreign territory is a better forum for determining the child's best interests: see also *Marriage of Soares* (1989) 13 Fam LR 163. It might also be that a court will not decide the merits of the case where the child lived in a foreign territory for a lengthy period (*Marriage of Chang* (1992) 15 Fam LR 629), or where the child was removed to Australia by a parent but in breach of a custody order to which the parent had consented: *Marriage of van Rensburg and Paquay* (1993) 16 Fam LR 680.

### 3 The Hague Convention

**[3.1]** On the assumption that a court has jurisdiction over a child, the first question to determine is whether the Hague Convention applies to the case. Two conditions must be satisfied before the Convention applies:

- the child must be under 16 years of age; and
- the child must have been habitually resident in a convention country immediately before any breach of custody or access rights: HC, art 4.

The concept of 'habitual residence' is not defined, although a number of points can be made about the concept on the basis of its natural meaning and role in the Convention. In *Cooper and Casey* (1995) 18 Fam LR 433, the Full Court of the Family Court adopted several propositions about the concept of habitual residence made by judges in England and the United States. Thus, the court held that a child can have only one place of habitual residence. This is determined by focusing on the child's past experience (and not on its or its parents' intentions). Habitual residence demands 'an appreci-

able period of time and a settled intention', and provided the purpose for remaining in the territory was settled the period of residence need not be long: *Cooper and Casey* at 435; see also *Friedrich v Friedrich* 982 F 2d 1396 (1992); *Re J (a minor) (abduction)* [1990] 2 AC 562 at 578; *Re B (minors) (abduction) (No 2)* (1993) 1 FLR 993 at 995. It is possible even for an illegal immigrant to be habitually resident in a territory (*Department of Health and Community Services and Casse* (1995) 19 Fam LR 474 at 484), as the question is one purely to be determined only by physical contacts with the territory. The child must have been habitually resident in a convention country, which means any country in which the Hague Convention is in force: HCR, r 10. The Regulations list Argentina, Austria, the Bahamas, Belize, Bosnia and Herzegovina, Burkina Faso, Canada, Chile, Croatia, Cyprus, Denmark, Ecuador, Finland, France Germany, Greece, Honduras, Hungary, Ireland, Israel, Italy, Luxembourg, Macedonia, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States of America as countries where the Convention is in force. However, any other country in respect of which the Convention has entered into force for Australia is included: HCR, r 10(b). This does not include a country that has merely signed the Convention, without further ratification, acceptance or approval: *Marriage of Hooft van Huysduynen* [1990] FLC 92-119.

**[3.2]** If a child is habitually resident in a convention country, the method for dealing with the child differs radically from that which has traditionally applied under Pt VII and its predecessors. The Hague Convention is expressly intended to enhance the international recognition of rights of custody and access arising in the place of habitual residence, and to ensure that any child wrongfully removed or retained from that place is promptly returned: HC, art 1. In most cases therefore the court's obligation to act in the best interests of the child is displaced as a consideration bearing on who is to have care or control of the child: *Re A (a minor)* [1988] 1 FLR 365 at 369. That is a matter ordinarily to be determined in the place of habitual residence.

**[3.3]** To assist the speedy return of unlawfully abducted children, the Hague Convention creates a network of central authorities throughout convention countries. These have the duties of tracing an unlawfully removed child and securing its return. They can also provide each other with general information about the laws of their countries that might be needed in an application under the Convention: HC, art 7; HCR, r 5. In Australia, the Commonwealth Central Authority is the federal Attorney-General's Department. Each state and territory also has a Central Authority, with all the powers and functions of the Commonwealth Central Authority: HCR, rr 8-9. It is open to a person to apply to a Central Authority for the child's return when, in breach of his or her rights of custody, a child has been unlawfully abducted from Australia to another convention country. If it is in accordance with the Convention, that claim is forwarded through the Commonwealth

Central Authority to the central authority in the country where the child is held: HCR, r 11. Likewise, a person who claims that a child has been unlawfully abducted to Australia can apply to the Commonwealth Central Authority for its return: HCR, r 13. The hope in both cases is that the prompt return of the child can be handled administratively. There are similar procedures for having central authorities assist in securing a person's rights of access in a convention country: HCR, rr 24–5.

**[3.4]** Nothing in the Hague Convention denies a person the right to apply to a court for the return of a child, either under Pt VII of the FLA or some other law: HC, art 18; HCR, r 6. Express provision is nevertheless made for a Central Authority to apply to a court for an order that a child be returned to a convention country or, if necessary, orders authorising a search for the child or temporarily placing the child in institutional care: HCR, r 14(1). Again, a Central Authority can apply to a court for orders relating to the return of a child who was abducted from Australia: HCR, r 14(2). It can also apply for an order that is needed to secure the effective exercise of rights of access to a child who is in Australia: HCR, r 25.

**[3.5]** It becomes necessary to consider what principles and rules determine whether a child is or is not to be returned to a convention country. The Hague Convention does not require the return of a child merely because it is found in Australia and the case falls within the scope of the Convention. Indeed, the return of the child is only mandatory if there has been a wrongful removal or retention of a child from a convention country: HC, art 12; HCR, r 16. There are some circumstances in which a removal or retention is not regarded as wrongful. In those cases the Hague Convention is not applicable and the return of the child, though possible, is not mandatory. Furthermore, the Convention makes different provision for helping to secure rights of access. The following issues are therefore considered:

- wrongful removal or retention;
- excusable removal or retention; and
- access.

#### A Wrongful removal or retention

**[3.6]** Article 3 of the Hague Convention provides:

The removal or retention of a child is to be considered wrongful where —

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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

The Regulations implement art 3 by providing that a child is to be returned unless the removal or retention of the child was not of this kind: HCR, rr 3 and 16(1)–(2)(a). This principle is relatively straightforward. It does,

however, incorporate two concepts that require further explanation: ie (i) removal or retention; and (ii) rights of custody.

**[3.7]** To show either a wrongful removal or retention a child must be outside the place of its habitual residence. However, ‘removal’ and ‘retention’ are mutually exclusive concepts. In *Re H (abduction: custody rights)* [1991] 2 AC 476 at 500, Lord Brandon of Oakbrook held that removal occurs when a child is taken out of the place of its habitual residence, whereas retention occurs when a child who has, for a limited period, been outside the place of habitual residence is not, on the expiration of the period, returned. That being so, a removal or retention is an event occurring on a specific occasion: see also *Kilgour v Kilgour* 1987 SLT 568 at 572. Understandably, it is therefore what constitutes a particular act of retention that has been more the subject of litigation. It has been held that a retention might occur when a party initiates legal proceedings designed to prevent the return of the child: *Re B (minors) (abduction) (No 2)* [1993] 1 FLR 682. It is also possible that a retention might occur when, even in a period in which the parties have agreed that a child can remain outside the place of habitual residence, a party indicates that the child will not be returned on the expiration of that period: *Re S (minors) (abduction: wrongful retention)* [1994] Fam 70 at 78–81. It is not the removal or retention of the child from the parent which constitutes a breach of art 3. The Convention is limited to cases of international abduction, so it is the removal or retention of the child from its place of habitual residence that creates the wrong: *Re H* at 500–1.

**[3.8]** The rights of custody which the removal or retention of the child violates can arise by operation of law, by reason of a judicial or administrative decision or by reason of an enforceable agreement: HC, art 3; HCR r 4(3). They include any rights relating to the care of the child and, in particular, any rights to determine its place of residence: HC, art 5(a); HCR, r 4(2). Therefore, a general right of guardianship recognised by law without adjudication is a right of custody for the purposes of the Hague Convention: eg *Marriage of Murray and Tam; Director of Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982. Similarly, a person whose only right in relation to the care of the child is that the child is not to be removed from the territory without that person’s consent has a right of custody within the meaning of the Convention: *C v C (abduction: rights of custody)* [1989] 2 All ER 465; *Marriage of Thompson* (1990) 14 Fam LR 542 at 547. If any such rights are held jointly, then each and every person who holds those rights holds rights of custody: *H and H* [1985] FLC 91–640 at 80 and 168. Where these rights are alleged to arise under the law of another convention country, the normal rules for proving foreign law can be bypassed as it is open to a court to take judicial notice of a law in force in a convention country: HCR, r 29(3)(a). The task may be further simplified in that a Central Authority will be party to any proceedings under the Hague Convention, and beforehand may be able to obtain information about the law of the other convention country from that country’s central authority: see HC, art 7(e).

**[3.9]** On an application made within one year of a wrongful removal or retention, the court must order the return of the child to the place of habitual residence: HC, art 12; HCR, r 16(1)(a). This is one reason why it is important to identify the event constituting the removal or retention of the child. In an application made more than one year after a wrongful retention or removal, the court must again order the return of the child unless it is satisfied that the child has settled into its new environment: HC, art 12; HCR, r 16(1)(b). The nature of this requirement that the child be settled into the new environment before an order for return can be refused was considered in *Graziano v Daniels* (1991) 14 Fam LR 697. There, the Full Court of the Family Court held that the relevant ‘environment’ encompassed the child’s geographical location, home, school, friends and opportunities, as well as the child’s own wishes and its relationship to its caregiver. The mere length of time the child has spent in the place must, naturally, be disregarded. In all these cases the court is to act expeditiously: HC, art 11; HCR, r 15(2). Indeed, if a court does not determine an application within six weeks of its having been made, the Central Authority can demand reasons for the delay; HC, art 11; HCR, r 15(4); *MacMillan v MacMillan* 1989 SLT 350 at 354–5. It appears that, in Australia, a court cannot make an order for return conditional, eg, on an applicant undertaking to provide for the abductor and child or not to enforce a parenting order made in the territory of habitual residence. The order must be unconditional, although auxiliary orders for the welfare of the child pending its return are permissible: *Police Commissioner of South Australia v Temple* (1993) 17 Fam LR 144; cf *C v C* [1989] 2 All ER 465. Nor, in Australia, can a court enforce undertakings given to a court in a convention country in proceedings brought under the Hague Convention: *Marriage of McOwan* (1993) 17 Fam LR 377.

#### B Excusable removal or retention

**[3.10]** There are a number of grounds on which a court may refuse to order the return of an abducted child, and which refuse to order the return of an abducted child. These therefore enable the removal or retention of the child to be excused, and are:

- the rights of custody were not being exercised at the time of the removal or retention;
- there was consent to or acquiescence in the removal or retention;
- a return would be of risk to the child;
- a mature child objects to the return;
- a return would be contrary to the protection of human rights and fundamental freedom; or
- the application for return was made more than one year after a wrongful removal or retention and the child has settled into its new environment.

The last ground has already been discussed in **[3.9]** and need not be reconsidered. Each of the others is considered in turn, but in all cases the onus of making out ‘the excuse’ is borne by the person who is resisting the order for return: *Graziano v Daniels* (1991) 14 Fam LR 697 at 703.

*Applicant not exercising custodial rights*

**[3.11]** The court can refuse to order the return of the child if the applicant was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and these rights would not have been exercised if the child had not been so removed or retained: HC, art 13(a); HCR, r 16(3)(a)(i). The critical time at which the applicant must have and be exercising the rights of custody, is the time when the removal or retention takes place. Therefore, this excuse is not made out merely because, at some time after the removal or retention, the applicant loses his or her rights of custody and, therefore, the capacity actually to exercise them: *Marriage of Murray and Tam; Director, Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982 at 993; cf *Marriage of Barraclough* (1987) 11 Fam LR 773.

*Consent or acquiescence*

**[3.12]** The order for the return of the child can be refused if the applicant had consented to or subsequently acquiesced in the child being removed to, or retained in, Australia: HC, art 13(a); HCR, r 16(3)(a)(ii). Whether the case is one of consent or acquiescence is simply a matter of timing: consent is given before the removal or retention, and acquiescence occurs after: *Re A (minors) (abduction: acquiescence)* [1992] Fam 106 at 123. In either case, it would not appear necessary that the consenting or acquiescing party have knowledge of his or her rights under the Hague Convention. To the extent that person's knowledge is relevant, it is only to show that the person knew of the act constituting removal or retention and that the act was, in some sense, wrong. This consent or acquiescence may be expressed, or inferred from conduct in circumstances in which different conduct might be expected if there were no consent or acquiescence: *Re A; Re AZ (a minor) (abduction: acquiescence)* [1993] 1 FLR 682 at 686–7. However, to establish consent or acquiescence there must be clear and unequivocal words or conduct which can properly be interpreted as such: *Re R (child abduction)* (1995) 1 FLR 716 at 727. The court should therefore be reluctant to find, say, acquiescence in a removal of the child when the parties are confused or in a state of emotional turmoil: *Re A* at 121. Thus, acquiescence has been established where a father wrote to an abducting mother that he was 'not going to fight' for the children or 'let them become casualties' (*Re A*), and by a father's ten months inactivity after learning of the mother's refusal to return the child: *W v W (child abduction: acquiescence)* [1993] 2 FLR 211. The execution of an agreement that the child live in the new country can amount to acquiescence, but not when the relationship between the parties is unsettled and, soon after, the applicant changes his or her mind: *Department of Health and Community Services and Cass* (1995) 19 Fam LR 474 at 479–80. Once an event is held to constitute consent or acquiescence, the approval of the abduction cannot be undone. However, it is only by objectively considering all relevant circumstances — including those that took place after the alleged consent or acquiescence occurred — that it is possible to judge whether the act unequivocally amounts to an approval of the abduction.

*Risk to child*

**[3.13]** The court may refuse to order the return of the child if there is a grave risk that the return of the child to the country in which it habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation: HC, art 13(b); HCR, r 16(3)(b). This ground was considered by the Full Court of the Family Court in *Gsponer v Johnstone* (1988) 12 Fam LR 755, where it held that each of the three categories of harm must be read separately. Accordingly, the excuse is made out if there is a grave risk of physical harm or of psychological harm or of an otherwise intolerable situation. However, the court in *Gsponer* (at 766–7) also reinforced that the emphatic tone of the ‘intolerable situation’ category was paralleled in the other two, and therefore it was insufficient to prove a grave risk of merely physical or psychological harm. It must be shown that the physical harm or psychological harm was ‘of a substantial or weighty kind’: see also *Re A (a minor)* [1988] 1 FLR 365 at 372; *Director-General of Family and Community Services (NSW) v Davis* (1990) 14 Fam LR 381 at 385. This is the only ground that enables a court to give any consideration to facts that relate to the interests of the child; a factor that is otherwise irrelevant in applications brought under the Hague Convention. As the court held in *Gsponer* (at 768) it follows that, if the question of risk to the child is in doubt, it is best that its return be ordered and that the court in the place of habitual residence determine the question. *Gsponer* confirms that this ground of excuse is difficult to establish. In particular, it is not made out by showing that the child would suffer harm by reason of an abducting parent’s refusal to return to the place of habitual residence with the child: *C v C (Abduction: rights of custody)* [1989] 2 All ER 465 at 470; *Davis* at 386. The excuse was nevertheless successfully invoked in the Scottish case of *MacMillan v MacMillan* 1989 SLT 350, where Lord Coulsfield held that exposure to the petitioner’s depression and alcoholism would present a grave risk to the child. He refused an order for returning the child to Ontario but left it open for the parties to present further information to the court, as he thought practical arrangements could be made to minimise the risk to the child and that a return was possible. This aspect of the decision was reversed by the Extra Division, which held (at 354) that, on finding a grave risk to the child, the refusal of an order for return should be final.

*Child’s objection*

**[3.14]** The court may refuse to order the return of the child if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child’s views: HC, art 13; HCR, r 16(3)(c). Two issues arise here. The first is the nature of the child’s objection. It appears on the basis of New Zealand authority that the child’s objection to being returned must be an emphatic objection, and not a mere preference to remain where it is: *Damiano v Damiano* [1993] NZFLR 548; cf *Re S (a minor) (abduction: custody rights)* [1993] Fam 242. It need only be an objection to an immediate return, not an objection to return in any

circumstance whatsoever: *Re S* at 250. The second issue is the age at which a child can be considered mature enough for its objection to be taken into account. This will naturally be an individual assessment for the trial judge to make. In *Marriage of Bassi* (1994) 17 Fam LR 571 an objection led to the refusal of an order for the return of a child aged 13, and in *Re S* of a child aged only 9.

#### *Protection of rights and freedoms*

**[3.15]** The order for the return of the child can be refused if the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms: HC, art 20; HCR, r 16(3)(d). This is a substitute for the public policy exception usually found in international conventions, although, even as clumsily expressed in the form implemented in the Regulations, it appears to be narrower than the public policy exception. The reference to ‘the protection of human rights and fundamental freedoms’ is open ended, and despite the repetitive reference to ‘the fundamental principles of Australia’ might include those rights and freedoms found in international conventions to which Australia is party, but which it has not implemented: cf *Marriage of Murray and Tam; Director, Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982 at 999–1000. It does not, however, allow a party to argue that the provision in the UN Convention on the Rights of the Child that makes the welfare of the child a paramount consideration should determine what order is to be made: *Murray and Tam* at 1000.

#### *Effect of establishing excuse*

**[3.16]** It is still open to a court to order the return of the child to its place of habitual residence, even if the person who is resisting the order for return makes out a case on one of these grounds: HCR, r 16(5). But if such a case is made out it is also open to the court to refuse to order the return of the child: HCR, r 16(3). The difference to the position where a court concludes that there has been a wrongful removal or retention is that, where the removal or retention is excusable, the return is not mandatory. The little Australian authority that exists on this point intimates that the decision to return or not to return the child depends on the merits of the case. Presumably, this means that the decision really depends the court’s conclusion as to whether a return is in the best interests of the child: *Graziano v Daniels* (1991) 14 Fam LR 697 at 705; cf *Re A (minors) (abduction)* [1992] Fam 106 at 122; *Re A (minor) (abduction) (No 2)* [1993] 1 All ER 272 at 280. Nevertheless, the decision of the Extra Division in *MacMillan v MacMillan* 1989 SLT 350 at 354 suggests that if the removal or retention becomes excusable because a return would risk the child’s being exposed to harm, the return of the child will not be ordered.

#### C Access

**[3.17]** The Hague Convention does not give rights of access either the importance or attention it devotes to rights of custody. It defines them as

including ‘the right to take a child for a limited period of time to a place other than the child’s habitual residence’: HC, art 5(b); HCR, r 2(1). However, the concept is much broader and would undoubtedly parallel rights existing under a contact order: see ss 64B(2)(b) and (4). For the Hague Convention to apply to rights of access, the child to which they relate must be habitually resident in a convention country: *B v B (minors: enforcement of access abroad)* [1988] 1 All ER 652. Furthermore, the rights of access to the child must arise under the law of a convention country — although that need not be the same convention country in which the child was habitually resident: *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216. There is no need to show a removal or retention of the child from its place of habitual residence, but that will often be the reason why an applicant finds it necessary to invoke rights under the Hague Convention.

**[3.18]** The central authorities have a duty to promote the peaceful enjoyment of rights of access, and the fulfilment of any conditions applicable to those rights. They are also obliged to take steps to remove any obstacles to the exercise of rights of access, to the extent that it is possible: HC, art 21. In Australia, a person who claims to have rights of access to a child under the FLA or a state or territory law can apply to a central authority to have arrangements made for organising or securing the effective exercise of those rights in a convention country. A foreign central authority can apply to the Commonwealth Central Authority for similar arrangements to be made in relation to a child who is in Australia: HCR, r 24. In the latter case, a central authority can also apply to a court for an order relating to rights of access to the child: HCR, r 25. However, if a central authority considers it necessary to make an application to a court, it is hard to see what specific responsibilities it has, beyond providing the applicant with appropriate legal representation: *Re T (minors) (international child abduction: access)* [1993] 3 All ER 127.

**[3.19]** The Hague Convention does not impose any specific duties on a court in a convention country in relation to rights of access, unlike the particular duties relating to the speedy return of children it imposes when rights of custody are in question. It therefore appears that, as in any other case relating to a contact order, a court in Australia must decide the question of access by reference to the best interests of the child as a paramount consideration: s 65E. In addition, the court must respect the rights of access recognised in another convention country. But nothing in the Hague Convention demands that these be enforced unless it is in the child’s interests to do so: *B v B (minors: enforcement of access abroad)* [1988] 1 All ER 652 at 658–9.

#### 4 Part VII of the Family Law Act 1975 (Cth)

**[4.1]** The provisions of Pt VII of the FLA and, for ex-nuptial children in Western Australia, the Family Court Act 1975 (WA) apply when a multi-state case concerning the care or control of a child does not fall within the terms of the Hague Convention. They also apply when a court concludes

that, in accordance with the Hague Convention, the removal or retention of the child is excusable. In such cases two approaches to the care or control of the child are possible. First, a person who wants an order for the care or control of the child may apply for a parenting order. Or, again for ex-nuptial children in Western Australia, the person could apply for a custody order in the same manner as if the case had no international element. The court's task in making a decision about the care and control of the child might nevertheless be complicated by the need to take the foreign elements of the case into account. In particular, it might have to assess the significance, if any, of a foreign order relating to the child. It might also be possible, in some cases, to register the order under Div 13 of Pt VII. This procedure helps to avoid litigation and, indeed, limits the possibility of subsequent litigation once registration takes place.

#### A Choice of law

**[4.2]** In any multi-state case involving the care or control of a child, the law of the cause is the law of the forum: *J v C* [1970] AC 668 at 720; *Marriage of van Rensburg v Paquay* (1993) 16 Fam LR 680 at 686; cf *R v Langdon* (1953) 88 CLR 158 at 160. In Australia, this means the applicable law is Pt VII of the FLA or Pt III Div 3 of the Family Court Act 1975 (WA).

#### B The basic principle

**[4.3]** A parenting order is one that confers some parental responsibility on a person: s 61D(1). It can deal with concerns such as the person with whom a child is to live (and to that extent is called 'a residence order'), contact between a child and others ('a contact order'), maintenance ('a child maintenance order') and any other aspect of parental responsibility ('a specific issue order'): ss 64B(1)–(6). In all cases excepting a child maintenance order, a court can make any parenting order that it considers proper: s 65D(1). However, in doing so the court must regard the best interests of the child as the paramount consideration: s 65E. There is little doubt that this basic principle conditions the approach a court must take to any international elements in the case which relate to the position of the child.

**[4.4]** The leading case on how a court is to deal with a foreign parenting order in proceedings relating to the care or control of a child is *McKee v McKee* [1951] AC 352, an appeal to the Privy Council from Ontario.

The parties in *McKee v McKee* [1951] AC 352 were American, and their son was born in California in 1940. They separated soon after, but executed an agreement that the boy should not be removed from the United States without both parties' permission. Subsequently, the Superior Court of California issued a custody order. Under California law the child was to remain in the father's custody until 1947 when, in accordance with the court's subsequent custody order, custody passed to the mother. However, in late 1946 the father made an application in Ontario for custody, which Wells J granted. This was upheld by the Provincial Court of Appeal and the Supreme Court of Canada. The Privy Council also upheld the custody order in the father's favour.

In the Privy Council, Lord Simonds considered the effect of the California order giving custody to the mother. It was assumed the California court had jurisdiction to make the order, but on finding the court in Ontario also had jurisdiction over the child the paramount consideration was the child's own welfare: *McKee* at 363–4. The court could make an independent judgment on this issue, though in doing so it had to give 'proper weight' to the foreign order. That depended on the circumstances. The more recent the foreign order and the smaller the change in circumstances, the greater the weight it should be given. However, the court is in all cases to make its own decision as to the best interests of the child: *McKee* at 364. Later authority shows that the foreign order is likely to receive more respect if, soon after it was made, the child was abducted to Australia in breach of the order: *Taylor v Taylor* (unreported, SC (Vic) (Lush J) 17 September 1970). Even in this case the court might disregard the order if the return of the child to the place where the order was made would be contrary to the child's best interests: *Re E (D)* [1967] Ch 761. Consequently, it is open to a court to confirm the rights recognised in a foreign parenting order or to upset them, either by appointing a custodian to replace the foreign custodian or to act jointly with the foreign custodian: *Re Willoughby* (1885) 30 Ch D 324. Or, the foreign custodian might simply be given the right to remove the child from Australia without the court's having to make a comprehensive parenting order: cf *Nugent v Vetzena* (1866) LR 2 Eq 704; *Monaco v Monaco* (1937) 157 LT 231; see also ss 67Q and 67U.

**[4.5]** The abduction of a child who is resident in another territory is another factor a court may have to deal with in a multi-state parenting or custody case. In these cases the court must still make its decision by reference to the best interests of the child. However, at an early stage it must also determine whether the interests of the child are best decided by a court in the territory from where the child was taken: *Marriage of Schwarz* (1985) 10 Fam LR 235 at 237. To some extent, the policy results from the influence of the Hague Convention on the general law even though, in these cases, the Convention is not directly applicable: see *Marriage of Barrios and Sanchez* (1989) 13 Fam LR 477; *Marriage of van Rensburg and Paquay* (1993) 16 Fam LR 680. Thus the court can order the return of the child, so long as it is

in the child's interests: see ss 67Q and 67U. However, the longer the residence of the child in the foreign territory or the more recent the abduction the more likely a return will be ordered: *Marriage of Reihana* (1980) Fam LR 134. Conversely, the longer the child has been resident in Australia the more likely the court in this country will be prepared to determine the merits of the case: *Marriage of Schenck* (1981) 7 Fam LR 170. The court is also more likely to exercise its jurisdiction to determine the merits of the case if it appears there will be delays in doing so in the foreign territory: *Clague v Graves* (1987) 11 Fam LR 494. The court will also be inclined to exercise jurisdiction if the foreign court is unlikely to give priority to the interests of the child: *Marriage of Raja Bahrin* (1986) 11 Fam LR 233.

**[4.6]** For an ex-nuptial child in Western Australia, the Family Court Act 1975 (WA) also states expressly that, in making orders in relation to the child, the court is to have regard to the welfare of the child as the paramount consideration: WA, s 28(2); see also *Re Davis and Councillor* (1981) 7 Fam LR 619 at 622–3; *Thorpe v McCosker* (1983) 8 Fam LR 964 at 966. In that light, the principles outlined in [4.4]–[4.5] would seem equally applicable to multi-state cases concerning ex-nuptial children in Western Australia.

#### C The registration of foreign parenting orders

**[4.7]** Division 13 of Pt VII of the FLA prescribes a procedure for the enforcement of certain overseas child orders by registration. These are court orders determining the person or persons with whom a child under 18 years old is to live, the custody of the child, and the persons with whom it can have contact or who have access: s 70F. However, it is not every such order that can be registered. First, the order must have been made in 'a prescribed overseas jurisdiction': s 70F. The only jurisdictions so prescribed are New Zealand, Papua New Guinea, each of the United States of America and the District of Columbia: s 4(1), r14 and Sch 1A. Even though the Hague Convention also applies to New Zealand and the United States, the registration procedure may be useful if an application under the Convention for a return fails. Second, the order cannot be either an interim order or an ex parte order: ss 70F and 70G; cf *Marriage of Uriarau* (1986) 11 Fam LR 657 at 661. The order can, however, relate to a child born outside marriage: *Marriage of Blair and Jenkins* (1988) 12 Fam LR 85. Division 13 does not need a referral of powers relating to ex-nuptial children from the states to maintain its constitutional validity, for according to the Full Court of the Family Court in *Blair* the forerunner to Div 13 was a valid exercise of the external affairs power. Unlike other aspects of Pt VII, it can and does operate in Western Australia without being limited to children born in wedlock: s 69ZH(4).

**[4.8]** To enforce an overseas child order, a person must provide, preferably, the secretary of the federal Attorney-General's Department or the court with the required documents. These are a certified copy of the order and a certificate to the effect that it is enforceable in the overseas territory. If the secretary receives the documents, he must be satisfied that the child, a parent

or a custodian is ordinarily resident or present in Australia, or is proceeding here. If so, the secretary must register the order with an appropriate superior court. These are the Family Court of Australia, the Family Court of Western Australia or the Supreme Court of any state or territory: r 23(1). The order can be registered directly in the court, in which case similar requirements must be met: s 70G and r 23. However, on receiving the required documents from the secretary the court must register the order. It has a limited discretion to refuse registration if the documents are filed by someone else: *Marriage of Trnka* (1984) 10 Fam LR 213.

**[4.9]** The result of the registration of an overseas child order is that it has the same force and effect as if it were an order made under Pt VII: s 70H. However, once the order is registered Division 13 also imposes limitations on the power of a court in Australia to make a residence or contact order in relation to the child, or indeed a specific issues order affecting its day-to-day care, welfare and development: s 70J. The court is only allowed to exercise jurisdiction in those matters in two cases. The first is when the relevant parties to the order consent to its jurisdiction, and the second is when the court is satisfied that there are 'substantial grounds' for believing that it is in the interests of the child to exercise jurisdiction: s 70J(1). It appears the latter is difficult to prove. For example, this ground is not made out by showing that the arrangements for the child in Australia are satisfactory and the child wishes to stay in the country: *Marriage of Greenfield and Dawson* (1984) 9 Fam LR 606.

**[4.10]** The existence of a registered overseas child order not only limits the jurisdiction of a court in Australia to make orders in relation to the child. In the rare case that the court can exercise jurisdiction, s 70J(2) states that it can only make an order if in addition: (a) the welfare of the child would be adversely affected if a new order were not made; and (b) there has been such a change in the circumstances of the child since the overseas order was made that a new order must be made. Furthermore, in its terms s 70J(2) place these limits on the court merely when the child 'is the subject of an overseas child order'. There is no express requirement that the order actually be registered. So, it may be simply on proof of the existence of, eg, a Papua New Guinea order, that the court's power to deal with the child is limited by s 70J(2).

**[4.11]** An Australian court can only exercise jurisdiction and make a new order in relation to a child after the registration of an overseas child order if it is necessary to make different provision for the child. If it does so, the overseas child order must be cancelled: s 70K. However, where an order was made in Australia before the registration of an overseas child order either the Australian or the overseas order can be discharged. Again, onerous conditions must be satisfied before the overseas order can be cancelled, ie: (a) the parties to the order must consent to its cancellation; (b) there must be 'substantial grounds' for believing that the child's welfare will be adversely affected unless it is cancelled; or (c) there has been such a change in the circumstances of the child since the order was made that it is inappropriate

for it to continue in operation: s 70L(6). Otherwise, the Australian order must be discharged: s 70L(5).

**[4.12]** New Zealand, Papua New Guinea and the United States make similar provision for the registration and enforcement of parenting orders made in Australia: ss 22A–22L Guardianship Act 1968 (NZ); Custody Orders Reciprocal Enforcement Act 1978 (PNG); Uniform Child Custody Jurisdiction Act (USA). To facilitate this, Div 13 enables the transmission of documents needed to secure the enforcement of a parenting order. A person can require the registrar of a court in Australia to send the required documents to the appropriate court or official in one of those territories: s 70M and r 24.

## 5 Problem

**[5.1]** Claudius and Gertrude were Danish nationals living in Helsingor, Denmark. They were married, and had one child: Hamlet, who is now 8 years old. In November last year, the family moved to Launceston, Tasmania, where they intended to live and work for one year. However, Claudius' alcoholism and mental illness had long put the marriage under strain. In the year before they moved to Launceston, Claudius had, in Hamlet's presence, shouted abuse at Gertrude and struck her. On another occasion he had grasped Hamlet and refused to let him go, leaving Hamlet upset and frightened. In moments of remorse, Claudius blamed his alcoholic father and the suicide of his mother.

In February this year, Claudius returned alone to Helsingor and immediately instituted proceedings in the Danish courts for dissolution of the marriage. In March, he also demanded that Gertrude return Hamlet to him. That month, in her written response to Claudius, Gertrude told Claudius that she refused to return Hamlet and that she wanted to stay in Launceston to make it her permanent home. On receiving the letter, Claudius telephoned Gertrude. He now cannot recall much of the conversation, and Gertrude thought that, at times, he was incoherent. However, they both recollect that Claudius said that, 'I accept that Hamlet will have to stay in Australia, if that is what you want'.

Claudius has now applied to the Family Court of Australia for an order that Hamlet be returned to Denmark. The law of Denmark provides that, while married, both parents of a child have the guardianship of the child. Advise Gertrude whether she can resist this application, and keep Hamlet in Launceston.

**[5.2]** This question is to be determined, at least initially, in accordance with the principles of the Hague Convention on the Civil Aspects of Child Abduction 1980, which has force of law in Australia by virtue of the Family Law (Child Abduction Convention) Regulations. The Convention applies when the child is aged under 16 years and, before there was any breach of any rights of custody, the child was habitually resident in a convention country. Hamlet is 8 years old, and although his place of habitual residence

still has to be resolved the only possible place of habitual residence — other than Australia — is Denmark. Denmark is a convention country: see r 10. Furthermore, it should be noted that the Family Court has jurisdiction to entertain Claudius' application as Hamlet is present in Australia at the time the application is made: Family Law Act 1975 (Cth), s 69E(1)(a).

The Hague Convention being applicable, the basic principle is that the removal or retention of a child from its place of habitual residence is 'wrongful' if two conditions are satisfied. First, the removal or retention must be in breach of rights of custody that exist under the law of the country where the child is habitually resident. Second, at the time of the removal or retention, those rights were being exercised or, but for the removal or retention, would have been exercised: art 3. There are two arguments that Gertrude might present to suggest that there is not a wrongful retention in this case. The first is that Hamlet has not been retained from the place of his habitual residence, as he is habitually resident in Australia. However, this is unlikely to succeed. A child can only have one place of habitual residence, and this will depend on the child's experience. It will demand an 'appreciable period of time and a settled intention': *Cooper and Casey; Re J (a minor) (abduction)*. Hamlet had only been in Australia for approximately four months before Gertrude expressed an intention to keep him in this country. Furthermore, in *Re S (minors) (abduction: wrongful retention)* Wall J held that, where parents have equal rights of custody, the unilateral action of one cannot change the habitual residence of the child unless the other parent agrees or acquiesces over time to the arrangement. While there might be an argument that Claudius has acquiesced in Gertrude's retaining Hamlet in Launceston, there is insufficient evidence to show that he has acquiesced over time to Hamlet's acquiring habitual residence in Australia.

The second argument that Gertrude might present to suggest that there is no wrongful retention in this case is that Claudius was not exercising any rights of custody at the time of the retention. It could be argued that, since Claudius was in Denmark at the time Gertrude said she was intending to keep Hamlet in Launceston, he was not actively involved in the regular care and attention of his son. There seems to be no question that Claudius has rights of custody in Denmark, the place of habitual residence, because the law of Denmark recognises that he is a joint guardian with Gertrude while they remain married. It appears that they are not yet divorced. There is insufficient evidence as to whether the law of Denmark would consider that, the child being in Australia and Claudius being in Denmark, he is not exercising his rights of custody. However, this again will be difficult to establish. It was understood that Hamlet would stay in Australia until November this year. So, until Claudius had heard from Gertrude that Hamlet was not returning to Denmark, it probably cannot be argued successfully that he has abdicated the exercise of his rights of custody.

It is true that, under the family's arrangements in coming to Australia, Hamlet was to remain outside Denmark until November this year. However, in stating in March that she intended to keep Hamlet in Launceston permanently, at that time Gertrude probably retained him from his place of habitual

residence: *Re S*. It therefore seems more likely that the Family Court would consider that Hamlet has been wrongfully retained from his place of habitual residence, in breach of his father's rights of custody. The result is that Claudius has a *prima facie* case that Hamlet be returned to Denmark: see rr 3 and 16(1)–(2)(a).

Gertrude has better prospects in showing that, although Hamlet has been wrongfully retained from his place of habitual residence, the retention can be excused. The two grounds of excuse suggested by the circumstances of this case are: there was acquiescence in the retention, and a return would be of risk to the child: see rr 16(3)(a)(ii) and (b). Acquiescence to a retention can only arise after the act of retention occurs: *Re A (minors) (abduction: acquiescence)*. In this case, the retention probably occurred when Gertrude wrote to Claudius and told him that she would keep Hamlet in Launceston. In subsequently saying, 'I accept that Hamlet will have to stay in Australia, if that is what you want' Claudius has provided some evidence that he accepts that Hamlet should stay in Australia. However, there is also evidence that this may not have been the acquiescence of a man with full comprehension of what he said and the implications of what he said. Claudius is alcoholic and mentally ill, and Gertrude's own evidence is that, in the same conversation, he was sometimes incoherent. The court will be reluctant to find acquiescence when a person is in a state of emotional turmoil: *Re A*. There is even more reason to expect that the court would not find acquiescence in Claudius' particular circumstances.

In art 13(b) of the Convention and reg 16(3)(b) of the Family Law (Child Abduction) Regulations, a retention is excused if there is a grave risk that the return of the child to the place of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Gertrude's central argument should be that Claudius' alcoholism, mental illness and the evidence of his physical violence to her and Hamlet in the recent past show that there is a grave risk of such harm or of such an intolerable situation if Hamlet is returned to him. In *Gsponer v Johnstone*, the Full Court of the Family Court held that the physical harm or psychological harm that is being risked should be 'of a substantial or weighty kind'. This case is similar to *MacMillan v MacMillan*, in which the Court of Session held that exposure to the petitioner's depression and alcoholism would present a grave risk to the child. *MacMillan* strongly supports Gertrude's case that the wrongful retention of Hamlet in Australia be excused.

However, that does not conclude the matter because, even if the Family Court holds that Hamlet not be returned to Denmark under the Hague Convention, it is still open to the Family Court to order the return of the child to its place of habitual residence: r 16(5). However, the court can also refuse to order the return of the child: r 16(3). The difference at this point is that the Family Court decides this question by reference to its own assessment of what is in the best interests of the child: *Graziano v Daniels*; cf *Re A (minors) (abduction)*; *Re A (minor) (abduction) (No 2)*. Still, the 'risk to the child' excuse is the one instance under the Hague Convention when the

interests of the child override the *prima facie* obligation to return the child to the place of habitual residence. So, if the Family Court concludes under the Hague Convention that the retention be excused on this ground, it is unlikely to conclude that it is in the best interests of the child that he be returned to his place of habitual residence. Again, the decision of the Extra Division of the Court of Session in MacMillan suggests that, if the retention is excused under the Hague Convention because a return would risk the child's being exposed to harm, the return of the child will not be ordered under some other power.

---

#### Further tutorial discussion

---

**[5.3]** How would your answer to the problem in [5.1] differ if the foreign country concerned was Russia, and not Denmark? Russia is not a country in respect of which the Hague Convention is in force?

---

#### Further Reading

M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials*, Butterworths, Sydney, 1997, pp 788–792.

P E Nygh, *Conflict of Laws in Australia*, 6th ed, Butterworths, Sydney, 1995, pp 432–452.